



REPUBLIC OF KENYA



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**Nding'uri v Nding'uri & 4 others (Civil Appeal E429 of 2024)
[2025] KECA 971 (KLR) (23 May 2025) (Judgment)**

Neutral citation: [2025] KECA 971 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E429 OF 2024
PO KIAGE, J MOHAMMED & WK KORIR, JJA
MAY 23, 2025**

BETWEEN

LUCY WANJIKU NDING'URI APPELLANT

AND

ANN WAMBUI NDING'URI 1ST RESPONDENT

PETER NJOGU MUCHAMI 2ND RESPONDENT

RUEL NGATIA NDONYE 3RD RESPONDENT

MEDICAL OFFICER OF HEALTH KIAMBU 4TH RESPONDENT

THE OFFICE THE ATTORNEY GENERAL 5TH RESPONDENT

*(An appeal from the ruling and orders of the High Court of Kenya at Kiambu
(A. Mshila, J.) dated 31st May, 2024 in Misc. Appln. Case No. E103 of 2021)*

JUDGMENT

1. The 1st, 2nd and 3rd respondents filed a Notice of Motion dated 6th May 2021, later amended to an Originating Summons dated 22nd October 2021, in the High Court at Kiambu against the appellant, the 4th and 5th respondents, and the County Government of Kiambu. The application was made under section 146 of the *Public Health Act*, Order 51 of the Civil Procedure Rules and section 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya. In the main, the 1st, 2nd and 3rd respondents sought orders;

“2. THAT this Honourable Court be pleased to order and direct that the 1st respondent [the appellant] do point out where she interred the body of Michael Nding'uri Mwaniki to the Applicants herein and the same be exhumed for reburial on LR. No. GithunguriKanjai3X2.



3. THAT upon granting order (2) above, do direct the 2nd respondent [Medical Officer of Health – Kiambu] to grant or issue any of the Applicants with a permit to exhume the body or remains of Michael Nding’uri Mwaniki interred on the place or land to be pointed out by the 1st respondent [the appellant].
 4. THAT upon granting prayer 3 (above), this Honourable Court be further pleased to order and direct the 2nd respondent [Medical Officer of Health – Kiambu] to issue a burial permit for reburying the exhumed body or remains of Michael Nding’uri Mwaniki to any of the Applicants.”
2. The application was premised on grounds on the face of the summons and the supporting affidavits of the 1st, 2nd and 3rd respondents, all sworn on 6th May 2021. It was deposed that the 1st respondent was married to the late Michael Nding’uri Mwaniki (deceased) for more than six (6) years, while the 2nd and 3rd respondents are step-brother and uncle to the deceased, respectively. The deceased died on 27th March 2021, at Kiambu Level 5 Hospital, while undergoing treatment. Prior to his death, he had separated with his first wife, the appellant, due to hostility. It was averred that upon the demise of the deceased, his family agreed to have him buried on 1st April 2021, at his home in Minja village, Githunguri, on his father’s land known as GithunguriKanjai3X2 (the said land) measuring 25 acres. The family also agreed to go to the hospital on 29th March 2021, to clear the medical bills and make arrangements for the transfer of the body to Mukoe Mortuary, which is near their home. When the family arrived at the hospital on appointed day, there was a dispute between the 1st respondent and the appellant regarding who the body was to be released to. It was claimed that the appellant and her children were hostile to the 1st, 2nd and 3rd respondents. Parties eventually left the hospital without settling the issue.
 3. The next day, on 30th March 2021, the 1st, 2nd and 3rd respondents received information that the deceased’s body had been taken from the mortuary by the appellant with the intention of burying it. Upon the 1st respondent confirming the same with the hospital, she made a report to the police vide OB No. 1302042021 and investigations commenced. The 1st, 2nd and 3rd respondents asserted that they did not know where the appellant took the deceased’s body and thus they were seeking orders to have her point out where she buried him, so that the body can be exhumed and a post-mortem carried out to ascertain the cause of his death. They also wanted to give the deceased a befitting burial.
 4. The appellant’s counsel, Ms Ngatia & Associates, subsequently lodged a Notice of Preliminary Objection seeking that the application be struck out or dismissed with costs on two (2) grounds namely;
 - a) The deceased was buried on 30th March 2021 on his parcel of land comprised in title no. L.R. No. GithunguriKanjai3X2. To the extent that the Applicants [the 1st to 3rd Respondents] seek that the body of the deceased ‘be exhumed for reburial on L.R No. GithunguriKanjai3X2’ which is the same parcel of land where the deceased is buried, the application is frivolous, vexatious and an abuse of court process.
 - b) The deceased was accorded a decent send off on 30th March 2021 by his wife; the 1st respondent [the Appellant] herein, the children of the deceased and some step-brothers and sisters of the deceased. None of the Applicants is a parent, spouse, child or a relative to a nearest degree of consanguinity to



