



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1790 OF 1998

JOSINDA KATUMBA KAMAU PLAINTIFF

VERSUS

ANNAH NGENDO DEFENDANT

JUDGMENT

A tragic bomb blast occurred at the American Embassy on the morning of the 7th of August 1998. Vincent Kamau Nyoike was an employee of the American Embassy who tragically died in the said bomb blast. His body was not traced until two days later at the city mortuary by his son.

Arrangements for his burial was made by his clan members for the 18th of August 1998. A day before the burial, 17th of August, 1998, Josinda Katumba Kamau filed this suit before the High Court of Kenya at Nairobi by way of an injunction to restrain Annah Ngendo from burying the body of the deceased.

She described herself and the defendant respondents as windows to the deceased. Her prayers according to the plaint was that:-

“The defendant be restrained by way of injunction from burying the body of the deceased pending determination as to whether the plaintiff and her children are entitled under the Estate of the deceased, and or in the alternative the defendant be restrained by way of an injunction from receiving and or claiming compensation, benefits and entitlements from the former employer of the deceased or under any existing life policy.”

The plaintiff came to court ex parte. She got her orders on 17.8.98 granting her an injunction whereby the defendant was restrained from burying the deceased. The parties thereafter attended court before Hon. Justice Mbogholi-Msagha (who had given the Original Orders), Hon. Justice Aganyanya, Hon. Justice Waweru and Hon. Lady Justice Aluoch. This was with a view of giving the parties an opportunity to come to an amicable settlement. The parties failed to come into any agreement (August was a court vacation period).

The plaintiff was given leave to amend her plaint, which amendment she then added the following prayer to the one above.

“A declaration that the remains of the deceased be buried at his home at Machakos where his favourite matrimonial home was up to and including the time of his death.”

This suit was referred to me on the 23rd of September 1998 for hearing inter parties. When the parties came before me they intimated through their advocates that they would wish that the main suit be heard. By now the Amended defence had been filed whereby the defendant had counter-claimed and prayed that

the deceased be buried at his matrimonial home on his clans land Plot No.411 Uthiru/Ruthimitu.

I therefore recorded the following consent.

“By consent, 17.8.98 application be and is hereby withdrawn. Costs in the cause. The main suit do proceed for full hearing once issues are agreed upon.”

The agreed issues were agreed upon as follows:-

“Where the remains of the deceased Vincent Kamau should be buried? Who should bear the costs of this suit?”

I gave time for the parties to comply with summons for directions and pre-trial issues. As it was envisaged that this case would take a considerable time to hear, the plaintiffs advocate requested that the body be transferred to Chiromo University Mortuary from Lee Mortuary in order to save on costs at the latter mortuary. The defendants had no objections to this. (The orders of Hon. Justice Aganyanya had been that the costs of the mortuary storage fee should be shared equally amongst the parties.)

The case was set down for hearing on the 26.10.98. As far as possible this case has been set down on a day to day basis for hearing.

The plaintiff, through her advocate, stated that she was going to prove that she was the lawful wife and consequently, the lawful widow. That the deceased was resident in Machakos where he bought land and built a permanent house. He had properties in Machakos. She thus prayed that as a result of this she should be allowed to bury the deceased.

She called six witnesses.

The defendant on the other hand stated through her advocate that they would be relying on the Kikuyu Customary Law. That the defendant is the one who is entitled to bury.

She too called six witnesses including herself.

The plaintiff did not pursue her first prayer of the plaint nor touched on it. She concentrated on the second prayer on burial rights. It is therefore my task to decide as per the agreed issues whether the deceased is to be buried in Machakos or in Dagoretti. Failure to reach a decision, should there be a neutral ground recommended and or ordered for burial?

In order to establish this I require to go into the details and facts of the case as given by both parties in evidence.

This will touch upon the life of the deceased before marriage, marriage, children, family activities, land, illness in 1984, Burial and the law.

i). Life before Marriage The deceased was born in 1949. He had three brothers:-

1. Wallace Njoroge

2. John Nyoro

3. Simon Kanyari

And four sisters:

4. Esther Nduta

5. Caren Wambui

6. Hannah Njeri

7. Gathoni.

Both his parents are deceased. His mother died in 1992 and his father in 1972.

