



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 1 OF 2022

(An appeal arising from the judgment and decree of the Hon. RS Kipng'eno,

Principal Magistrate, in Nyando SPMCCC No. E235 of 2021,

of 5th January 2022)

BETTY ATIENO NDOMO.....APPELLANT

VERSUS

ELVIS ONYANGO NDOMO.....1ST RESPONDENT

MONICA AGOLA NDOMO.....2ND RESPONDENT

RULING

1. The application for determination is the Motion, dated 6th January 2022, where the appellant seeks, principally, stay of the judgment and decree of 5th January 2022 and of the proceedings in Nyando SPMCCC No. E235 of 2021, or an injunction to stop the burial of Charles Ndomo Oriedo, deceased, and that the body, be preserved at Lee Funeral Home, or any other morgue, pending the hearing and determination of the appeal. It also seeks that directions be given on an expedited disposal of the appeal. The same is brought at the instance of Betty Atieno Ndomo, the appellant.

2. The grounds upon which the Motion is premised are on the face of the application. They may be summarized as stating:

- a. That the appellant was aggrieved by the judgment of the trial court, hence the appeal;
- b. That the appeal has reasonable prospects of succeeding;
- c. That the appellant was willing to abide by such terms or conditions for grant of the stay sought and for expeditious disposal of the appeal;
- d. That the appeal was brought without unreasonable delay and in utmost good faith;
- e. That the appellant would suffer substantial loss if the orders sought are not granted, and the appeal was likely to be rendered nugatory;
- f. That the respondents would suffer no prejudice should the orders be allowed; and
- g. That the orders were necessary to preserve the *status quo*.

3. The factual background to the Motion is given in the affidavit that the appellant swore on 6th January 2022. She is a daughter of the deceased, and had been sued in the lower court as a defendant, where the respondents, herein, had sought to be declared the persons lawfully entitled to make final decisions on and to dispose of the remains of the deceased. The suit was determined in favour of the respondents, and the appellant was dissatisfied. She avers that the principal issue for termination is the place of burial or disposal of the remains of the deceased. The suit was determined in favour of the respondents, and she was dissatisfied. She avers that the principal issue for determination is not the place of burial of the deceased person, but who has priority with respect to the interment of the remains of the deceased. She avers

that the respondents intended to inter the remains of the deceased at a site behind a bathroom and a goat's pen, a site that the family had abandoned during a meeting on 11th December 2021. She asserts that each deceased person was entitled to a decent and honourable send off, which should include a proper and honourable burial site, but not near a pit latrine and away from a bathroom, chicken coop and goats pen. She avers that should the orders sought not be granted, then the parties would be forced to exhume the body, which would be even more extreme.

