



RN v MAO (Civil Appeal E179 of 2023) [2023] KEHC 21247 (KLR) (8 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21247 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E179 OF 2023
HM NYAGA, J
AUGUST 8, 2023**

BETWEEN

RN APPELLANT

AND

MAO RESPONDENT

RULING

1. Before me is an Application dated July 28, 2023 seeking the following orders;
 - a. That pending the hearing of this Application *inter partes* there be a stay of execution of the judgment and decree delivered by Honorable R. Kefa (PM) on the 28th July 23 and all consequential orders arising therefrom.
 - b. That pending the determination of the Intended appeal this honorable court be pleased to order stay of execution of the judgment and decree delivered by Hon. R. Kefa (PM) on July 28, 2023 and all consequential orders arising therefrom.
 - c. That the costs of this Application be provided for.
2. The Application is supported by grounds set out on the face of it and the Supporting Affidavit of the applicant.
3. In a nutshell, the applicant states that she is the biological mother of the late RO also known as RT also known as GT (now deceased) whose body is lying at Mediheal Mortuary, Nakuru.
4. The applicant avers that on the July 7, 2023 the respondent herein filed suit in the trial court seeking amongst other orders a permanent injunction against the applicant herein by herself, agents, children, family members from interfering with, interring or burying the deceased's body.



5. That after full trial the lower court delivered judgment in favor of the respondent herein. That aggrieved by the decision she has appealed to this court. Contemporaneously with the said appeal, she filed this Application.
6. It is the applicant's case that the impugned judgment of the trial court is at variance with among others, Article 2(4) of the Constitution.
7. The applicant further states that she and the respondent have lived separately for seven (7) years and that her mother had physical custody, care and control of the deceased since her childhood. That by dint the judgment the applicant and her family have been restrained from participating in the burial arrangements of her biological daughter without any compelling reasons. She fears that unless the court issues the orders sought she will not only suffer irreparable loss, but this appeal will be rendered nugatory. That the respondent will not suffer any loss by the maintenance of the *status quo* pending determination of the appeal.
8. The applicant further avers that she has an arguable appeal with high chances of success as it raises serious issues of law and fact regarding customs and cultural practices of the Akamba Community.
9. The respondent opposed the Application. In his Replying Affidavit, he avers that the Application is hinged on falsehoods and misrepresentation of facts. That he is the one who has single handedly paid the hospital bill and the mortuary fees in respect to the deceased, who is his daughter.
10. The respondent further avers that contrary to her assertions, the applicant has not been restrained from participating in the burial arrangements. That the applicant has no place of her own to bury the deceased but plans to bury her in her parents' home in Machakos which is unfair to him as the father of the deceased, with whom he had a close relationship.
11. The respondent further avers that the applicant has not offered security as required and prays that the applicant be ordered to deposit a sum of Kshs. 808,500/- paid to the hospital.
12. The respondent further avers that he stands to suffer loss and mental anguish if the trial court's orders are not complied with.
13. The Court directed the parties to file their submissions, which I have duly considered. It also suffices to state that there are other averments by the parties that I have considered but will not delve into them at this stage. I believe that they are better addressed in the appeal itself.
14. From the material before me, it is apparent that the parties were physically separated for around seven (7) years. It is also apparent that during the lifetime of the deceased the appellant (mother) had her physical custody. The respondent avers that he was maintaining the deceased.
15. It is noted that this is a matter that the appellant faults the court for its interpretation of Akamba Customary Law. Though not very clear, it is apparent from the decree extracted that the trial court allowed the respondent to bury the deceased in accordance with Luhya Customary Law.
16. I am of the view that the determination of which customary law was applicable is a substantive issue for consideration on appeal. It cannot be said that the appeal has no chance of success.
17. The applicant has come under Order 42 Rule 6 of the Civil Procedure Rules. The said rule provides as follows;

“Stay in case of appeal [Order 42, rule 6.]



- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the Application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on Application being made, to consider such Application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (2) No order for stay of execution shall be made under sub rule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the Application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

18. The question for the court is whether at this stage the applicant has met the threshold for the grant of stay of execution.
19. It was pointed out by the respondent that she has not offered any security. The applicant states that she is ready to abide by any reasonable conditions as the court may order for the due performance of the impugned judgment and decree.
20. In my opinion, given the nature of the dispute and the orders that were issued by the court, there was no monetary decree in which security could have been offered. The prayer that the appellant deposits the amount spent by the respondent may have been appropriate if this was a monetary decree. However, this does not bar the court from granting orders for compliance by the appellant.
21. On substantial loss, it is obvious that unless the stay is granted, then the deceased will be buried, and thus render the appeal nugatory. In the event the deceased is buried and the appellant is successful, it will mean that the body will have to be exhumed, an unwanted scenario.
22. Having considered the Application, the response thereto and the Submissions filed, I am inclined to grant the Application on the following terms;
 - a. There will be a stay of execution of the decree of the lower court pending hearing and determination of the appeal.
 - b. The appellant/applicant to file an undertaking that she will cater for all the mortuary charges incurred, from the date of the delivery of the trial court’s judgment until the determination of this appeal. This should be done in the next three (3) days from the date of this Ruling.
 - c. In regard to the appeal, I am of the opinion that the same ought to be heard expeditiously, to avoid the parties incurring a lot of extra costs. I recognize that this is a matter that requires urgent attention and it shall be heard during the court’s vacation.



- d. I hereby admit the appeal and direct that the same be heard vide written submissions. The appellant to file and serve the record of appeal and her submissions within the next seven (7) days. The respondent to file and serve his submissions within seven (7) days upon service of the appellant's Submissions.
- e. The lower court record to be transmitted to this court before the mention date to be given shortly.
- f. There shall be a mention on August 23, 2023 to confirm compliance and take a date for judgment.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 8TH DAY OF AUGUST, 2023.

HESTON M. NYAGA

JUDGE

In the presence of;

C/A Jennifer

Mrs. Mukira -Elizabeth Wangare & Co. Advocates

Absent -Speline Odande & Co. Advocates