Apart from Wallace Njoroge who is the first born in the family none of brothers or sister came to give evidence in court although their names were often mentioned.

Wallace Njoroge gave evidence as the plaintiffs witness No.2 (PW2). He informed the court that he began to work earlier than the other siblings. He assisted his father by educating the deceased. It was he who took him to school.

Indeed this was confirmed by DW1 - the defendant in this case. The deceased had gone to the same school as she did, Riruta Primary School then St. Paul Primary School. He later proceeded to Aquinas School.

After he finished his studies he worked with the National Assembly, Kenya Film Co-operation (1970 - 1975); he was without a job for 3 years before PW2 got him employment with the American Embassy in 1978 where he worked until his untimely death.

ii) Marriage

The Plaintiff stated that she was working as a waiter in Eastleigh at a bar called Kinagop. (but in the restaurant section) when she met the deceased in 1979. She was residing in a small room in Eastleigh. The deceased made her move to a larger room. They began to cohabit and in 1980 they began to live as man and wife. She was not aware that the deceased was married until 1984, when she had gone to meet him in hospital and was attacked by his wife.

In 1984 the deceased established a home for her in Machakos.

In 1993, PW2 - the deceased brother Njoroge came with his second wife, two daughters, some of the deceased brothers and the deceased to her mothers home where he came to pay dowry. They were there for almost three days celebrating.

PW5, the plaintiff uncle confirmed this. He stated that the plaintiffs father had died. He now acted as his father whenever it was required. He was thus present during the dowry ceremony.

PW2 narrated how he took a bull and ram. He carried local brew and crates of beer. He also paid Kshs.10,000/= according to Kikuyu customary law.

The defendants witness DW2 - the secretary-general of the deceased's clan and DW6 - the son of the deceased stated that although there is nothing wrong with a polygamous marriage and the paying of a dowry, this must be done with the knowledge of the clan. The clan was not aware of the said ceremony and that the whole matter was kept in secret.

PW2, on the other hand insisted that he was now acting as the father of the home and as such had a right to take the dowry.

He stated in his evidence that the defendant had no dowry paid for her otherwise he would have been there. The defendant stated that she met the deceased in school when he was in standard three and she was in standard two whilst at the Riruta Primary School. She went on to study child care.

In 1964 the two met again at Alliance High School at a choir festival. Their friendship rekindled. In

1966 they got married.

This was done when she had joined Dagorretti children's Home where she still works to date. The deceased father informed her mother that he was coming to take her. She was collected by him and clan members. She was taken to the deceased home and given a room. She cohabited with the deceased. According to Kikuyu customary law she was given a cooking pot (sufuria) a table, two chairs. The deceased was shown where to build whilst she was shown where to cultivate on the land.

The deceased built her a permanent house

. The defendant called DW4 an expert in Kikuyu customary law who narrated how a girl who gets married, a ceremony is thereafter held. A home is established

. iii) Children :

The Plaintiff stated that she had five children with the deceased.

a) Christine Mwikali Kamau born in 1977.

b) Caroline wanjiru kamau born 1984

c) Faith Wanza Kamau born in 1979

d) Duncan Nyoike born in 1987

e) Nduta Kamau born in 1991.

She stated that the deceased provided all their needs. This included school fees and health care. In fact she produced to court identity cards given to her for purposes of claiming medical insurance duly issued by the American Embassy and reflecting the same being issued for and on the deceased name.

She had one for her three younger children and herself. The reasons she gave that the others were left out was they were above 18 years and did not qualify for the medical scheme.

She stated that the deceased loved them very much. He had provided for their basic needs and insisted that she stops employment and concentrate on the children.

He would take them for a family outings and produced photographs (Exh D) to this effect showing what a wonderful life they had as a family. Her advocate tried to show that the defendant was unable to produce similar photographs of herself and the deceased in a happy carefree family life. The photograph she produced were of official family gatherings and functions.

In cross examination the plaintiff admitted that in 1979 she had already had two children out of wedlock. She confirmed to this court that Faith Wanza Kamau aged 7 years old in 1979 and Christian Mwikali Kamau aged 10 years old in 1979 were not the children of the deceased. She insisted that when the deceased choose to marry her, that he said he would accept the two children as his own. She therefore had the two children register their ID card in the deceased name.

