REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

HIGH COURT CIVIL APPEAL NO. E020 OF 2026

MONICA ADHIAMBO OTIENO…….. 1ST APPELLANT

SYLVESTER ONYANGO OWIMBO…….. 2ND APPELLANT

LUCAS ALUOCH ALAKA…….. 3RD APPELLANT

-VERSUS-

NOAH OCHIENG OOKO……..RESPONDENT

RULING

1. The Appellants filed an application dated 31st March 2026 seeking the following reliefs:

    i) Spent.

    ii) That pending the hearing and determination of the intended appeal, a temporary injunction be issued restraining the Respondent, his agents, or any person acting on his behalf from removing, transporting, or burying the body of the late Christine Auma Owuor.

    iii) That an order for stay of execution be issued against the order of Honourable Ayieta J. A. (RM) at Madiany delivered on 31/3/2026, specifically the order vacating

the previous injunction and allowing the Respondent to proceed to the burial.

iv) That the cost of this application be costs in the appeal.

2. The application is supported by the grounds set out thereunder and by the supporting affidavit of the 1st Appellant sworn on even date. The Appellants' gravamen is inter alia; that the Respondent through his advocate has openly in court, while seeking to have the interim orders of injunction earlier issued vacated, declared his intention to bury the deceased and therefore if he is allowed to do so, the subject matter of the dispute will be destroyed, rendering the intended and the substantive suit an academic exercise; that the trial court erred in law and fact by vacating the injunction while the substantive suit (regarding marital status and burial rights) remains active and pending determination on its merits thus failing to protect the subject matter of the entire claim by the Appellant; the court failed to apply the Oxygen principle (Article 159) and the Supreme Court precedent in Kenya Railways Corp V Okiya Omtatah, which holds that an affidavit is properly attested if the Advocate has a valid practicing certificate, regardless of the physical location of their officer stamp; that the Appellants, as the family of the deceased's first husband, will suffer irreparable harm if the burial is conducted by the Respondent, as the custom and dignity of the deceased will be permanently violated; that the Honourable Trial Court instead of appreciating the fact that the Appellants filed a fresh application at the trial court, the court declined to issue interim orders and instead fixed a mention date for 7th April 2026, which date is too far off to prevent the Respondent from creating a fait accompli (a completed act); that the Appellants have instituted the appeal and the application speedily without any delay and that

the appeal raises weighty issues which the Court should address before the body of the deceased is buried until this appeal is determined; that no prejudice shall be occasioned to the Respondent if the order for stay of execution is made; that the Appellants' appeal is arguable and stands an overwhelming chance of success; that the deceased is currently preserved at Matangwe mortuary which is the only thing standing between the Applicants and the total destruction of the subject matter of this suit; that the mention date of 7/4/2026 set by the trial court on the application filed under urgency seeking interim orders of injunction to determine the rightful burial place of the deceased will be rendered an academic and nugatory exercise; that the balance of convenience heavily favours the Applicants as the body can remain preserved at the mortuary until the appeal is heard, whereas the Respondent will suffer no irreparable harm by waiting for the legal process to conclude and that the Honourable Court grants the orders of stay and a temporary injunction to preserve the status quo pending the determination of the appeal.

3. The application was strenuously opposed by the Respondent who filed a replying affidavit dated 7/4/2026 wherein he averred inter alia; that he had married the deceased under African Christian marriage law and also Luo customary law; that he has a marriage certificate to that effect; that upon the marriage they retreated to Kabudha village where they cohabited until her demise; that the deceased prior to the marriage had been customarily to another man who is now deceased with the 1st Appellant as their daughter; that he took care of the deceased's children from her previous marriage; that the deceased who had been ailing was later hospitalized at Bondo Sub County Hopsital before being transferred to Jaramogi County Referral Hospital in Kisumu; that he handled all the hospital bills without any assistance from the Appellants herein;

that the Appellants are engaging in forum shopping as they already have filed a similar application now pending before the lower court; that the Appellants are prosecuting two similar applications seeking similar reliefs; that the injunction sought is not merited; that the Appellants upon getting interim orders from this court still went ahead to pursue similar order in the trial court; that no good reasons have been availed to warrant the orders sought and that the application should be dismissed with costs.

4. The application was canvassed by way of written submissions.

5. Learned counsel for the Appellant submitted that the Appellants seek to arrest a situation where a subordinate court has effectively handed a "final victory" to the Respondent through a procedural technicality, thereby permitting the irreversible act of burial before the merits of a contested marriage can be ventilated.

6. Learned counsel submitted that the issues for determination were whether the intended Appeal is arguable or whether it is based on a mere procedural technicality contrary to Article 159 of the constitution; whether the Respondent's marriage to the Deceased is a legal nullity due to a subsisting customary marriage; whether the Appeal will be rendered nugatory if the interim orders of injunction are not granted; whether part-compliance with a trial court's direction (under the threat of dismissal) precludes a party from challenging the legality of the underlying order and whether the Respondent is estopped from relying on an Affidavit that suffers from the same "defect" he successfully used to strike out the Appellants' pleadings.

7. On the issue of arguability, it was submitted that the overriding objective under article 159 of the Constitution must be respected. It was submitted that the trial court struck out the Appellants' affidavits on a "minor geographical technicality" regarding the location of the Commissioner for Oaths' stamp. Under Article 159(2)(d) and Sections 1A and 1B of the Civil Procedure Act, courts are mandated to deliver substantive justice without undue regard to technicalities. Reliance was placed **In *Kenya Railways Corporation v. Okiya Omtatah [2022] KESC 68 (KLR)*, the Supreme Court clarified that an affidavit is validly attested as long as the Commissioner holds a valid practicing certificate. The geographical location of the stamp does not go to the root of the oath. The Appeal thus raises a fundamental question of law regarding judicial discretion and the misapplication of procedural rules.**

8. As regards the doctrine of subsisting customary marriage, learned counsel submitted that the Respondent's claim to the body rests on a Marriage Certificate. It was submitted that this document is a legal nullity for the following reasons; that the Deceased was the wife of the late Norbert Otieno Owimba; that under Luo Customary Law, marriage is a covenant initiated by dowry; that dowry has never been returned; that the Respondent explicitly stated that he did not pay dowry.