the deceased. Accordingly, the Applicants have no locus standi to bring these proceedings.”

5. Further, the appellant responded to the application through a replying affidavit dated 8th June 2021. She averred that she is the sole wife of the deceased, having been married to him under Kikuyu Customary Law in 1985. Their union was blessed with seven (7) children namely;
 - i. Edith Wanja Nding’uri
 - ii. Hellen Wairimu Nding’uri
 - iii. David Kongo Nding’uri
 - iv. Wallace Mbugua Nding’uri
 - v. Elphantus Murimi Nding’uri
 - vi. Everlyne Wanjiru Nding’uri
 - vii. Crispus Mwaniki Nding’uri
6. The appellant explained that the 1st respondent was a stranger to her, the 2nd respondent is a son to the step-brother of her father- in-law and the 3rd respondent is a brother to her mother-in-law. Consequently, she asserted that the three (3) respondents had no locus standi to institute the proceedings. Moreover, the 1st, 2nd and 3rd respondents were seeking that the deceased be exhumed from and reburied at the same said land where he was buried. The appellant claimed that the application was commenced for a collateral purpose and not for the aim of according the deceased a befitting send-off, as alleged. Her reasons for that argument being that, while the 1st respondent admitted in her affidavit that she was notified on 30th March 2021, that the body of the deceased had been released to the appellant, the application was filed on 6th May 2021, a period of over one month since they became aware that the body of the deceased had been released for interment. Moreover, on 30th March 2021, the deceased had been given a befitting send-off by the appellant, his children, the clergy, some members of their extended family and neighbours, when he was buried on the said land. The appellant questioned why none of the respondents had visited the appellant’s matrimonial home which was situated on the said land, to ascertain that the deceased was buried thereon.
7. It was alleged that the application which was camouflaged as an application seeking exhumation of the body of the deceased, for reburial on the same land where he was buried, was an attempt by the 1st respondent to be recognised as a wife of the deceased, which she was not. The appellant denied the claim that she had separated from the deceased prior to his death. She further disputed having assaulted and chased away the deceased. She explained that she learnt of the death of the deceased through the 2nd and 3rd respondents, who went to her matrimonial home on 28th March 2021, in the company of a group of people and notified her that the deceased had expired while undergoing treatment at Kiambu Level 5 Hospital. On 29th March 2021, in the morning, while accompanied by her children and some step-brothers of the deceased, they proceeded to the hospital and inquired whether the deceased was there. Upon checking the hospital records, the Registrar of the hospital informed them that an individual going by the deceased’s name had been admitted there on 26th March 2021 and at the time of admission he was in the company of the 1st respondent who stated that she was his wife and next of kin. The appellant was further informed that the deceased’s cause of death was respiratory failure caused by pneumonia, which is one of the signs and symptoms of Covid-19. Consequently, pursuant to *Public Order No. 2 of 2021* on the Coronavirus Pandemic, issued by His Excellency the President of the Republic of Kenya on 26th March 2021, the funeral of the deceased had to be conducted within 72 hours of the confirmation of death and the attendees of the funeral limited to 50 people.