The defendant on the other hand stated in evidence that she had five children.

a) Stanley Kamau Nyoike born 1966

b) Susan Ngugi born in 1968

c) Mercy Wangari born in 1970

d) Jennifer Njeri born in 1972

e) Anthony Njoroge born in 1979

She informed the court that she brought her children up well and educated them. This was with the participation of the deceased.

iv) Family Activities

The plaintiff, as stated earlier gave evidence and said that they would often go out as a family on outings. She produced pictures of family seen at a local Hotel enjoying a days outing.

She said her relationship with the deceased was very very good. She got the impression that his first wife was a quarrelsome woman and therefore sort peace by staying with her (plaintiff).

The defendant on the other hand said that the deceased participated in the family life well. She noticed a change in 1985 whereby the deceased began to do night shifts . Even though he would often be collected and dropped home by his employers vehicle.

The family often had important gatherings and occasions to attend. The deceased had been faithful in attending the functions. These included a picture in 1993, July 10th where the deceased attended a function at his married daughters home, 8th June 1996 at the home of his daughters in law (son- Nyoike), 9th June 1997 at the home of a second daughter in law (son- Ngugi). On May 1997 his daughters in laws home and on 5th July 1998 with clan members.

(v) Accident/illness

The deceased has always been a healthful man. Sometime in 1984 he had an accident on a motor bike. He broke his leg and was admitted to hospital. This incident is significant to both parties. To the plaintiff as she said it was then that she first knew and met the defendant. So the defendant, as she denied the allegations.

The plaintiff stated that when she had heard of the accident, she went to see the deceased then in hospital. The defendant attacked her and beat her with a bottle. When asked the deceased would hear nothing of it. He warned her to be quite and not mention the incident. She obeyed.

The plaintiff further said when he was discharged from hospital she took him home to Eastleigh . He had a walking stick which he left at the office.

The defendant denied the allegations that she beat up the plaintiff. She in fact does not remember at all seeing the plaintiff at the hospital. There were many people and the deceased in fact was introducing her to his workmates and friends who came to see him.

She produced Ext D21 crutches that she had kept since the accident. The deceased had been discharged and had come home to Dagorretti where he recuperated. DW6 his son said that he had planned to join the polytechnic but delayed to do so while he looked after his father. He identified the crutches he used. He was with him when the plasters were changed.

It was therefore not true that the plaintiff took the deceased to Eastleigh.

vi) Land and Properties

The Plaintiff stated that the deceased had established a matrimonial home with her. That he bought 1/2 an acre land where he built a permanent stone house.

She thus prays that the deceased be buried at Machakos where the children, who miss him, would see

his grave.

In Machakos, apart from the land their house is on, there was no other property the deceased owned. He had, nonetheless friends.

PW6, was called and gave evidence to the effect that he had sold the piece of land in Machakos to the deceased for kshs.20,000/=. The sale price being kshs.17,000/= and the transfer fee kshs.3,000/=. He had bought this land from him in 1986 and paid the purchase price in instalment and in full. He nonetheless was unable to produce any written sale agreement. There was a balance of Kshs.3,000/= that the deceased did not pay or utilise to effect transfer. He admitted that since 1986 the Matrimonial home of the plaintiff has been under his name. He has since registered that portion of land - namely on 24.10.90 in his name but did not even at that time transferred it to the deceased.

The plaintiff spoke of land at Kasarani but seems to know little details of it. She recalls having been taken there by the deceased to wait for him one day.

She also recalls and know that there is land at Dagorretti that belongs to the deceased's father.

The advocate for the plaintiff challenged the defendants DW2 and DW6 that the land the defendants are on does not belong to the defendant but his father. The defendants and the witness did not deny this. They stated that the deceased father had divided the land amongst the sons. Since he died, the elder son Wallace Njoroge (PW2) has not gone for the letters of Administration to have the land sub-divided and title given to each brother. It seems that he has a problem with another brother and is thus dragging his feet. They admitted that the land is ancestral and PW1 is the rightful heir to her husbands estate.

-(vii) Burial

When the plaintiff first filed suit she did not claim the right of burials but property. It was only later as the case progressed that she claimed the right to bury at Machakos.