9. It was also submitted that Section 11(2)(a) of the Marriage **Act, 2014** provides that a marriage is void if either party is in an existing marriage. Since the customary union was never dissolved, the deceased lacked the legal capacity to marry the Respondent. The Respondent was, at best, a "widow-inheritor" (*Jater*), a status that

does not confer burial rights over an intact dowry marriage (*S.M. Otieno Case*).

10. On the nugatory principle, preservation of the status quo, it was submitted that in burial disputes, the injury is not "damages" but the permanent loss of the right to bury a kin in their rightful ancestral home. Once buried, the suit abates as it becomes an "academic exercise**."**

11. It was submitted that the Respondent's Advocate explicitly declared an intention to proceed with the burial immediately after the trial court vacated the interim orders. That the respondent even went on ahead to have an order rendering the Notice of motion application useless issued upon striking out the supporting Affidavit on the 1st April 2026 and thus it is clear from the move that the Respondents were intending to remove the deceased from the mortuary and bury her before the mention date which was intended for the 7th April 2026. That it is therefore this Honourable Court which actually preserved the subject matter by issuing the interim orders. Hadn't this Honourable Court not issued the interim orders, the subject matter would have long have been buried to the detriment of the Appellants. That in this case, the body is the subject matter (*res*). Once a burial occurs, the subject matter is destroyed. As held in ***James Apeli & Another v. Prisca Buluku [1980] LLR 1244***, the court has a duty to preserve the status quo to ensure that the eventual judgment is not "a mere paper on the wall."

12. It was submitted that the trial court's refusal to grant interim protection while setting a distant mention date of 7th April 2026 created a "legal vacuum" that emboldened the Respondent to create a *fait accompli*. This forced the appellants to move this Honourable Court to preserve the status quo on the subject matter, which they urge this Court to intervene to prevent the suit from abating.

13. As regards the legal rebuttal to the Respondent's objection, it was stated that the Respondent's Advocate on the 9th April 2026 raised the issue of part compliance with the court direction having filed a fresh Verifying Affidavit to accompany the plaint. It was submitted that filing the fresh affidavit was a **compulsory step to keep the suit alive** (since the Plaint remained) and a **precautionary measure** to prevent a total collapse of the case while the Appellant's sought to correct the legal error via appeal.

Further, the Respondent therefore suggests that the Appellants should have let their case die in the lower court to prove their commitment to the Appeal. It was submitted that filing the fresh affidavit was a rescue mission for the suit. That this Appeal is not about the new affidavit; it is about the **unlawful destruction of the original record** and the **unwarranted vacation of orders** that protected a human body. That the Appeal is very much alive. That the Respondent's argument and/or insinuation that "compliance" ends the appeal is legally flawed. The trial court ordered a fresh affidavit within three (3) day and that failure to comply would have led to the striking out of the **Plaint**, which would have permanently ended the claim before the Appellants could even reach the High Court. That compliance was therefore a **mandatory act of necessity** to keep the seat of justice open and that it was

therefore a **mandatory act of necessity** to keep the seat of justice open.

14. Learned counsel further submitted that following a court's directions to save a suit from dismissal by filing a document under the duress of a court-imposed deadline does not constitute a waiver of the right to challenge the legality of that order and neither does it constitute an admission that the underlying ruling was correct. It is an act of **preservation**, not **consent**. The Appellants filed their **Memorandum of Appeal** immediately, which is the ultimate "protest" in law. That this Appeal seeks to reinstate the **original Supporting Affidavit** and the **Interim Injunction**, neither of which was restored by the mere filing of a fresh Verifying Affidavit. The 'compliance' mentioned by the Respondent is a procedural bandage that does not heal the substantive legal wound inflicted by the trial court and that to allow the Respondent to succeed on this technicality would be to reward a "gotcha" style of litigation which is against the spirit of **Article 159 & Substantive Justice**. The Appellants should not be punished for being diligent in their attempt to satisfy the trial court while simultaneously seeking a higher court's correction of a legal error."

15. On the issue of procedural hypocrisy and clean hand, **the Respondent's** Replying Affidavit is itself "fatally defective" by the very standard he urged the lower court to adopt, the **Respondent's** affidavit was sworn in Bondo but commissioned in Kisumu. If the Appellants' affidavits were "struck out" for a stamp-station mismatch, then by the Doctrine of Estoppel and Par Delictum, the Respondent cannot benefit from a standard he himself has failed to meet. Furthermore, the Respondent's annexures are not certified/commissioned as required by the Oaths

and Statutory Declarations Act, rendering them inadmissible as evidence. Under Order 19 Rule 7 of the Civil Procedure Rules, uncertified exhibits are inadmissible and should be expunged from the record.

16. As regards the issue of forum shopping being refuted, learned counsel submitted that the claim is malicious. That forum shopping involves hiding cases to get a "second bite." The Appellants have been transparent, informing both courts of the parallel proceedings. Following the trial court's abdication of its duty, the Appellants have since filed a **Notice of Withdrawal** of the lower court application. There is now only **one** application before this Court. The move was a necessity to escape a biased and hostile forum that failed to preserve the subject of this case.

17. Finally, the learned counsel concluded by submitting that the balance of convenience favors the preservation of the body. Mortuary fees are quantifiable; a wrongful burial is a permanent cultural and legal injury. We urge this Court to remain the sole arbiter of the status quo and prayed that a temporary injunction restraining the Respondent from burying the deceased, a stay of execution of the trial court orders dated31st March 2026 specifically the order vacating the previous injunction and allowing the Respondent to proceed with the burial and that the appeal be heard on its merits on a priority basis.

11. Learned counsel for the Respondent raised three issues for determination as follows:

i. Whether the Applicants have made out a case for grant of temporary injunction.

ii. Whether the Respondent has a right and duty to bury the deceased.

iii. Who should bear the cost for the application.