8. The appellant deposed that, being the sole wife of the deceased and upon viewing his body, she requested the hospital to release the body to her for burial. However, the Registrar indicated that due to the conflicting details as to who was the wife of the deceased, it was necessary that she presents a letter from the Chief of the area where she resided, stating her relationship with the deceased. By letter dated 29th March 2021, the Assistant Chief of Kanjai Sub- location confirmed that the appellant was the wife of the deceased.
9. On presenting that letter to the hospital, the appellant was issued with the invoice in respect of the medical bills and one of the items that was billed was a disposable body bag, signifying that the deceased's death was a suspected Covid-19 case. On 30th March 2021, she was issued with a burial permit and the body was released to her and her children, for interment. The appellant averred that the deceased was interred on the said land where their matrimonial home was situated.
10. In reply to the appellant's averments, the 1st respondent swore a further affidavit on 15th October 2021, maintaining that she was legally married to the deceased under Kikuyu Customary Law and the 2nd and 3rd respondents attended the marriage ceremony. She contended that, the fact that the appellant claimed that she was informed of the death of the deceased by the 2nd and 3rd respondents, was admission that at the time of the deceased's death, she had separated from him. Moreover, the fact that the records at Kiambu Level 5 Hospital showed that the 1st respondent is the one who had admitted the deceased, was proof that the appellant was not living with the deceased at the time of his death. The 1st respondent contended that in the circumstances, the body ought to have been released to her. To buttress the claim that she was a wife to the deceased, the 1st respondent produced a letter from their area chief, indicating that she was a wife to the deceased. She asserted that there was no evidence to show that the deceased was buried on the said land, and the pictures that were adduced in evidence showing him being buried, were not enough to prove that he was buried and at the alleged place. The 2nd and 3rd respondents also swore further affidavits on even date, supporting the 1st respondent's assertions.
11. The application was canvassed by way of written submissions. Mshila, J. considered the pleadings and submissions before the court and delivered a judgment on 31st May, 2024. She ordered as follows;
 - i. The application is found to have merit and it is hereby allowed.
 - ii. 1st Respondent to disclose and provide evidence of the exact location of interment of the Deceased: if not interred on L.R. No. GithunguriKanjai3X2 then the 1st Applicant is hereby granted leave to exhume the body to enable her perform the deceased's final rights and give him a befitting re-burial on L.R. No. GithunguriKanjai3X2.
 - iii. The 2nd Respondent be and is hereby directed to grant to any of the Applicants a permit to exhume the body or remains of Michael Nding'uri Mwaniki and a burial permit be issued to enable interment of the body on L.R. No. GithunguriKanjai3X2.
 - iv. Parties at liberty to apply.
 - v. Each party to bear their own costs.
12. Dissatisfied with the judgment, the appellant filed the instant appeal containing seven (7) grounds, which, condensed, are that the learned Judge erred in law and in fact by;
 - a. Failing to appreciate that the essence of the suit was to enable the 1st respondent support her claim as '2nd wife' of the deceased.
 - b. Holding that the deceased had two wives.



- c. Failing to appreciate that a determination that the 1st respondent was a wife of the deceased would pre-judge pending proceedings before the court.
 - d. Issuing an imprecise and irreconcilable judgment.
 - e. Failing to appreciate that exhumation of the decomposed remains was traumatic to the appellant and the deceased's family and injurious to public interest since the deceased succumbed to COVID-19 related illness.
13. The appellant implored us to set aside the impugned decision and allow the appeal with costs.
 14. During the hearing of the appeal, learned counsel Mr. Ngatia, SC appeared for the appellant, while learned counsel Ms. Ng'ang'a appeared for 1st, 2nd and 3rd respondents. There was no representation for the 4th and 5th respondents. However, the 5th respondent lodged written submissions drawn by Ms. Aprinah Shikoli, Senior State Counsel. Counsel present highlighted their written submissions which they had filed prior.
 15. For the appellant, Mr. Ngatia, SC drew our attention to the provisions of section 146 of the *Public Health Act*, pursuant to which the 1st, 2nd and 3rd respondents made the application for exhumation. Specifically, he referred to sub-section 2 of that provision which sets out the three (3) persons who can be issued with a permit for exhumation, that is, the legal personal representative or next of kin of the person buried, or his duly authorized agent. Citing the decision in LYDIA BUNYALI Vs. MEDICAL OFFICER OF HEALTH TRANSNZOIA COUNTY V ANOTHER [2021] KEHC 3591 (KLR), counsel urged that if one does not fall within the three (3) distinct categories, then such an application is for dismissal. Mr. Ngatia, SC, contested the 1st respondent's claim that she fell within the purview of section 146(2) of the *Public Health Act* by virtue of being a second wife to the deceased. He argued that although the 1st respondent alleged that she had been married to the deceased under Kikuyu Customary Law, there was no evidence that any of the customs of a
 16. Kikuyu Customary Law Marriage were performed, including payment of dowry, which the learned Judge appreciated in her judgment. For this argument, counsel placed reliance on section 43 of the *Marriage Act*, Chapter 150 of the Laws of Kenya. The provision stipulates that a customary marriage should be celebrated in accordance with the customs of the communities of one or both of the parties to the intended marriage. Further, where payment of dowry is required, payment of a token amount of dowry shall be sufficient proof of customary marriage.
 17. The learned Judge was faulted for finding that the 1st respondent was a legitimate second wife of the deceased, based on a letter from the chief, which she deemed to be satisfactory evidence of a customary marriage having occurred. Counsel cited the decision in ANNA MUNINI & ANOTHER Vs. MARGARET NZAMBI [1984] KEHC 22 (KLR) where the court relied on this Court's decision in HOTTENSLAH WANJIKU YAWE Vs. PUBLIC TRUSTEE [1976] KECA 1 (KLR), for the holding that the onus of proving customary law marriage is on the party who claims it. Moreover, evidence as to the formalities required for a customary law marriage must be proved on a balance of probabilities. Further, in ROSE WAMBUI KIARIE Vs. JANE NJERINARUYA [2015] KEHC 4044 (KLR), the High Court specified the essentials of a valid Kikuyu Customary Marriage to include; capacity to marry, consent of parties; Nguracio and Ruracio ceremonies and, commencement of cohabitation. Counsel relied on ASA Vs. NA & ANOTHER [2020] KEHC 345 (KLR) where the court while referring to section 43(2) of the *Marriage Act* was of the view that the most important fact



