



SCM & another v Attorney General & 2 others (Miscellaneous Criminal Application E033 of 2022) [2023] KEHC 18176 (KLR) (28 February 2023) (Ruling)

Neutral citation: [2023] KEHC 18176 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
MISCELLANEOUS CRIMINAL APPLICATION E033 OF 2022**

J WAKIAGA, J

FEBRUARY 28, 2023

BETWEEN

SCM 1ST APPLICANT

SMM 2ND APPLICANT

AND

LNM 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

RULING

1. By a Notice of motion dated September 29, 2022 brought under sections 146 of the *Public Health Act* cap 242, section 378(2) of the *Criminal Procedure Act* and article 159(2) of *the Constitution*, the applicants moved the court for order that the remains of one PMM (deceased) be exhumed from Land Parcel Number LOC.x/Mariira/xxxx and a postmortem be conducted to ascertain the cause of his death. The prayed that the OCPD and OCS Githumu Police Station do provide security during the exhumation.
2. The said Application was supported by the affidavit of SCM in which he deposed that the deceased was his brother and had been mentally ill suffering from neuropsychiatric condition for which he was under treatment as at the time of his death, which condition made him unable to make any viable life decisions.
3. The family had to intervene from time to time in his wellbeing and decision making, based on the fact that those living around him would from time to time confuse him and lead him to take loans, using his tea farm as collateral, with the 2nd Respondent being one of those who took advantage and moved into his house and efforts to kick her out had not materialized at the time of his death.



4. That on the 11th day of September 2022 at about 2.08 am he received distress call from the Village Elder that the deceased had passed on mysteriously and when he got to the scene, he found the body covered in a clean bed sheet and lying in a clean bed which the 2nd respondent claimed, he had been sleeping in prior to his death, yet the body was very dirty.
5. From the neighbors he heard that they heard a bang minutes before the 2nd respondent raised an alarm indicating that the deceased was no more and stated that he had been complaining of severe headaches, which led to his death and thereafter commenced funeral plans portraying herself as the wife of the deceased without involving other family members.
6. That they insisted on a postmortem being conducted to ascertain the cause of death but the 2nd respondent insisted that he was suffering from severe headaches for weeks leading to his death and that when he learnt that she intended to bury him on 16th, he communicated to the relevant authorities to allow the family conduct postmortem and to participate in the burial, only to learn that the 2nd respondent had hastened the process and buried him at 10.00 am which raised suspicion, hence this Application, to enable them conduct postmortem to ascertain the cause of death.
7. The Application was supported by another affidavit sworn by SMM, wherein he deposed that he had all the reasons to believe that the deceased was murdered and that the 2nd respondent had a role to play going by the manner she rushed to inter his remains.
8. In response to the Application the 2nd respondent swore a replying affidavit in which she deposed that she was the widow of the deceased whose cause of death was ascertained to be Pneumonia as per the death certificate issued by the hospital.
9. She stated that this court did not have pecuniary jurisdiction as the cause of action arose at Ikumbi and therefore the matter should have been filed at Kigumo. It was contended that the applicants had no locus standi to bring the Application and that she had been wrongly sued, not being the legal representative of the deceased estate.
10. She stated that the fact of the matter was that the applicants who are her brothers in law want her out of the home, and that the 1st Applicant had taken and retained the Title Deeds belonging to the deceased which he wishes to take over having declared that they don't recognize as the wife of the deceased who they intend to get out of the land together with her children.
11. It was deposed that in the year 2004, the applicants had been arrested and charged at Kigumo for the offence of malicious damage to property after destroying her house and that the application herein is aimed at evicting her from her only known property.
12. From the affidavits herein, I have identified the following issues for determination:
 - a) Whether this court has jurisdiction to hear and determine the matter?
 - b) Whether the Applicants have locus stand to bring the action?
 - c) Whether the 2nd Respondent is properly sued?
13. Jurisdiction has been stated to be everything and where the court has no jurisdiction, the same is required to down its tools and proceed no further. This was the position taken by the Supreme Court in the case of *in the matter of Interim Independent Electoral Commission* [2011] eKLR to the effect that jurisdiction flows from the law and the recipient Court is to apply the same with any limitations embodied therein and may not arrogate to itself jurisdiction through the craft of interpretation.



14. Exhumation of bodies is provided for under section 146 of the Public Health Act which states as follows;

“ 146. Permit to exhume (1) Subject to the provisions of section 147, it shall not be lawful to exhume any body or the remains of any body which may have been interred in any authorized cemetery or in any other cemetery, burial ground or other place without a permit granted in manner hereinafter provided. (2) 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. (3) Such permit may be granted by the Minister in respect of any body or the remains of any body interred in any cemetery or burial ground or any other place. (4) The permitting authority may prescribe such precautions as he may deem fit as the condition of the grant of such permit, and any person who exhumes any body or the remains of any body contrary to this Act, or who neglects to observe the precautions prescribed as the condition of the permit, shall be guilty of an offence and liable to a fine not exceeding one thousand five hundred shillings: Provided that nothing herein contained shall be deemed to affect the right of a magistrate to order the exhumation of a body or the remains of any body for the purpose of holding an inquiry into the cause of death of any person. “(emphasis added)

15. A reading of the Act under which the application is founded together with the reasons advanced by the applicants clearly shows that the court which has jurisdiction is the Magistrate’s Court and as such this court though clothed with original and unlimited jurisdiction may not arrogate to itself jurisdiction which the statute has clearly vested on the Magistrate’s Court. I therefore find that this court does not have subject matter jurisdiction and as such decline to proceed further.

16. In view of the courts finding above, I decline to make any orders herein but will dismiss the Application dated September 29, 2022 for want of jurisdiction.

17. The parties herein being family members, each shall bear their own cost and its ordered.

DATED SIGNED AND DELIVERED AT MURANGA THIS 28th DAY OF FEBRUARY 2023

J. WAKIAGA

JUDGE

In the presence of:

Ms. Mutahi - Court Assistant

Mr. Kome Advocate for the Applicants

Mr. Ben Mwangi Advocate for the 2nd Respondent

