



**Kasura (Suing as the son, next of kin and legal representative of the Late Solomon Leperes Kasura) v Kioko (Alias Magdalene Mwikali Kasura) & 2 others (Environment & Land Case E014 of 2021) [2024] KEELC 1566 (KLR) (18 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1566 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT & LAND CASE E014 OF 2021  
CG MBOGO, J  
MARCH 18, 2024**

**BETWEEN**

**NOAH PARSIMEI KASURA (SUING AS THE SON, NEXT OF KIN AND LEGAL REPRESENTATIVE OF THE LATE SOLOMON LEPERES KASURA) ..... PLAINTIFF**

**AND**

**MAGDALENE MWIKALI KIOKO (ALIAS MAGDALENE MWIKALI KASURA) ..... 1<sup>ST</sup> DEFENDANT**

**ANTHONY KIOKO MIGWI ..... 2<sup>ND</sup> DEFENDANT**

**NYAGOMCHONGA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Before this court is the Notice of Motion Application dated 3<sup>rd</sup> October, 2023 filed by the plaintiff/ applicant and it is expressed to be brought under Article 159 and Article 40 of *the Constitution* of Kenya, Sections 1A & 1B, 3, 3A & 63 (c) & (e) of the *Civil Procedure Act*, Orders 40 Rule 3 (1), Rule 4 (1), Order 51 Rule 1,3 and 13 (2) of the Civil Procedure Rules seeking the following orders: -
  1. Spent.
  2. Spent.
  3. That pending the hearing and determination of this suit, an order of injunction do issue restraining the 2<sup>nd</sup> defendant/ respondent by himself, agents and/ or servants or any other person acting through him from disposing/burying the remains of Magdalene Mwikali Kioko (deceased) on the property known as original CisMara/ Enabelibel/ Enengetia/ 77 since



subdivided into CisMara/ Enebelibel-Enengetia/ 1610-1616 and/or committing any acts which are prejudicial to the suit property.

4. That the officer Commanding Station, Narok Police Station, do supervise enforcement and compliance of the court orders and provide security.
5. That the costs of this application be borne by the 2<sup>nd</sup> defendant/respondent.
2. The application is premised on the grounds inter alia that the plaintiff/applicant after being informed of the demise of the 1<sup>st</sup> defendant indicated to the 2<sup>nd</sup> defendant/respondent and the other children of the deceased of his opposition to bury the body of the deceased on the suit property, but the 2<sup>nd</sup> defendant/ respondent and his siblings have declined and insisted that the deceased shall be buried on the suit property.
3. The application was supported by the affidavit of the plaintiff/ applicant sworn on even date. The plaintiff/ applicant deposed that on 19<sup>th</sup> February, 2021, he was issued with Letters of Administration Ad Litem for the estate of the deceased for purposes of filing and prosecuting the suit against the defendants/ respondents. Further, that during the pendency of this suit, he was reliably informed that the 1<sup>st</sup> defendant is deceased and the 2<sup>nd</sup> defendant/respondent who is her biological son, intends to bury her remains on the suit property.
4. The plaintiff/applicant deposed that the suit property belongs to the late Solomon Leperes Kasura and the deceased deceitfully, by misrepresentation and taking advantage of the late Solomon Leperes Kasura, caused the suit property to be registered in her name. Further, that the ownership of the suit property is contested and it would only be fair that it is preserved as it will cause emotional distress to exhume the remains later in the event that the estate of the late Solomon Leperes succeeds.
5. The plaintiff/applicant further deposed that the deceased 1<sup>st</sup> defendant upon achieving her fraudulent action and depriving the late Solomon Leperes Kasura of his property, she abandoned the late Solomon Kasura and remarried Richard Migwi Kangangi. In addition, the children of the deceased 1<sup>st</sup> defendant acquired names as a demonstration that their deceased mother got remarried to Richard Migwi Kangangi. He deposed that unless the issue of ownership is heard and determined, the parties herein cannot lay claim and utilize the same to the detriment of each other. Further, that they will suffer loss, expense and damage due to the act of degrading waste to the land as a result of the said burial.
6. The application was opposed by the replying affidavit of the 2<sup>nd</sup> defendant/ respondent which was sworn on 9<sup>th</sup> October, 2023. The 2<sup>nd</sup> defendant/ respondent deposed that he is shocked that the plaintiff/ applicant has come to court to stop the burial of his mother on the suit property where she has lived 70% of her life and developed the same with intent of living as evidenced in the pictures attached. Further, that sometime in the year 2015, his son passed on and was buried on the suit property apportioned to him by the deceased 1<sup>st</sup> defendant and the plaintiff/applicant nor his siblings stopped the burial and neither did he attend the said burial.
7. The 2<sup>nd</sup> defendant/respondent further deposed that it is also within the subject parcel of land that he too buried his father to the exclusion of the plaintiff/applicant and his siblings who chose not to attend and left him to shoulder all the expenses of the burial. Further, that the plaintiff/ applicant has not internalized as to what if the deceased 1<sup>st</sup> defendant is buried elsewhere and she be later buried on the suit property herein upon completion of the suit. Further, that even if he buried his mother, he would be doing so on his own account within where she lived and developed and to which is his entitlement as evidenced in the title deed.