12. As regards whether the Applicants have made out a case for grant of interim order for injunction, it was submitted that the following three conditions must be satisfied before the grant of an injunction as was set out in the case of ***Giella v Cassman Brown & Co. Ltd [1973] EA 358:***

a) The Applicants must establish a *prima facie* case with a probability of success;

b) The Applicants must establish that they will suffer irreparable injury if an injunction is not granted; and

c) If the court is in doubt, it will decide the application on a balance of convenience.

13. As to whether a prima facie case has been made, it was submitted that the Applicants have not established a *prima facie* case with a probability of success. At the heart of their application is the claim that the deceased was married to the father of the 1st Applicant. They have not presented any evidence that the deceased was in a valid marriage with any of them or a member of their family. That they have not accounted for their relationship with the deceased from the

time when she began living with the Respondent. That nothing has been placed before court to establish that the Applicants in any way were present in the life of the deceased prior to her death. They never took care of her or even visited her while she suffered in the hospital.

14. It was submitted that the deceased was legally married to the Respondent and a marriage certificate has been filed to that effect. By presenting a valid marriage certificate, the Respondent has satisfied the requirements of the legal proximity doctrine and he has proved that he was closer to the deceased than any other person.

15. Learned counsel submitted that the 2nd and 3rd Applicants have no *locus standi* to bring this suit since they were not in any relationship with the deceased. The deceased was never married to any of them. Further, a prima facie case was defined by the Court of Appeal in ***Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (2003) eKLR*** *as follows:*

> ***"A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter"*** *(Underlining for Emphasis)*

16. It was further submitted that the Applicants' claim over the body of the deceased is further premised on a case of fraud. We submit that fraud is not a simple matter that if it is pleaded, it must be specifically proved with cogent evidence. The Applicants have failed to prove what fraud was committed in registering the marriage between the Respondent and the deceased.

17. On the other hand, the Respondent in his response has filed both certificate of marriage and certificate of no objection to the notice given to the public on the intention of the Respondent and the deceased to marry. This clearly shows that the marriage was conducted in full compliance with the law and regulations. The Applicants have presented nothing before this Honourable Court to demonstrate that either the Respondent or the deceased lacked capacity or was unavailable to contract a marriage.

18. Again, the learned counsel stated that they had filed a letter from the area chief who has described the Respondent as the next of kin. **Black's Law Dictionary 14th Edition** defines next of kin as follows:

> ***"In the law of descent and distribution, this term properly denotes the persons nearest of kindred to the decedent, that is, those who are most nearly related to him by blood; but it is sometimes construed to mean only those who are entitled to take under the statute of distributions, and sometimes to include other persons."***

19. That the Respondent and the deceased were in a contract of marriage. They had decided how to carry on with their lives. It is trite that this court cannot re-write a contract between parties. Anybody who was willing to challenge the marriage between the Deceased and the Respondents could have done so while the deceased live. Reliance was placed in the case of AP v PAP [2019] KEHC 5203 (KLR) it was held as follows:

> ***"17. A marriage is a contract or a solemn union of willing partners, who a part from the normal differences ought to live in harmony and appreciating each other. One spouse cannot be forced on the other."***

20. Similarly, in Christopher Nderi Gathambo & Samuel Muthui Munene.. vs Samuel Muthui Munene [2003] KEHC 82 (KLR) which was handling a burial dispute over the remains a female teacher had the following to say:

> ***"In the legal sense -***
>
> ***Marriage is a contract between one or more males and one or more females for establishment of a family…. It is also a civil contract entered into by consent of the parties with the form whether of a civil or religious nature prescribed by law."***

21. It was submitted that the deceased was married to one Norbert Otieno Owimba under the Luo customary laws then

some claims are made which run afoul to the Constitution and the written law which states that the customary marriage was never dissolved and therefore the deceased was not available to marry. It was submitted that this sentiment is a misplaced argument especially when the statute provides clearly that death of a spouse dissolves marriage and as such there was no need for the marriage to be dissolved.

22. Learned Counsel placed reliance on **Section 16(a) of the Marriage Act** provided as follows:

"A marriage registered under this Act subsists until it is determined by—

(a) the death of a spouse;"

23. Further, **section 15(1) of the Marriage Act** is even more categorical as it provides as follows:

"15. Rights of widow and widowers

(1)A widow or widower may re-marry."

24. It was submitted that while it is maintained that the deceased was never married to Norbert Otieno Owimba, a suggestion that her customary marriage to the said Norbert Otieno Owimba needed to be dissolved upon the latter's death is to read the statute upside down.

25. As regards the issue if a widow could not marry after the death of the 1st husband, it was submitted that it was the most absurd submission we've heard on this matter and

therefore it renders the application of the said customary law null and void. The said customary law (if it exists) then is inconsistent with the Constitution, the written law and it is repugnant to morality and justice. Further, the customary law cannot tie a widow not to remarry while freely allowing the widower to remarry. Article 45(3) of the Constitution provides as follows:

> ***"(3) Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage."***

To require from a widow that which is not required from a widower is to offend the constitution and the said must not be allowed to stand.

26. On the issue of payment of dowry by Norbert Otieno Owimba to the deceased's family, it appears that the Applicants do not know the difference between dowry and bride price. Dowry is a personal gift to a woman and the same is not paid to the family of the bride. The same would have been paid even if marriage was to be dissolved. The court in the case of F B I v B G [2018] KEHC 8677 (KLR) had the following to say about the two:

> ***"40. I agree with the Kadhi assessor that "bride price" and "dowry" are two different things, though the two have often been confused to mean the same thing. Bride price is a gift or payment made to the parents of the bride at marriage, while dowry is***

a gift given to the woman in a marriage, which becomes her sole property. The promise of dowry in the marriage is a contract and in my view is enforceable. The two goats of the respondent were not given to the appellant. Now that the marriage is for dissolution and the two cows promised to the appellant have not been paid by the respondent to the appellant, I order that the respondent do give the appellant the two cows or the money equivalent of Kshs,16,500/= per cow which translates to Kshs.33,000/= as dowry within 60 days from the date of this judgment."