to be proved is the evidence of payment of dowry in fulfillment of the requirement of customary law marriage. The court therein further observed that;

As regards the chief's letter, it is of little evidentiary value towards proving payment of dowry. It attests to an event the chief did not witness as described in the foregone paragraphs. It is hearsay evidence which cannot be relied upon by this court."

18. In view of the foregoing decisions, it was asserted that the 1st respondent is not a wife of the deceased and, therefore, she was not entitled to the exhumation orders.
19. Mr. Ngatia, SC, faulted the learned Judge for giving orders which were imprecise and difficult to comprehend to the extent that the learned Judge ordered the appellant to, 'disclose and provide evidence of the exact location of interment of the Deceased: if not interred on L.R. No. GithunguriKanjai3X2...' Counsel asserted that the appellant had stated not less than 15 times in her reply at the trial court that she had buried the deceased on the said land where their matrimonial home was. Moreover, when counsel took over the matter, he filed a preliminary objection where he expressly indicated the same place of burial. He submitted that in the circumstances, the learned Judge ought not to have again ordered that the appellant disclose where the deceased was buried. To counsel, the learned Judge's order directing that, '1st Respondent to disclose and provide evidence of the exact location of interment of the Deceased: if not interred on L.R. No. GithunguriKanjai3X2 then the 1st Applicant is hereby granted leave to exhume the body to enable her perform the deceased's final rights and give him a befitting re-burial on L.R. No. GithunguriKanjai3X2.' was contradictory. On reliance of the Supreme Court decision in *ASANYO & 3 OTHERS Vs. ATTORNEY GENERAL* [2018] KESC 15 (KLR), counsel urged that ambiguities in the decision of a court render it defective.
20. Learned Senior Counsel further submitted that when the learned Judge ordered the appellant to 'disclose and provide evidence of the exact location of interment of the deceased', it was not clear to whom she was supposed to give that evidence since the only legitimate forum where she could give that information was the court, where she had already given the said information. It was argued that if exhumation of the body of the deceased was allowed, it would agonize the family of the deceased. Further, it would be injurious to the safety of the public since the deceased was suspected to have succumbed to a Covid-19 related illness. By dint of the decisions in *JOAN AKOTH AJUANG & ANOTHER Vs. MICHAEL OWUOR OSODO THE CHIEF UKWALA LOCATION & 3 OTHERS*; *LAW SOCIETY OF KENYA & ANOTHER* [2020] KEHC 9788 (KLR) and *REPUBLIC Vs. MINISTRY OF HEALTH, CABINET SECRETARY MINISTRY OF HEALTH & ATTORNEY GENERAL EX-PARTE KENNEDY AMDANY LANGAT & 14 OTHERS & AMIT KWATRA & 12 OTHERS* [2018] KEHC 5221 (KLR), it was urged that the body of the deceased should not be exhumed as it would pose a great threat and risk to the health of members of the public.
21. In opposition to the appeal, Ms. Ng'ang'a commenced by submitting that the only contention that the 1st, 2nd and 3rd respondents had with the appellant, was for her to point out and confirm where the deceased was buried. If it was on the said land then no exhumation was going to take place. We inquired from counsel whether it was true, as had been asserted by the appellant's counsel, that the appellant had said on oath, many times, that the deceased was buried on the said land where their matrimonial home was. Ms. Ng'ang'a's answer was that the appellant filed an affidavit only once in which she said that the deceased was buried on the said land. Further, the 1st, 2nd and 3rd respondents challenged the photographs that the appellant provided, showing the deceased being buried because they had no way of confirming that the person being buried in the photographs was the deceased. Counsel was emphatic that the 1st respondent had the locus standi to make the application for exhumation, since