According to her evidence, the deceased was settled and his home was in Machakos. He would often comment to her that he would like to be buried in their little piece of land.

He would say this to her jockingly. She therefore did not see the reasons why she could not bring him there. She was under the impression that the deceased had cut ties with his family at Dagoretti and would only go there for occasions such as burials.

She had never been introduced to the family at Dagoretti although PW2 and his brother came to Machakos and saw her. The deceased had refused her to attend his mothers burial. She was prepared and had gone to Nairobi with group from Machakos. She was taken to Kasarani where she was told to stay. She returned home without going to the funeral. Although she was heard stating:-

“Is this the way I shall live?”

He said, “to leave him alone and not to ask questions.” ”

When the bomb blast occurred she went to look for him. She received information of his death and notified her people on 9.8.98. She was not able to see his body until the time this court ordered that it be removed from Lee Mortuary to the Chiromo University Mortuary. The deceased belonged to two association in Machakos that dealt with the welfare of the bereaved. She too was a member. The way the association works according to PW3 and 4 who are secretary respectively of the organisation is that the member who joins does so with a small fee. On every death that occurs of a member - all the members must attend and pay their condolences. They would record in a book of their attendance and pay up to 10/= as donations. The women would pay 5/-. They would bring fire wood, food and other assistance during the gatherings. If the death occurred in Nairobi - the amount paid would be Shs.20/- and 10/- respectively. The committee would take charge of the collection. They would provide for the coffin,

transportation and any other services. The family of the deceased would name the clergy who would officiate at the funeral and would notify the committee of a burial date.

The deceased was faithful at paying his donation and attending such function. Often he gave his car for such service where it was needed.

When the death of the deceased was known, a committee sat at his house in Machakos and another at his home in Eastleigh. They were collecting and were waiting for the date of the burial from the family to be announced to them.

On the 12.8.98, the plaintiff sent PW5 who was accompanied by PW3 to Dagorretti to enquire as to the funeral arrangement. According to PW5 they expected that a committee from Machakos and from Dagorretti to sit together and then deliberate on the burial. I believe at this stage all they wanted was participation in the burial. When they met there to seek out Njoroge as the only person they knew, they did not find the plaintiff whom they expected to meet with them there. Njoroge on the other hand met them and told them that they would come to Eastleigh on the 22.8.98.

They waited and Njoroge did not come. They noticed an Advertisement in the press that the burial would be on the 18.8.98. The Machakos Committee stopped their collection. They were surprised that the announcement came out without the plaintiff being mentioned nor her children.

Njoroge came to tell the plaintiff that he was not able to convince the Dagorretti Committee to include her in their plans.

He then informed the court that when on the 9.8.98 he found the body with the deceased's son - all of them went back to Dagorretti.

They went to the deceased house. The defendant became very hostile. He therefore did not participate in the funeral arrangements at all.

On the 18.8.98 he (PW2) was served with a court order, that he later noticed was for the defendant. He took it to the defendant. The orders was to stop the burial which was duly stopped.

PW2 was not happy with the burial arrangements because the advertisements left out his parents. He was not consulted at all and the Dagoretti committee failed totally to take into consideration the plaintiff in the burial arrangements.

For instance, the defendants wants to bury the deceased across the road. The land at Dagoretti - owned by his father has a road that cuts across the said land. The road is a boundary for the Nairobi City and the rural area. Although the land across the road belongs to family it is within Nairobi area where the Nairobi by - laws does not permit burial.

PW2 stated that his parents are buried in the rural side of the housestead near his house. He said he was never consulted on the burial site.

When asked where he wished to have the deceased buried he stated that:-

“the body be buried where all would attend [the] funeral. Both sides should be there without fear...”

The plaintiff desired the body to be buried at Machakos. If it was not possible, at a neutral place such as the Langata Cemetery.

The defendants case has always been together with her witnesses that the plaintiff is unknown to her. She became known to them when the court order was served stopping the burial and was physically seen first at the court during the various mentions.

The defendant narrated how that very morning of the fateful 7th of August, 1998 the deceased had left with their daughter Njeri in his vehicle to go to see the doctor. She had gone to work. On hearing the news of the bomb blast she returned home. She found her daughter who informed her that she had parted with her father at 10.00 a.m. from there starting in the evening and following day the quest of the family was to find the deceased.