Further, the Applicants would table any evidence that the bride price was paid. The bride price if any was paid to a family. That even affidavit evidence of any member of the deceased's family would suffice. Nothing has been presented, not even a photo to back up such claims. None of the Applicants received the said dowry (read bride price) and therefore none of them can vouch for the veracity of the claims.

27. It was further submitted that an affidavit of an elder sister to the deceased was filed categorically denying that no bride price (dowry) was ever paid. She is a member of the deceased family and she would know if any dowry or bride price was paid. That there would be any evidence by an expert in Luo customary law even if it is just affidavit evidence. None of the Applicants has claimed to be an

expert in Luo customary law and such their testimonies cannot be treated as truth but as mere hearsay.

28. As regards the issue of irreparable injury, it was submitted that the Applicants were not living with the deceased prior to her demise, and they have presented nothing in support of the contrary position. Instead, they have pleaded that the Respondent was living with the deceased.

29. The learned counsel submitted that an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable harm which would not be adequately compensated by an award of damages. In this case, the Applicants have not demonstrated what injury they will suffer if the Respondent is allowed to bury the deceased.

30. It was submitted that in any event, the 1st Applicant is just as a biological daughter of the deceased as her sister Anjeline Atieno who is also the biological daughter of the deceased. The said Anjeline Atieno wishes that the deceased should be buried at the home of the Respondent, where they have lived all along. The 1st Applicant does not have more right than her sister who is also the biological daughter of the deceased.

31. Further, it was submitted that it is trite law that there is no property in a dead body and as such the Applicants will not suffer any loss even if the deceased was to be buried at the home of the Respondent where she spent her time and last days on earth.

32. Again, counsel stated that the law that governs applications for injunctions is premised under ***Order 40 Rule 1 of the Civil Procedure Rules 2010*** which provides as follows:

> ***Order 40 temporary injunctions and interlocutory orders***
>
> ***[Order 40. rule 1] Cases in which temporary injunction may be granted.***
>
> ***1. Where in any suit it is proved by affidavit or otherwise—***
>
> ***(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or***
>
> ***(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,***
>
> ***the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as***

the court thinks fit until the disposal of the suit or until further orders.

It was submitted that the said law talks extensively of property and it was further stated that that there is no property in a dead body and thus there would be no property capable of being preserved by way of an order of injunction. Further, the Applicants having failed to establish a prima facie case, we needed not to even deal with the second and third conditions. We place further reliance on the case of ***Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR*** where the Court of Appeal stated as follows:

> ***"…these are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially… if the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the courts must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should***

normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration."

The learned counsel further stated that the Applicants have failed to establish a *prima facie* case with a probability of success, hence this Honourable Court should find and hold that it will be immaterial to delve into the other two conditions to be considered on grant of temporary injunction as was held in the case of ***Commercial Finance Co. Ltd v Afraha Education Society & Others Civil Appeal No. 142 of 1999*** in the following words:

"….the judge should address himself sequentially on the conditions for granting an injunction instead of proceeding straight away to address himself on the third condition because where the Applicant has no registered interest in the land comprised in the title dispute and therefore has not demonstrated that it has a prima facie case with probability of success no interlocutory injunction would be available."

Again, it was submitted that the Applicants have not presented any evidence to show that they have any relationship with the deceased capable of being protected through the orders sought. On the other hand, the

Respondent has filed a marriage certificate which is *prima facie* evidence that marriage exists between him and the deceased and that this court is being invited to presume marriage between the deceased and Norbert Otieno Owimba. It was urged that this Honourable Court should decline such invitation as there is no need to presume a customary marriage where a valid marriage between the Respondent and the deceased exists as evidenced by a marriage certificate.

33. As regards the issue of balance of convenience, it was submitted that the Applicants are guilty of misrepresentation and concealment of material facts, as they are aware that the deceased was living with the Respondent at the home of the Respondent. In fact, even the 1st Applicant and her sister Anjeline Atieno have all along lived with the deceased and Respondent at the home of the Respondent. That the 2nd and 3rd Applicants have also concealed the material facts by not informing this court that they never visited the deceased while she was sick in hospital. Finally, the 1st Applicant has admitted before this court that when the family of her husband came to know her home, she took them to the home of the Respondent and not to the family of the 2nd and 3rd Applicants. This confirms that the deceased was living with the Respondent. That the 1st Applicant has claimed that she contributed towards payment of bills for the deceased in the hospital. Nothing could have been easier than proving this since any bill paid at the hospital even if made in cash, a receipt is issued. If she made payment via any digital means

or via cheque, there would be evidence. It was contended that she has placed nothing before this court to prove her contribution.

34. As regards the issue of whether the Respondent has a right and a duty to bury the deceased, it was stated that this court should delve into crystalized positions developed over time in determining burial disputes. Counsel submitted on the following Five (5) limbs including the doctrine of legal proximity and that the courts have times without number relied on this doctrine on determining the burial disputes. Under this doctrine, the relationship must be proved legally for it to be considered to exist. In the case of SAN v GW [2020] KECA 46 (KLR) the Court of Appeal held as follows:

> ***"The third aspect of this dispute is that the law only recognizes the persons who are closest to the deceased to have the right to bury the deceased. Those persons have been identified as the spouse, children, parents and siblings, in that order."***

35. Further, it was submitted that anyone who can prove the legal proximity by way of marriage will come first in the order of priority. We humbly invite the Honourable Court to find and hold that the Respondent has proved the legal proximity by presenting a valid marriage certificate and chief's letter. In the case of Ambiyo v Muhinja [2023] KEHC 21865 (KLR) it was held thus:

"97. The existence of a marriage between the Plaintiff and the Deceased is therefore key to determining on who between the Plaintiff and the Defendant has the right to bury the deceased."