- she was able to prove that she is a wife to the deceased by producing the letter from the Chief, and her National Identity Card which bore the name of the deceased as her surname. She also produced a book showing that the traditional ceremony for paying dowry took place, in the presence of the 2nd and 3rd respondents.
22. Moreover, the 1st respondent was the next of kin of the deceased as per the medical records at Kiambu Level 5 Hospital.
 23. Ms. Ng'ang'a contended that while the 2nd and 3rd respondents are the ones who informed the appellant that the deceased had passed on and that preparations for his burial had started, the appellant proceeded to bury the deceased in a place unknown to them and without informing them. She argued that it was in the interest of justice and for purposes of closure of this matter, that the appellant is compelled to point out where she buried the deceased. Counsel urged that, the evidence of the chief's letter, the dowry book and the evidence by the 2nd and 3rd respondents to the effect that they attended the dowry ceremony on 10th January 2018, established the fact that the 1st respondent was a wife to the deceased. To buttress this assertion, Ms. Ng'ang'a relied on the decision in *KIMANI Vs. GIKANGA*, (1965) EA 735, at page 739, as cited with approval by this Court in *ELIUD MAINA MWANGI Vs. MARGARET WANJIRU GACHANGI* [2013] KECA 540 (KLR), where the Court held that customary law must be accurately and definitely established, and that this may be done by reference to a book or document of reference including a judicial decision. In conclusion, counsel urged that the appeal be dismissed with costs to the 1st, 2nd and 3rd respondents.
 24. We sought to know from Ms. Ng'ang'a the basis of the claim that the deceased's remains were not buried on the said land and, whether she had evidence that he was buried elsewhere. Counsel's reply was that the fact that the appellant was hostile towards the deceased before his death and their uncertainty about where she buried him made them apprehensive. We probed counsel whether she had asked to cross-examine the appellant concerning the averments she made in her replying affidavit to the effect that she had buried the deceased on the said land. Ms. Ng'ang'a conceded that the 1st, 2nd and 3rd respondents had not made that request.
 25. The Office of the Attorney General, the 5th respondent, filed submissions equally opposing the appeal although as aforementioned, there was no appearance by counsel during the hearing. The submissions affirm the determination made by the trial court to the extent that the 1st respondent duly proved her marriage to the deceased. It is submitted that the 1st respondent met the principles to be established in proving a customary law marriage, as set out in *HOTTENSIAH WANJIKU YAWE Vs. PUBLIC TRUSTEE* (supra). Counsel further submits that the trial court properly exercised its discretion in issuing the order for exhumation of the deceased. The decision in *HELLEN CHERONO KIMURGOR Vs. ESTHER JELAGAT KOSGEI* [2008] eKLR is cited for the argument that a court will without fear make orders for disinterment whenever the circumstances of the case make it desirable or imperative to do so. On reliance of the decisions in *KIBIRA Vs. INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 2 OTHERS* [2019] KESC 62 (KLR) and *UNITED INDIA INSURANCE CO. LTD Vs. EAST AFRICAN UNDERWRITERS (KENYA) LTD* (1985) EA 898, it is contended that the appellant failed to demonstrate how the trial court erred in the discharge of its discretionary power. Counsel argues that contrary to the appellant's assertion that the impugned orders were imprecise and irreconcilable, the said orders were clear and precise, and effectively concluded the cause of action that was before the court. In the end it is urged that the appeal is unmerited and ought to be dismissed with costs to the respondents.
 26. In a brief reply to the submissions by the respondents, Mr. Ngatia, SC referred us to paragraph 19 of the trial court's ruling where the learned Judge discounted the dowry book for having anomalies.