8. The 2<sup>nd</sup> defendant/ respondent further deposed that a property becomes an estate if the same was registered in the name of the deceased and he/she died intestate, a fact which was not the case in the suit property. Further, that one does not lose parentage identity upon either party marrying or getting married hence the plaintiff/ applicant should stop castigating his family as to nomenclature since these are facts which could be articulated by their parents who are now deceased.
9. The 2<sup>nd</sup> defendant/respondent deposed that the plaintiff/applicant has remained quiet for the longest period of time only to claim the subject land more than 40 years since it was allocated to the deceased 1<sup>st</sup> defendant 26 years in the lifetime of their father and almost 20 years since the demise of their father.
10. The plaintiff/applicant filed a further affidavit sworn on 15<sup>th</sup> October, 2023. The plaintiff/applicant deposed that there is no evidence that the deceased 1<sup>st</sup> defendant had expressed any intention to be buried on the suit property and that according to Maasai customs, one of the considerations in determining the burial place of a deceased is whether the deceased had established a home on the property or the wishes of the deceased person. Further, that the 2<sup>nd</sup> defendant/ respondent confirms that the deceased 1<sup>st</sup> defendant never established a home on the suit property as the structures wherein he grew up, are currently occupied by casual labourers.
11. The plaintiff/applicant further deposed that his assertion that the deceased 1<sup>st</sup> defendant deserted his father and married Richard Migwi Kangangi has not been refuted. Further, that if there was any union by cohabitation between the late Solomon Leperes and the deceased 1<sup>st</sup> defendant, she would still not be buried on the suit property since she was remarried and effectively terminated any association with the late Solomon Kasura and his property.
12. The plaintiff/ applicant further deposed that even if the court were to hold that the suit property belongs to the late Solomon Leperes, the deceased 1<sup>st</sup> defendant would still not be entitled to a share of the suit property as there is a condition precedent which a person claiming dependency has to establish. Further, that the estate of the deceased 1<sup>st</sup> defendant wants to come to court with unclean hands and it seems that the estate of the deceased 1<sup>st</sup> defendant wants to reap where she has not planted as she is not a dependent of the deceased Solomon Kasura as defined under Section 29 (b) of the *Law of Succession Act*.
13. The plaintiff/applicant deposed that upon learning of the demise of the 1<sup>st</sup> defendant, the elders from the community visited the chief's office to raise concerns as to the burial of the deceased 1<sup>st</sup> defendant as it would ignite tension and premonition on the estate of the late Solomon Leperes. Further, that on 28<sup>th</sup> July, 2021, this court had granted interim orders pending the hearing and determination of the suit and denying him the orders in the present application will have the effect of partially determining the dispute in favour of the deceased 1<sup>st</sup> defendant.
14. The plaintiff/applicant further deposed that the annexed photographs and screenshots are inadmissible in evidence and offend the provisions of the *Evidence Act* on admissibility of electronic evidence as required under Section 65 (8) as read with Section 106 and 106B.
15. The 2<sup>nd</sup> defendant/respondent filed a further replying affidavit sworn on 23<sup>rd</sup> October, 2023. The 2<sup>nd</sup> defendant/respondent deposed that even if his father was Maasai and his mother Kamba, that does not deprive them as their own children, their entitlement, including burying their mother which he did with his father and son. Further, that the plaintiff/applicant has not provided proof of divorce between the late Solomon Leperes and the deceased 1<sup>st</sup> defendant. He deposed that the suit by the plaintiff/ applicant is a land claim from his mother as she then was, and now to be referred to as the estate since no orders were accorded in differential on title in her lifetime.