That the Priority Hierarchy favours the Respondent since generally, the order of priority is the surviving spouse, followed by children, parents, and then siblings. It is not in dispute that the deceased was married to the Respondent. **Section 3(1) of the Marriage Act** defines marriage as follows:

> ***"Marriage is the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act"***

It is not in dispute that the Respondent is the person who is legally married to the deceased and the marriage is duly registered. The deceased has never been in any marriage which is legally recognized and protected by law, apart from what she had with the Respondent. Further, it is not in dispute that marital centrality which views marriage as the "inner core" of family relationships makes the Respondent the closest person to the deceased. A legally recognized spouse typically has the primary right over extended family or clan members and that the marriage certificate held by the Respondent and the deceased cannot be challenged in any way. It lends credence and validity to the marriage. The claims by the Applicants that the deceased was married to

someone else are without merit and there in nothing to back them. that this is the position of the **Marriage Act** at **section 12 (e)** that failure to register the marriage makes it voidable and we so submit and invite this Honourable Court to find and hold so.

36. Counsel submitted that the Applicants have placed nothing before this Honourable Court to prove that the deceased was married to any other person apart from the Respondent. **Section 59** of the **Marriage Act** provides for ways of proving marriage as follows:

"59. Evidence of marriage

(1) A marriage may be proven in Kenya by—

a) a certificate of marriage issued under this Act or any other written law;

b) a certified copy of a certificate of marriage issued under this Act or any other written law;

c) an entry in a register of marriages maintained under this Act or any other written law;

d) a certified copy of an entry in a register of marriages maintained under this Act or any other written law; or

e) an entry in a register of marriages maintained by the proper authority of the Khoja Shia, Ith'nasheri, Shia imam,

Ismaili or Bohra communities, or a certified copy of such an entry.

37. It was submitted that despite subsection (1), a marriage may be proven in Kenya if it was celebrated in a public place of worship but its registration was not required, by an entry in any register maintained at that public place of worship or a certified copy of such an entry and having been faced with a similar case where a Plaintiff was alleging marriage under customary law but without a marriage certificate the court in the case of Ambiyo v Muhinja [2023] KEHC 21865 (KLR) (supra) had the following to say:

> ***"110. The Marriage Act, 2014 has its underpinnings in the Constitution. The primary objective of the Act was to ensure that all forms of marriage in Kenya enjoy equal legal status and to safeguard the rights of parties to marriage by providing the certainty that registration and certification provides.***
>
> ***111. We do this in other sectors of our lives. For instance, if one wishes to establish that they have academic credentials from an institution of learning, the conclusive proof is a certificate. One cannot argue for instance that long stay at that institution of learning qualifies them to be recognised as having the academic credential without meeting the prerequisites for its conferment.***

112. Likewise, if one wants to prove ownership of land, they produce a title deed. If one is establishing ownership of a car, they produce a log book or the sale agreement, one cannot adduce evidence of an incomplete transaction and invite the adjudicator to infer from the original intention of the parties that the transaction was completed.

113. The Act is therefore clear on what constitutes a marriage and how one will prove it. In light of the clear provisions of the law I have no hesitation in finding that the Plaintiff did not establish that he was married to the deceased under Kikuyu Customary law"

That having failed to prove the existence of any marriage between the deceased and the man they allege, the Applicants lose the right of burying the deceased and we invite this Honourable Court to find and hold so as was held in **Ambiyo v Muhinja [2023] KEHC 21865 (KLR)** (supra) when the court held as follows:

"119. Having discounted the existence of a marriage I would find as Nambuye J (as she then was) did in Shem Navade Asuluda v Peter Irungu Kamakia [2009] eKLR, that this ousts the right of the plaintiff as the presumed spouse to bury the deceased

and ushers in the defendant as the nearest relative."

Further, reliance was placed in the case of Mburu & 4 others v Mburu & 3 others; AIC Kijabe Hospital (Interested Party) [2025] KEHC 12574 (KLR) where it was held as follows:

> ***"34. The doctrine of proximity, as articulated in the case of Ruth Wanjiru Njoroge -vs Jemimah Njeri Njoroge & Another [2004] eKLR, identifies the person with the fundamental proximity in law to the deceased as having the color of right of burial…..***
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> ***35. Secondly, the Deceased contracted a statutory Christian marriage with Magdalene Waithera on 14 March 2020 at a church in Gilgil. This was after almost 37 years of enjoying a union with her under customary marriage. This created a primary legal bond with his second wife and her children, the Appellants***
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> Similarly, in the case of Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge & another [2004] KEHC 2617 (KLR), Ojwang J, (as he then was) had the following to say:
>
> > ***"The fundamental issue that will resolve most of the claims in this application is marital status prior to the death of Mr Samuel Njoroge Muiruri. This position is fully recognized by the applicant and by the respondents.***

It was stated that the person, in social context prevailing in this country, who is in the first line of duty in relation to the burial of any deceased person, is the one who is closest to the deceased in legal terms. Generally, the marital union will be found to be the focus of the closest chain of relationships touching on the deceased. And therefore, it is only natural that the one who can prove this fundamental proximity in law to the deceased, has the colour of right of burial, ahead of any other claimant."

Counsel further placed reliance in the case of Martha Wanjiru Kimata & another v Dorcas Wanjiru & another [2015] KEHC 7090 (KLR).

38. Learned counsel invites this Honourable Court to find and hold that the Respondent had the closest legal proximity to the deceased and as such he has a right and duty to bury the deceased.

39. As regards the Luo customary law, learned counsel submitted that despite the contestations by the Applicants the right of the Respondent to bury the deceased is in tandem with the Luo Customary law. It is the allegations of the Applicants which flies on the face of the said customary law. That the Respondent could not inherit the deceased because he does not belong to the same family or clan with the man who is alleged to have married the deceased. Both

the deceased and the Respondent were available and free to marry.

40. Learned counsel cited **Charles Oyo Nyawello**, in his book *"Luo Customary Law, (2018), Law Africa"* at 233, states that once a husband dies, the widow is left with the liberty to either continue as his wife with one of his male relatives, or to decline such continuation in favour of a new line. The deceased herein chose the latter. That nothing has been tendered to the contrary that upon marrying the Respondent, the deceased severed any link to any previous relationships which she may have had. The Respondent did not fulfil any Luo customs in marrying the deceased and he moved her to his home where he lived with her till her demise.