Concerning the dispute about where the deceased was buried, counsel contended that if the learned Judge had any questions about it, she had the powers to order a site visit to the piece of land whereupon the grave would have been pointed out. In counsel's view, although the application for exhumation was made under the guise of wanting to give the deceased a befitting burial, the real purpose of the application was to have the 1st respondent conferred with the status of a legitimate, second wife to the deceased, which the trial court did.

27. In response to the submissions made on behalf of the 5th respondent, it was asserted that the same were in conflict with provisions of the Office of the Attorney General Act, Chapter 6A of the Laws of Kenya and the *Government Proceedings Act*, Chapter 40 of the Laws of Kenya. Section 5(1)(i) of the Office of the Attorney General Act, Chapter 6A provides that;

In addition to the functions of the Attorney-General under Article 156 of *the Constitution*, the Attorney- General shall be responsible for:

representing the national Government in all civil and constitutional matters in accordance with the *Government Proceedings Act* (Cap. 40)”

Section 12(1) of the *Government Proceedings Act* states;

“Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may be.”

28. Counsel submitted that it is not within the function of the Attorney General to act for one citizen against the another. Various authorities were cited to buttress the argument that the Attorney General is mandated to only represent the national government in civil and constitutional matters. By affirming the subsistence of a customary marriage between the deceased and the 1st respondent, the 5th respondent was accused of bias. Counsel submitted that the biased and erroneous submissions made on behalf of the Attorney General, should be disregarded and a reprimand issued that the high office should not be used as a hired gun. Mr. Ngatia, SC prayed that the impugned ruling be set aside with costs to the appellants.
29. We have considered the record of this appeal and the submissions by parties and distilled the issues for consideration as; whether the 1st respondent had the locus standi to make the application for exhumation and, whether the impugned orders of the trial court were imprecise and difficult to comprehend.
30. As we consider these issues, we keep firmly in mind our mandate as a first appellate court as expressed in the oft cited case of SELLE Vs. ASSOCIATED MOTOR BOAT CO [1968] EA 123 that;

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif -v - Ali Mohamed Sholan (1955), 22 E. A. C. A. 270).”



31. On whether the 1st respondent had the locus standi to make the application for exhumation, section 146(2) of the *Public Health Act* prescribes person who can make such an application as follows;

“Such permit shall be granted only to the legal personal representative or next of kin of the person buried, or to his or their duly authorized agent.”

32. In the impugned ruling, the learned Judge made a finding that the 1st respondent was a legitimate second wife of the deceased. She made this finding based on the chief’s letter dated 28th April 2021, which indicated that the 1st respondent was married to the deceased, and the National Identification Card of the 1st respondent which displayed the name of the deceased as her surname. The consequence of that finding is that the 1st respondent fell within the ambit of section 146(2) of the *Public Health Act*.

33. The appellant contests that finding and the claim made by the 1st respondents that she falls within the purview of section 146(2) of the *Public Health Act*, by virtue of being a second wife to the deceased. It is argued that although the 1st respondent alleges that she was married to the deceased under Kikuyu Customary Law, no evidence was adduced to show that any of the customs of a Kikuyu Customary Marriage were performed, including payment of dowry.

34. On their part, the 1st, 2nd and 3rd respondents insist that the 1st respondent had the locus standi to make the application for exhumation, since she was able to prove that she is a wife to the deceased by producing the letter from the Chief and her National Identity Card which bore the name of the deceased as her surname.

35. She also produced a book showing that the traditional ceremony for paying dowry took place, in the presence of the 2nd and 3rd respondents. The 1st respondent also claimed that her name was recorded at Kiambu Level 5 Hospital as the next of kin of the deceased. Section 43 of the *Marriage Act* provides as follows;

A marriage under this Part shall be celebrated in accordance with the customs of the communities of one or both of the parties to the intended marriage.

Where the payment of dowry is required to prove a marriage under customary law, the payment of a token amount of dowry shall be sufficient to prove a customary marriage.”