16. The 2<sup>nd</sup> defendant/ respondent further deposed that the plaintiff/applicant confirms that there are structures for casual labourers, however, the plaintiff/applicant fears to state, to whom the casual labourers are answerable to besides, the owner of the other permanent house. Further, that the plaintiff/ applicant has not informed this court why his mother left the home and was subsequently buried in her parental home and not the home of her husband, the late Solomon Leperes.
17. The 2<sup>nd</sup> defendant/respondent deposed that on 18<sup>th</sup> October, 2023, there was a meeting held where some of the elders from the Kasura family were present, himself alongside his siblings together with the plaintiff/applicant's sister and there were no skirmishes. He deposed that the issues of insecurity are just but a scare from burying their mother and if at all there will be any animosity as premeditated in the chief's letter, the same chief or the OCS of the area is obligated to accord them security. Further, that one has a right to be buried in her own land to the exclusion of others the same way one can wish to be cremated or buried in certain style.
18. The 2<sup>nd</sup> defendant/ respondent deposed that the plaintiff/ applicant is using the application to build his case having testified besides providing evidence instead of waiting for the defence to undertake its part to enable the court make a finding. Also, that it is not trite law to deny them to bury their mother in her own land or in the interest accorded to him since by doing so, it will be as if the deceased 1<sup>st</sup> defendant had no right over the subject parcel of land.
19. The plaintiff/applicant also filed a further supplementary affidavit sworn on 26<sup>th</sup> October, 2023. The plaintiff/ applicant reiterated the contents of his supporting affidavit and further affidavit and deposed that he has since established that Richard Migwi Kangangi, the husband of the deceased 1<sup>st</sup> defendant has instituted similar proceedings, in Nakuru Chief Magistrates' Civil Suit No. 579 of 2023 which proceedings confirm, that there are alternative burial sites for the deceased other than the suit property.
20. The application was canvassed by way of written submissions. On the 16<sup>th</sup> October, 2023 the plaintiff/ applicant filed his written submissions dated 15<sup>th</sup> October, 2023. The applicant/plaintiff submitted that it is well established that matters of burial are subject to the deceased's and the parties' personal law and that the personal law of Kenyans is, in the first instance, their customary laws. He submitted that as long as custom or customary law is not legally objectionable, there is nothing inherently wrong in relying on the same in order to reach a just determination. The plaintiff relied on the cases of Mrao Limited versus First American Bank of Kenya Limited & 2 Others [2003] eKLR, Virginia Edith Wambui Otieno versus Ochieng' Ougo & Another [1987] KLR 371, Dinah Odhiambo Oyier versus Hellen Achieng & 3 Others High court Civil Appeal No. 14 of 2017 [2017] eKLR, Republic versus Minister for Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others, Mombasa HCMCA No. 617 of 2003 [2006] 1 KLR (E&L) 563 and Munyu Maina versus Gathiha Maina [2013] eKLR.
21. The plaintiff/applicant further submitted that the place of burial is closely linked to the person's wishes, the duty imposed on those closely related to the deceased, and whether the deceased had established a home. Reliance was placed in the cases of M'imanene M'rutere versus Lewis Kirimi & 2 Others, Civil Appeal No. 20 of 2018 [2018] eKLR and Joyce Omondi Oleng & Another versus Sueflan Radal [2012] eKLR.
22. The plaintiff/applicant submitted that he has made out a strong case both in the plaint and in his affidavits that the deceased 1<sup>st</sup> defendant obtained the title deed by fraud and misrepresentation by masquerading as a wife to the late Solomon Kasura and that soon after achieving her desired goals, she