41. Further, that the Applicants have neither called any expert witness with expertise in Luo customary law nor proved the customs they allege and therefore, any assertion that they make with regard to Luo customs should just be taken as their imaginations. In the case of Imbogo v Imbogo [2023] KEHC 24707 (KLR) it was held as follows:

> ***"However, it is not enough to plead custom, it must be proved. It is trite that customary law, unlike statute or case law, is treated as a fact rather than a law. It is not codified or is in written form. It has to be established through evidence….Its proof is through an expert that is a person familiar or conversant with, the custom….In the present case I did not see any evidence of "an expert" in Luhya***

customary law. Indeed, none of the witnesses presented himself as such or were led in evidence to ascertain their expertise in Luhya customary law of marriage….A detailed account of their expertise in Luhya customs ought to have been laid before they could be presented to court as expert witnesses. Custom as stated hereinbefore cannot be assumed.

42. It was submitted that failure by the Applicants to call an expert witness who is well versed in Luo Customary Law can only lead to one conclusion, that the said claims have not been proved. This was the holding in the case of **Nyaribo Nyankomba V Mary Bonareri Munge [2010] KEHC 933 (KLR)** when the court rendered itself thus:

> ***"Time and again it has been stated that cases resting purely on customary law, it's absolutely necessary that experts versed in the customs be summoned to testify so as to assist the court reach a fair verdict since the court itself is not well versed in those customs and traditions. In the absence of such expert testimony, there can only be one conclusion, such claim remains unproved."***

Further, it was submitted that the deceased had deliberately opted out of the Luo customary way of life through her

lifestyle and/or the specific legal regime of celebrating a marriage with the Respondent by solemnizing the said marriage in church. We have tabled several documents to evidence that the deceased chose to concentrate more on her new way of life of Christianity and she dedicated her life to serving in the church. That the constitution and statutes provide that customary law is not absolute and it does not rank above the Constitution, the written law and common law. Its applicability is only relevant to the extent that it is not "repugnant to justice and morality" or inconsistent with written law. **Section 3(2)** of the **Judicature Act** provides as follows:

> ***"(2)The Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."*** That to insist that a widow is not free from marriage, while a widower is free to marry, runs afoul to the constitution, written law and is repugnant to justice and morality. It is discriminative and it serves to elevate the status of a

widower above that of a widow. The deceased was available and indeed free to marry the Respondent.

43. Reliance was placed in the case of Mburu & 4 others v Mburu & 3 others; AIC Kijabe Hospital (Interested Party) [2025] KEHC 12574 (KLR) (supra) the court held as follows:

"32. The present case is a classic example of the tension between customary law and the realities of modern life. The law does not exist in a vacuum. As held in Sakina Sote Kaittany & another v Mary Wamaitha [1995] KECA 2 (KLR), courts are guided by customary law only so far as it is not repugnant to justice and morality. The modern constitutional and judicial trend is to prioritise the nuclear family and the choices made by individuals during their lifetime over the rigid application of custom.

It was submitted that it is important to consider and respect the religious belief of the deceased as a new way of life which she had chosen for herself. **William J Wagner** in *'Death, Dying, and Burial: Approaches in Religious Law and Practice'* (1999) 59, discusses the importance of religious and cultural practices on the burial of a deceased. He states that:

"Thus, the observance of the religious duties of the preparation of the dead for burial is quite solemn, and those observing them do so with close

attention to the spirit in which they carry them out, constantly reciting prayer in the form of psalms."

Further, customary law cannot outweigh the written law or/and the right of the person who had the closest legal proximity to the deceased. This was the holding in the case of **Ontweka & 3 others v Ondieki [2024] KECA 11 (KLR)** when the Court of Appeal rendered itself thus:

"58. In instances where the customs and religious practices form part and parcel of the factual basis of a burial dispute, the same ought to be considered to the extent that they are not contrary to the Constitution and other laws. However, they do not automatically attain a higher place than the burial right of the person with the most proximate legal and familial bonds with the deceased."

44. As regards the wishes of the deceased, it was submitted that the deceased cannot dispose her body through a will and although there is no property in a dead body, courts have always held that where there are express wishes of the deceased, the same should be respected. In the case of SAN v GW [2020] KECA 46 (KLR) (supra) the Court of Appeal held as follows:

"The wishes or a will on how the deceased's remains will be disposed of upon death are not, as a general rule binding because, in the first place,

there is no property in a dead body and secondly, because a dead person cannot take part in the decision of his or her own burial. There must, however, be compelling reasons for not heeding the expressed wishes of the deceased."

That while not belabouring this point, it is submitted that the deceased expressly told several people including her sister and daughter, her wishes that if she dies, she should be buried at the home of the Respondent as per the filed affidavits. That the Courts have held that the wishes of the deceased while important and will be given much weight even above customary law, unless there are compelling reasons not to do so. We rely on the case of ***Samuel Onindo Wambi –Vs- COO & Another Kisumu Civil App. No. 13 of 2011 (2015) eKLR*****.**

45. That none of the Applicants was any closer to the deceased during her last moments and therefore, they can neither confirm nor deny the wishes of the deceased with regard to this matter.

46. Citing with approval the case of ***Samuel Onindo Wambi v C O O & another [2015] KECA 620 (KLR)*** the court in the case of Mburu & 4 others v Mburu & 3 others; AIC Kijabe Hospital (Interested Party) [2025] KEHC 12574 (KLR)had the following to say:

"In Samuel Onindo Wambi v C O O & another [2015] KECA 620 (KLR), the Court of Appeal held thus: "A deceased person's burial wishes are akin to a will. Save for a compelling reason, they supersede customary law and should be followed.""