It was DW6 and his brother in law who found him lying in the city mortuary. They notified the American Embassy personnel who transferred the body to a warehouse in Industrial area. Thereafter the family began to sit and meet with the clan.

A committee was meeting in the evening everyday. DW2 the secretary General of the clan participated and was active together with DW5 and DW3. As the elders were unable to attend all the committee funeral meeting during the evenings PW2 Wallace Njoroge was chosen to be the co-ordinator. His task was to inform the elders the progress of the funeral and which direction the committee should take. The elders who met in the day time would give their advice.

PW2's wife was chosen as treasurer. The defendant in this case was not involved in the committee meetings. This is because she was required often and was basically in mourning. The defendant admitted she was given a bit of money for expenses and would cook food and tea for the young people and visitors respectively. She would not participate in the meeting unless called. For instance in preparing the eulogy, she gave information as to this to PW2's brother and PW2.

The defendant admitted that her relationship with PW2 had never been smooth. He used to come to her house drunk and misbehaved. One day he had his wife taken from Kikuyu where she worked at a hospital and arrested. She was taken to Kasarani police. When the defendant went to enquire PW2 abused her until the police released the wife from custody after seeing his conduct.

As soon as the mother died in 1992, the PW2 rarely came home to Dagoretti. He was hardly in touch with the family.

When the bomb blast occurred he was active in the committee as co-ordinator. It was he who was assigned the task of putting on up a tent as shelter for visitors. He borrowed a vehicle from his employer to assist in the funeral. He was given the task together with DW6, the son to the deceased, and another son to deal with the announcements. This they did and as DW6 was writing the wordings for the radio announcements, which he used for the newspapers. Announcement, he did so while he consulted PW2 and his brother. It thus means that the documentation went in with the full knowledge of PW2. Further the same announcement was read to the committee, the same evening and with their approval.

It was PW2 who then took DW6 to Eastleigh. He did not know about a resident in Eastleigh. PW2 first said that some of the clothes of the deceased were kept there. He never mention another woman in the deceased's life.

They went to Eastleigh and found the room locked.

DW6 decided to go back on another day as he was looking for a particular suit he had bought the deceased in his trip abroad. He found a lady who said the clothes are in the laundry but will let him know. He returned but did not find the lady. He instead found the suit and took it. He had been informed that the lady was removing things from the room. He wished to make more enquiry of the lady after the funeral.

DW6 stated that PW2 was in full participation of the burial arrangements.

DW2 stated that the whole problem with this case lies with PW2. He termed him as an irresponsible person. The reasons being that PW2 knew of the relationship between the plaintiff and the deceased. He went and paid dowry but did not notify him as one of the head of the clan. He normally would know what would occur to all the clan members. Instead PW2 was very secretive.

PW2 also knew of the court injunction and kept quiet. If the clan knew they would have averted coming to court and sorted the whole situation.

On the issue of the Elders from Machakos, the committee noted as the elders came in. They came in as visitors and PW2 quickly went to talk to them. He took them inside another brother's house. The Dagoretti elders called PW2 and asked what the visitors wanted. PW2 said, he will tell them but that they should be left alone to be served tea first.

When they the elders came they said they agreed to meet a lady in town. When they missed her they came to Dagoretti thinking they would find her at Dagoretti. As she was not there, they said they would return the next day.

The elders never returned.

At no time were they told of the plaintiff and of her relationship to the elders.

PW2 was thus responsible for the misunderstanding before the court. He himself admitted that people are not happy with him. He did participate in the committee. As to the burial site, PW2 objected strongly that the deceased should be buried next to his parents. The reasons being that the parents are buried on PW2's portion of land. His son is also buried there. He did not want the deceased to be buried there too and as such he approached DW2 with this objection.

The defendant then suggested the deceased be buried behind her house. The clan objected to this as according to Kikuyu customary law an elderly man is always buried in front of his house because there was no space in front of the deceased house due to the road cutting through the land, the clan agreed to bury the deceased across the road on the Nairobi side area.

PW2 participated in this decision.