- deserted the late Leperes and married Richard Migwi Kangangi with whom she lived with until her demise.
23. He submitted that ownership of the suit property pending conclusion of the suit is not the same as burial on the suit property. That ownership can easily be reversed once proved but a burial has ramifications be it economic or cultural value.
  24. The plaintiff/applicant submitted that in the instant case, he cannot be compensated by way of damages in the event that he succeeds in the suit. He relied on the cases of Lawi Kigen Kiplagat versus Japheth Amenya Ratemo [2021] eKLR, Joseph Siro Mosioma versus Housing Finance Company of Kenya Limited & 3 Others [2008] eKLR and Chebii Kipkoech versus Barnabas Tuitoek Bargarioria & Another [2019] eKLR.
  25. The plaintiff/ applicant submitted that the balance of convenience tilts in his favour considering that *the Constitution* does not protect that which has been acquired unlawfully. To buttress on this submission, the plaintiff/applicant relied on the case of Paul Gitonga Wanjau versus Gathuthis Tea Factory Company Limited & 2 Others [2016] eKLR and Re Burial of Musa Magodo Keya (deceased) [2021] eKLR.
  26. On the 24<sup>th</sup> October, 2023 the 2<sup>nd</sup> defendant/ respondent filed his written submissions dated 23<sup>rd</sup> October, 2023 where he raised two issues for determination as follows: -
    - a. Whether the applicants have satisfied the requirements for the orders of injunction sought.
    - b. Who should bear the costs of the application.
  27. On the first issue, the 2<sup>nd</sup> defendant/ respondent submitted that there must be compelling reasons for not heeding the expressed wishes of the deceased on how their bodies should be interred. Further, that the application before this court is not one of the so many contemporary disputes of who has a right to bury a deceased person, but whether the deceased should be buried on the suit property. That from the pleading, it is clear that the plaintiff/applicant acknowledges that the deceased was a wife of his father and she sired children with whom he acknowledges as his half-brother and sisters. Further, that in any event the deceased will only be buried in a very negligible space which would not cause any irreparable loss.
  28. The 2<sup>nd</sup> defendant/ respondent submitted that the plaintiff/ applicant has not provided any evidence that the other family members are objected to the deceased being buried on plot no. Cis-Mara/ Enabelibel-Enenetia/1616 registered in his name and that it is clear that the wishes and intentions of the deceased was to be buried on the land. That in regard to burial disputes, the court recognizes the persons who are closest to the deceased do have the right to bury the deceased and the other consideration is that the person claiming the right to bury the deceased must be the one who has demonstrated to have been closer to him or her during his or her lifetime. The 2<sup>nd</sup> defendant/ respondent relied on the case of Samuel Onindo Wambui versus COO & Another Kisumu Civil App. No. 13 of 2011 [2015] eKLR.
  29. The 2<sup>nd</sup> defendant/ respondent further submitted that the plaintiff/applicant has not established a prima facie case for the orders sought. Also, it is not disputed that the deceased and the 2<sup>nd</sup> defendant/ respondent and his siblings, have been using the land for a long time. Further, that no customary law has been presented before this court to warrant the court to reach a decision that the deceased cannot be buried on the suit property.
  30. He further submitted that given that there are no proprietary rights in a dead body, no irreparable loss will be occasioned to the plaintiff/applicant.