Further reliance was placed on the cases of ***Jacinta Nduku Masai -vs- Leonida Mueni Mutua & 4 Others [2018] eKLR***, and ***Apeli & Enoka Olasi -vs- Prisca Buluka [1980] eKLR***.

47. In the end, it was submitted that this Honourable Court should find and hold that there is no reason for departing from the clear wishes of the deceased.

48. As regard the Applicants' conduct towards the deceased, it has always been a matter for consideration, how the Applicant conducted themselves towards the deceased whenever courts have been called upon to determine burial disputes.

49. That the Respondent has pleaded and it has not been controverted that the deceased never maintained any closeness with the Applicants. That from the moment she got married to the Respondent, she never visited the family of the Applicants.

50. Further, it was submitted that during all the time when the deceased was sick, nobody from the family of the 2nd and 3rd Applicants ever visited her in hospital or offered her any form of assistance.

51. Citing with approval the Court of Appeal case of **Samuel Onindo Wambi vs. COO & Another** Kisumu Civil App. No. 13 of 2011 (2015) eKLR, the Court of Appeal in the case of **SAN v GW [2020] KECA 46 (KLR)**

> ***"The other consideration is that the person claiming the right to bury the deceased must be one who is demonstrated to have been close to him or her during his or her lifetime. Regarding this last limb, the Court of Appeal in Samuel Onindo Wambi vs. COO & Another Kisumu Civil App. No. 13 of 2011 (2015) eKLR expressed the following view:***
>
> ***"…A person's conduct to a deceased person can extinguish the right of that person of burying the remains of the deceased. The appellant did not show any family closeness with the deceased when she was alive. Though he said that he used to visit the deceased and that he mobilized his siblings to build a house for her at Kibos there was no credible evidence to prove so. (sic). The fact that he was the deceased's first-born son did not give him an automatic right to bury her even if Luo customary law dictates so. The court has to consider all the circumstances of the case and the justice of the case…In this case, besides the fact that given the father and his family's***

treatment of the deceased he is not deserving of the right to bury the deceased remains”””

52. It was submitted that one of the witnesses who has recorded her statement, and who is a biological daughter of the deceased, it is her testimony that the 2nd Applicant subjected the deceased and her children to cruelty and violence, something that made it easy for the deceased to walk away when she found love at the hands of the Respondent. That the Applicants abandoned the deceased and neglected her at her hour of greatest need. They never assisted her in any way when she suffered with sickness. While the 1st Applicant never stayed with the deceased who is her biological mother in the hospital as would have been expected, the 2nd and 3rd Applicants and their family members never visited the deceased at any time when she was in hospital or while sick at home. That the deceased was always being assisted by the Respondent, her sisters-in-law Caroline Odera and Eunice Adhiambo Opiyo; her elder sister Monica Misolo; her lastborn daughter Anjeline Atieno; or/and her nephews Kevin Misolo and Kennedy Misolo. The Applicants abandoned her. That in terms of "emotional proximity" and those who shared the deceased's daily life and care—rather than just biological or tribal ties’ the persons named above were closer to her than any of the Applicants.

53. Learned counsel urges this Court to find and hold that by their conduct; the Applicants had extinguished their

right to bury the deceased. This was the final holding by Court of Appeal in case of SAN v GW [2020] KECA 46 (KLR) (supra) when it held as follows:

> ***"In Samuel Onindo (supra) it was explained that a person's conduct towards a deceased person while alive could extinguish his or her right to bury the deceased. Since the appellant did not show any closeness towards the deceased after their separation and she did not show any sympathy towards him when he was ailing, it was only just that the deceased's wishes and choice of where he was to be buried were to be honoured."***

54. It was submitted that it is a common law principle that there is no property in a dead body. This means a body cannot be bought, sold, or held as security for a debt. To claim that the family of the 2nd and 3rd Applicants paid dowry therefore they must bury the deceased amounts to asserting that there is a property in a dead body capable of repaying the debt of the dowry paid, which the Respondent denies was never paid.

55. In the case of **Wainaina & another v Musungu [2026] KEHC 2552 (KLR)** it was held as follows:

> ***"28. The general principle is that under common law and Kenyan jurisprudence, the person with the strongest legal or customary***

relationship to the deceased is entitled to control burial arrangements."

56. Further, since a corpse is not property, it cannot be "owned" by an estate of the biological father of the 1st Applicant. This burial dispute should focus on the duty and right to dispose of the remains of the deceased rather than ownership of the body. That the Respondent, having proved the legal proximity, the emotional proximity and the wishes of the deceased, has the duty and the right to inter the remains of the deceased

97. As regards the issue of who should bear the cost of the application, learned counsel urges this court to find and hold that the applicant having failed to show a *prima facie* case with a probability of success and the application being dismissed; the Applicant should bear the costs for the Application.

98. Further, reliance was placed on **Section 27** of the **Civil Procedure Act** which is instructive and therefore necessary to guide the court, the Honourable Court has a discretion to award costs. That after a careful reading of section 27 above indicates that it is considered trite law that cost follow the cause/event as described by **Sir Dinshah Fardunji Mulla** in his book *'The Code of Civil Procedure, 18th Edition, 2011 reprint 2012 at 540'*, is that the costs must follow the event unless the court, for some good reasons, orders otherwise.