It thus meant that PW2 gave the impression to the plaintiff that the Dagoretti Clan refused to co-operate and involve her in the funeral while he kept quiet about PW1 existence.

The defendant and the witnesses who gave evidence were thus unaware of the plaintiff's existence. The deceased most certainly lived a secret life with the plaintiff that he left no trace for either family to know that he had a relationship in Machakos.

PW2 knew of this and seems to encourage the secretive situation. This is more so when their mother died in 1992.

viii) The Law

What then shall we say the deceased is? Does he profess to be a Kikuyu man or a Mkamba man in order to determine his place of burial?

Under the Judicature Act (Cap 8) Section 3(1)(2) states:-

“Section 3(1) the jurisdiction of the High Court, the court of appeal and of all subordinate courts shall be exercised in conformity with –

- a) the constitution***
- b) -----***
- c) -----***

but the common law, doctrines of equity and statutes of general application shall apply so far

only as the circumstances of Kenya its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

(2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties in 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.”

The defendants rely on the Kikuyu customary law. They called DW4, a Kikuyu expert on customary law. He is not related to any of the parties. He was born in 1910.

He stated that when a girl gets married there is a ceremony that would be done at their new home. After the parents to the couple have agreed to the marriage and the boy takes his bride the ceremony of “Goima” is then performed. This is when the boy takes his bride home. He then is given land to build and he thus become part and a member of the clan. The wife becomes a clan member through marriage. The wife is also given land. Not only is a place to built given but the place where she is to farm is given.

In the new house a goat is slaughtered as a sacrifice to cleanse that homestead. Everyone eats the goat, after the celebrations are over the married woman (wife) of that new home would clean the house and remove the left overs of the feast. The wife of that new home would then go out the front door with the rubbish/dirt and go out directly to the front gate. There she will throw her rubbish called Kiara (the container of food is called Ikunia).

(If any of the children born of the couple dies a different door is to be followed and the child would be thrown in the forest to be eaten by hyaenas). Where one dies and has no wife or dies whilst ill and also is not married they will be taken out to the forest.

An old man if he dies would have his ornaments removed. He would be wrapped in the hide of a bull that had been slaughtered. It is the eldest son who plays an important role in holding the head of the deceased as it is carried to the gave. He is assisted by his close age mates or brothers. There would be a grave dug exactly where the wife had thrown the rubbish during the celebration and ceremony of Goima. That area is called Kiara. The deceased would be buried facing his house. It is thus significant for the wife to have cleaned the house, gone out the front door, walked to the gate and thrown the rubbish cleared from the house after the ceremony. The rubbish is thrown outside the gate which would be the burying place of the husband.

During the funeral the task of the wives, where the home is polygamous, is to cook. They will not be concerned with the burial arrangements.

The deceased would be buried at the first wives’ home. This is because the first wife released the man (husband) from his viginity to become a man (Thatima). Once this has been done, the home becomes that of the 1st wife.

Thus if a husband wants another wife, he must notify the first wife. If he doesn’t it is matter that is sorted out in that home.

If a husband has an affair with other women, he must always return to the first wife at night. If he dies it is the first wives homestead that he is brought back to. If the husband wished to move his home he must move with the first wife to establish another home. If he doesn’t , whatever home that is established is not so established and he must be returned to the first wife.

The advocate for the plaintiff asked this witness what was the effect of burying someone across a road from his homestead? The answer was that “In those days there were no roads.”

The defence implied through this witness that burial should take place at the first wife’s homestead.

The advocate for the defendant relied on the authority of:

- Virginia Edith Wambui Otieno

v

Joash Ochieng Ougo & Another

CA 31 of 1987 at Nairobi.

Where the appellant, a kikuyu by tribe wished to bury her husband, a Luo by tribe in a piece of land in the Nairobi area of “upper Matasia or Langata” It was held that the test for customary law is as follows on that case:-

“1. the deceased was born and bred a Luo and as such under Luo customary law his wife on marriage became part and parcel of her husband’s house -hold as well as a member of her husbands clan. Their children are also Luo as well as members of their deceased father’s clan.

2. On the death of a married Luo man the customs are that the clan takes charge of his burial as far as taking into account the wishes of the deceased and his family.

3. -----

4. Under the Luo custom to which as we have said she is bound she has no right to bury her husband and she does not become the head of the family upon the death of her husband.