31. The 2<sup>nd</sup> defendant/respondent submitted that the balance of convenience tilts towards having the deceased body buried on the suit property, due to the fact that they are in possession and that the body will stay in the mortuary for a long time waiting the final determination of the main case at their expense if the orders are given. Further, that such long stay would cause emotional stress and torture and, in any event, if the plaintiff/ applicant succeeds in the suit, the body will be exhumed and buried elsewhere.
32. On the second issue, the 2<sup>nd</sup> defendant/ respondent submitted that the application is pre-mature, ill-conceived and lacks merit and should be dismissed with costs.
33. I have carefully considered the application, replies thereof and the written submissions as well as the authorities cited by the concerned parties.
34. In my view, the issue for determination is whether an order of injunction should issue restraining the burying of the remains of the deceased 1<sup>st</sup> defendant on the suit property.
35. A perusal of the proceedings in this matter indicate that the plaintiff/applicant filed an application for injunction dated 5<sup>th</sup> July, 2021. The said application was confirmed on 28<sup>th</sup> July, 2021 and further directions were given as to compliance with the main suit. In confirming the said orders, the court granted prayer 3 which reads: -

“That pending the hearing and determination of this suit this honourable court be pleased to issue temporary injunctive orders to restrain the defendants by themselves, agents or any person acting on their behalf from transferring, dealing with, alienating, charging or in any way disposing of with parcels no. CisMara/Enabelibel-Enenetia/77 and an order directed at the District Land Registrar Narok North/South/East to forbid all dealings or further registration of any entries in the register over CisMara/ Enabelibel-Enenetia/ 1610-1616 formerly CisMara/ Enabelibel-Enenetia/77.”

36. On 4<sup>th</sup> October, 2023 while the matter was still pending further hearing of the plaintiff/applicant’s case, it was confirmed to this court that the 1<sup>st</sup> defendant died on 26<sup>th</sup> September, 2023.
37. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in *Giella versus Cassman Brown & Co. Ltd* [1973] EA 358. In *Nguruman Limited versus Jan Bonde Nielsen & 2 Others* [2014] eKLR the court restated the law as follows: -

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

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. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court 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 is 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 existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted."

38. The Court of Appeal in the same case of Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR further opined that:

"...these are the three pillars on which rest 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 court 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."

39. The plaintiff/applicant contended that the ownership of the suit property is a contested subject and it is only fair that it is preserved as it will cause emotional distress to exhume the remains later in the event that he succeeds. He contended that the 2<sup>nd</sup> defendant/respondent intends to bury the deceased without his consent which acts constitutes an act of malice, disturbance and a threat to peace, law and order.

40. Whereas ownership of the suit property is highly contested, this court is also called to remembrance that the acts of misrepresentation with the intent to defraud the late Solomon Leperes have not been proved. The plaintiff/applicant largely dwelt on issues i.e. fraud and misrepresentation which in my view would best be canvassed during trial which is still ongoing, save for period in which the parties await the substitution of the deceased 1<sup>st</sup> defendant.

41. The plaintiff/applicant further contended that the estate of Solomon Kasura will suffer loss, expense and damage due to the act of degrading waste as a result of burial. On this issue, the plaintiff/applicant has not demonstrated the loss and expense suffered. In any case, the 2<sup>nd</sup> defendant/ respondent has buried on the suit property apportioned to him by the 1<sup>st</sup> defendant, his son and the late Solomon Leperes, who is also the plaintiff/applicant's father, and the plaintiff/applicant's siblings never stopped the said burial. Also, the 2<sup>nd</sup> defendant/ respondent seems to have alluded to a condition that if the plaintiff/applicant succeeds in the suit, the body can be exhumed and buried elsewhere. The emotional distress will then only be suffered by the 2<sup>nd</sup> defendant/respondent and not the plaintiff/applicant.

42. Having made the following observations, it is my finding that the plaintiff/ applicant has not established a prima facie case to warrant the orders sought.



43. Arising from the above, the Notice of Motion Application dated 3<sup>rd</sup> October, 2023 is hereby dismissed.  
Costs to be in the cause. Orders accordingly.

**DATED, SIGNED & DELIVERED VIA EMAIL THIS 18<sup>TH</sup> DAY OF MARCH, 2024.**

**HON. MBOGO C.G.**

**JUDGE**

**18/03/2024**

**In the presence of: -**

Mr. Meyoki Pere – C.A