36. In *ROSE WAMBUI KIARIE Vs. JANE NJERI NARUYA* (supra) the High Court, while making reference to Eugene Cotran’s work on “Restatement of African Law: The Law of Marriage and Divorce: Kenya” outlined the essentials of a Kikuyu Customary Marriage as follows;

13. ..
- i. Capacity to marry
- ii. Consent of parties
- iii. Ngurario
- iv. Ruracio
- v. Commencement of Cohabitation.”

37. Further, in *ELIUD MAINA MWANGI Vs. MARGARET WANJIRU GACHANGI* (supra) this Court expressed itself as follows;

Customary law is certainly not static. Like all other human inventions, it is dynamic and keeps evolving from generation to generation... The bottom line appears to be that the



essential steps and ceremonies must be performed, irrespective of the form in which they are performed. On the essentials of a valid kikuyu marriage, Cotran concludes that,

“No marriage is valid under Kikuyu law unless the ngurario ram is slaughtered” and that “there can be no valid marriage under Kikuyu law unless a part of the ruracio has been paid.””

38. In *HOTTENSIAH WANJIKU YAWE Vs. PUBLIC TRUSTEE* (supra), the Court established the standard of proof of a customary law marriage to be on a balance of probabilities. This standard was aptly described by this Court in *PALACE INVESTMENTS LIMITED Vs. GEOFFREY KARIUKI MWENDA & ANOTHER* [2015] KECA 616 (KLR). The Court observed;
39. In making such a determination we need to examine whether the appellant discharged its burden of proof on a balance of probability to prove ownership of the motor-vehicle. The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in *Miller – vs- Minister of Pensions* [1947] 2 ALL ER 372 discussing the burden of proof had this to say:-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.””
40. After re-evaluating the entire evidence and the impugned judgment, we find that the 1st respondent did not prove her marriage to the deceased on a balance of probabilities. We are not persuaded that the essential steps of a Kikuyu Customary Marriage were performed. The learned Judge having disregarded the dowry book for being deficient, and in the absence of any other satisfactory evidence, we find that the 1st respondent did not prove to the required standard that, dowry payment, which is a crucial element of the Kikuyu Customary Law Marriage, was carried out. Accordingly, the 1st respondent did not have the locus standi to make the application for exhumation.
41. As to whether the impugned orders are imprecise and difficult to comprehend, during the hearing we probed counsel for the respondents whether it was true, as alleged by the appellant, that she had sworn in her affidavit that she buried the deceased on the said land. Counsel admitted that indeed that was the case. She, however, hastened to add that due to the hostility that the appellant had towards the deceased, the 1st, 2nd and 3rd respondents were unsure whether truly he was buried on the said land. We inquired from counsel whether she had sought to cross-examine the appellant, to establish the veracity of her averments and her response was in the negative. In the circumstances, we concur with the appellant that the orders of the trial court are imprecise. If truly the appellant averred that she buried the deceased on the said land and produced photographs to demonstrate so, it is incomprehensible to us why the learned judge would make an order to the effect that, “1st Respondent to disclose and provide evidence of the exact location of interment of the Deceased: if not interred on L.R. No. GithunguriKanjai3X2 then the 1st Applicant is hereby granted leave to exhume the body to enable her perform the deceased’s final rights and give him a befitting re-burial on L.R. No. GithunguriKanjai3X2.” With respect, we think, this and the consequent orders, are perplexingly ambiguous, imprecise and incapable of legal execution.



- 42. As we conclude, we observe, as rightly pointed out by counsel, that the submissions filed on behalf of the Office of the Attorney General were biased in their substance. Contrary to its role of representing the national government, state counsel spiritedly argued for the 1st, 2nd and 3rd respondents. While the particular state counsel did not make an appearance in court, we castigate such outrightly improper conduct and hope that it shall never recur.
- 43. For the reasons adumbrated above, we find this appeal merited and we allow it to the extent that the ruling and orders delivered on 31st May 2024 are set aside in entirety and substituted with an order dismissing the originating summons dated 22nd October 2021.
- 44. Each party shall bear their own costs. Order accordingly.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY, 2025.

P. O. KIAGE

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**JUDGE OF APPEAL
JAMILA MOHAMMED**

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**JUDGE OF APPEAL
W. KORIR**

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