5. As with other African communities a man cannot change his tribal origin

. 6. -----”

The defendant relies on these same principles stating that the clan took over the burial arrangements. She played little part in it. that she did not choose the burial site but that the clan did. It is the clan who ought to be sued and not her. They (the clan) are currently not party to this suit.

The plaintiff relied on the case of V.E. Wambui Otieno case above and stated that it has no direct reference to the present case.

The clan was involved in that case. The clan in this case is not a party. That case had no relevance. Instead he relied on the case of:-

Mary Nduta & Others

v

Taddeo Mwaura & Others

HCCC 3213/81

Whereby the clan wished to have the deceased buried on his father land next to the father. The widow wished that the deceased to be buried on his own piece of land of 23 acres. The clan stated as there is no house the burial cannot take place there. The widow suggested another alternative piece of land.

The court held that the deceased be buried on his own land where he had no house. He relied on the evidence of Bishop Gatimu who stated

“Due to the Land Registered people prefer to be buried in their own land than

anywhere else.”

The deceased should be buried in the land that he bought. He should not be buried in Dagoretti as no irreparable loss would be occasioned. At Machakos, he would be buried with “dignity, respect and love.” - he added and “peace”.

DW6 stated that he would stand to suffer psychological if the burial takes places in Machakos.

I wish to distinguish the two authorities quoted before me. The V.E. Wambui Otieno case was decided in 1987 by the court of appeal at Nairobi by J.O. Nyarangi, H.G. Platt and J.M. Gachuhi (as they then were).

The Mburu case was decided in 1981 by J.M. Gachuhi as he then was sitting as a High court Judge.

The 1987 case has therefore precedent. Is that case relevant as stated by the advocate for the plaintiff?

It is important to recognise that in the Otieno case customary law is what is used as a guide in deciding that case. The principle outlined above can also be adopted here, namely that the wife becomes part of the husbands clan. A man cannot change his tribal origin.

If we apply these principles to this case we find that the deceased was born and bred a Kikuyu by tribe. His wife by marriage according to DW4 becomes part of the clan member. It thus means that the deceased clan is known and were in control of his affairs as far as burial is concerned.

Did the deceased in entering his relationship change his African tribal origin and become a Mkamba?

PW5, the uncle to the plaintiff stated that when she got married to the deceased he described his relationship as follows:-

“I am the one who stands for Josinda family if anything occurs it is not a must (I) be informed. They are Kikuyus and are therefore Kikuyu. As to where Josinda is born I am informed.”

This old man was quite clear in his mind that, the customary law applicable as far as the plaintiff was concerned was Kikuyu.

The plaintiff was asked whether she knew the Kamba customary law as pertaining burial. She said she did not.

I have weighed the evidence before me together with the law and I would declare that the deceased is a Kikuyu man whose life and death is governed by Kikuyu customary law.

Where then should the deceased be buried? Both land at Dagoretti and at Machakos are not in his name.

If we follow the Kikuyu customary law, the Dagoretti Home is the ancestral home. It is where the appellants established his home. It is where PW2 his brother went after leaving the mortuary together with other relatives. They did not go to Machakos but to Dagoretti.

The Land at Dagoretti belonged to the deceased father. He has a right to it as a beneficiary.

The land and house at Machakos was built but no formal move to Machakos was made under the Kikuyu customary law.

I believe the plaintiff and her side of the family together with the associations dealing with burials from Machakos knew all along the burial would be at Dagoretti. What they objected to is of their non

involvement in the burial arrangements and the role they wished to play. This had put fears and misgiving in the plaintiff who at first claimed the deceased property (indeed she has already taken his motor vehicle).

From the evidence before the court on both facts and law I find that the deceased Vincent Kamau Nyoike is a clan member of Mburiya- Mbui.

I hereby declare that his remains be buried at his matrimonial home of his clan on plot No.411/Uthiru/Ruthimitu.

I dismiss the plaintiffs case and enter judgement for the defendant on their counter-claim as declared above.

I award costs of this suit to the defendants including the full expenses of keeping the deceased body in the mortuary.

Dated this 2nd day of December, 1998 at Nairobi.

M.A. ANG'AWA

JUDGE