99. Finally, it was submitted that this Honourable Court should find and hold that the Respondent has demonstrated that he has a right and duty to bury the deceased through various pieces of evidence as was held in the case of Mburu & 4 others v Mburu & 3 others; AIC Kijabe Hospital (Interested Party) [2025] KEHC 12574 (KLR) (supra) when it held as follows:

> ***"40. This Court find that the fundamental proximity in this case is overwhelmingly established not by a single factor, but by the confluence of the Deceased's entire life narrative. This includes the legal proximity created by his statutory marriage to Magdalene Waithera after the demise of his first wife; the geographical proximity of the four-decade residence in Gilgil; the familial proximity evidenced by his life with and care by the Appellants in his later years; and the emotional distance from the Respondents demonstrated by the clear documentary evidence of estrangement. It is this holistic view of a person's life, not a singular reliance on contested customs or past legal status, that must guide this Court in determining where he should be laid to rest."***

100. I have considered the application and the rival affidavits as well as the submissions filed. It is not in dispute that the

matter involving the parties herein is still pending determination before the trial court. It is also not in dispute that the learned trial magistrate had exercised her discretion on the 31/3/2026 when she struck out an affidavit in support of the Appellant's averments regarding the suit that had been filed by the Respondent herein. It is also not in dispute that prior to the impugned orders, there were some interim orders of injunction barring the Respondent from proceeding to collect the body of the deceased from a certain private morgue. It is also not in dispute that upon the trial court's orders of striking the faulty affidavit, the Appellants interlocutory application collapsed and that the Appellants were left without any reprieve in terms of an interim relief pending the Appellants regularizing their pleadings by filing the proper affidavit so as to cure the defect and thereby clothe the plaint appropriately in readiness for the hearing of the main suit later on. It is also not in dispute that the Appellants immediately filed an application dated 31/3/2026 seeking temporary orders of injunction to prevent the Respondent from proceeding to collect the body of the deceased from the morgue for burial pending the hearing and determination of the said application and the main suit. It is also not in dispute that the Appellants said application was duly presented before the trial court which directed that the same be mentioned on 7/4/2026 for directions. It is not in dispute that the Appellants then rushed to this court seeking similar reliefs pending the determination of their

application and the intended appeal. It is not in dispute that the Appellants have since complied with the trial court's orders and filed a proper affidavit in support of the plaint. That being the position, I find the issue for determination is whther the application has merit.

101. For an Applicant seeking the remedy of a temporary injunction, he has to satisfy three conditions namely: whether he has a prima facie case with a probability of success; that he stands to suffer irreparable harm which cannot be adequately compensated by an award of damages and finally in the event of doubt then the court will decide on a balance of convenience. These conditions were set out in the case of **Giella v Cassman Brown & Co. Ltd [1973] EA 358:**

102. As to whether a prima facie case has been made, the Applicants have contended that the trial court made orders which were likely to give the Respondent an opportunity to steal a match from the Applicants as it was clear that the Respondent was to proceed to take the body from the mortuary and conduct a burial thereby denying the Applicants the substance of the suit which was yet to e canvassed. It is noted that the Applicants had already filed an application dated 31/3/2026 before the trial court which was then pending directions. The Applicants have not explained or presented evidence to the effect that the trial court had determined the application and made orders in

which they are aggrieved. The Applicants also did not explain why they could not approach the trial court to seek the relevant orders so that in the event they are declined then they can approach the high court. It would therefore mean that the trial court is still vested with the requisite discretion to grant orders to the Applicants in the pending application. Hence, it is likely that the orders sought in the application dated 31/3/2026 in the lower court could be granted and that once granted, the present application and the appeal would be overtaken by events. It is also not in dispute that the Appellants, while approaching this court did not see the need to first withdraw their application dated 31/3/2026 pending before the trial court and further went ahead to seek directions thereon even after they had been granted an interim order of injunction so that even as at 9/4/2026 all the way to 15/4/2026 they did not bother to do the right thing namely-withdraw the said application. It is strange that even after the Applicants had been granted orders by this court, they deliberately failed to withdraw the said application. It is therefore obvious that the Appellants were engaged in forum shopping, as it were which is not permissible. It matters not that they have now seen the light and purported to withdraw the same. One cannot fail to see the Applicant's bad faith in the whole scenario. Now that the Applicants have filed the requisite affidavit in support of the plaint before the lower court, I find that they will not suffer any prejudice. Hence, I am persuaded that

the Applicants have not established a prima facie case to warrant an order for a temporary injunction.

A prima facie case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (2003) eKLR** as follows:

> "A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter"

103. As regards the issue of whether the Applicants will suffer irreparable harm which cannot be compensated by an award of damages, it is noted that the main suit in the trial court relates to a burial dispute and that the same is yet to commence for hearing in earnest. The trial court upon striking out the Applicants' affidavit in support of the Plaint, granted the Applicants leave to file the proper affidavit. Already, the Applicants have since complied and that the status quo regarding the Plaint has been regularized and that the parties should now be in a position to proceed and take pretrial directions before the trial court so that the case can proceed to hearing. It is not in dispute that the trial court would not loose sight of the fact that the subject of the suit relates to the burial of the body of a deceased person in which all the parties have laid claim thereon. That being the position, the

Applicants would be perfectly in order to approach the said trial court for the grant of orders of status quo pending determination of the suit. Indeed, the trial court being a court of equity is vested with discretionary powers to make such orders as are expedient for the ends of justice and to ensure that the parties are given an opportunity to ventilate their rival claims as provided for under Article 48 of the Constitution. It is therefore my considered view that the Applicants are not likely to suffer irreparable loss or harm as contended.

104. As regards the third condition, it is noted that the parties herein in their submissions have dwelt a great deal over the pending dispute in the lower court namely the right of each of them to bury the remains of the deceased. I find that the learned counsels ought not to have embarked on an odyssey in going to the subject of the dispute yet the appeal herein only relates to the discretion of the trial court to grant interim orders pending determination of the suit. It was therefore not necessary for the counsels to go out of the script. They ought to have confined themselves to the question as to whether this court should grant an interim order of injunction pending determination of the Applicant's appeal. Hence, I have not seen the need to delve into the lengthy submissions of the learned counsels. That being the position, it is my considered view that the balance of convenience tilts in favour of declining the prayer for an interim injunction. I find that no prejudice will be suffered

by the Applicants if the application is declined since their rights before the trial court will be taken care of.

105. In view of the foregoing observation, it is my finding that the Applicants' Notice of Motion dated 31/3/2026 lacks merit. the same is dismissed with no orders as to costs. The interim orders earlier issued are hereby discharged.

Dated and delivered at Siaya this 22nd day of April 2026.

D. KEMEI

JUDGE

In the presence of:

M/s Nyarige.....for Appellants/Applicants

Salim Odeny.....for Respondent

Mourine.....Court Assistant