4. The appellant has attached, to her affidavit, copies of the pleadings and the judgment delivered in Nyando SPMCCC No. E235 of 2021.
5. The reply to the Motion is through an affidavit by the 2nd respondent, Elvis Onyango Ndomo, sworn on 10th January 2022. He avers that the principal issues for determination in the appeal is who has a right to bury and who ranks in priority. On who ranks in priority, he avers that the appellant had opposed all the decisions that the respondent had made with respect to the burial. He avers that he supports the judgment of the trial court, and believes that the trial court did consider all the relevant facts and issues and did not take into account extraneous and irrelevant facts. He asserts that he believes that the appellant did not have an arguable appeal because no substantive ground has been raised for impugning the decision of the trial court, the judgment was appreciative of Luo customs on burials and that the deceased's place of burial had been properly identified and dug, no exhibits or other evidence was produced to support the defence, and the appellant had not filed a counterclaim for consideration by the trial court. It is further averred that the appellant resided in Accra, Ghana, while the 2nd respondent, the widow of the deceased had lived with him daily prior to his demise. He avers that the appellant would suffer no substantial loss. He explains that the site identified for the interment conformed with Luo customs, for it was on the right side of the deceased's homestead, and not near a pit latrine or chicken coop and goats pen as alleged. He avers that the site is decent and reasonable, and was identified after consultation with elders. He further avers that the 2nd respondent, the widow, was the most suited person to take care of the grave, having lived with the deceased for over forty-seven years. He asserts that it is the respondents and other family members who have suffered psychological torture from the appellant's refusal to release the body of the deceased for burial.
6. Although directions on disposal of the Motion had not been given for filing of written submissions, the respondents filed written submissions simultaneously with the replying affidavit. They discuss three grounds; whether there was an arguable appeal, whether the appellant would not suffer substantial grounds; whether there was an arguable appeal, whether the appellant would not suffer substantial loss if the orders were not granted, and whether security for costs. On whether there was an arguable appeal, they cite *Edwin Otiemo Ombajo vs. Martin Odera Okumu* [1996] eKLR (Akiwumi, & Shah JJA, Bosire Ag JA), to make the point that it would be the surviving spouse who would have the right to bury the remains of their late husband, suggesting that, between the appellant and the 2nd respondent, the 2nd respondent had a superior right to bury the remains of the deceased, and, therefore, the appeal was not arguable in the circumstances. On whether the appellant would suffer substantial loss, they submit that the appellant did not demonstrate that she would suffer substantial loss if the orders were not granted. They have cited decisions in *Norah Adongo Onyango & another vs. Jane Awino Onyango* [2018] eKLR (Githinji, Okwengu & J. Mohammed JJA), *Dominic Nzyoka Mutua & others vs. Sammy Mutua & others* [2018] eKLR (C. Kariuki J), *Malula Mavuti & 3 others vs. Paul Musango Mavuti & 4 others* [2016] eKLR (Muriithi J) and *Ernest Kiprop Arap Kogo vs. John Kibet & 2 others* [2019] eKLR (Ombwayo J), to argue that the appellant would suffer no substantial loss should the orders not be made and the remains are interred, for the body can still be exhumed should she succeed in her appeal. On security for costs, it is submitted that the appellant had offered none, and that, in any event, where substantial loss is not established, there would be no basis for consideration of this ground.
7. When the matter came up for hearing, on 11th January 2022, Mr. Okoth, for the appellant, indicated that he was ready to make oral submissions; while Mr. Odongo, for the respondents, indicated that he would rely entirely on his written submissions, but would respond orally to any issues raised by Mr. Okoth in his oral address. On substantial loss, Mr. Okoth submitted that the deceased and the appellant shared love and affection, and his interment near a pit latrine and a dumpsite would subject her to psychological torment and torture. He submitted that given the position of the deceased in society, the interment of his remains near a dumpsite and a pit latrine, did not amount to a decent and respectable burial. He said that allowing the burial to go ahead on the basis that the body could be exhumed, should the appeal be successful, was not an option, it would be worse, in the sense of causing more torment. He submitted that the appeal would be defeated should the orders not be made. He also submitted that the Motion was filed timeously, without any delay. On security for costs, he submitted that the appellant was willing to furnish such security as the court shall require of her. Mr. Odongo relied entirely on his written submissions, although he still went on to reiterate the said written submissions.
8. Grant of stay of execution, pending an appeal at the High Court, is governed by Order 42 rule 6(2) of the Civil Procedure Rules. The provision envisages only two conditions: substantial loss and security for costs. See *Malula Mavuti & 3 others vs. Paul Musango Mavuti & 4 others* [2016] eKLR (Muriithi J).
9. On substantial loss, the appellant did not, in her seventeen paragraph affidavit, say even a word about her being exposed to substantial loss should the orders sought not be granted. It should not be left to the court to find, from the proceedings or the pleadings, that the applicant was likely to suffer such loss. The duty is on the applicant to satisfy the requirements of Order 42 rule 6(2), by placing material before the court, by way of affidavit, relating to the substantial loss that he or she alleges they stand to suffer. Where nothing is said in the affidavit, about the substantial loss likely to be suffered, the court would have no material upon which it can assess whether the applicant was likely to suffer such loss. Where nothing is said in the affidavit about the substantial loss likely to be suffered, the court will be entitled to conclude that the requirement in Order 42 rule 6(2) had not been satisfied or met or fulfilled.
10. Mr. Okoth, in his address to me, submitted at length on the substantial loss that the appellant stood to suffer. He talked about the psychological torture that the appellant would suffer if the deceased were interred at the site she was objecting to, pointing at the love and affection that existed between her and the deceased. That material was not averred to in the affidavit that the appellant swore in support of the application. I wonder where Mr. Okoth got them from. He did not refer me to the record of the trial court, or any other record, which could have contained that material. The material that he was stating would be matters of fact, expected to be within the knowledge only of the appellant and the deceased, and Mr. Okoth could only submit on it if it was averred to or disclosed in an affidavit by the appellant. As it is, since it is not in her affidavit, Mr. Okoth was making evidential statements from bar, unsupported by the filings that are before the court.

11. From what is before me, the appellant has not made any attempt, in her affidavit, to demonstrate that she would suffer any substantial loss, and, therefore, there is no evidence of it, upon which I can determine the Motion before me. If anything, it is the respondents who have gone out of their way to state the psychological torture that they are going through, due to the continued detention of the remains of the deceased, at the mortuary, on account of the contestation brought by the appellant. That is detailed in paragraph 17 of the replying affidavit. It would appear that the respondents are more alive to this requirement than the appellant, whose burden it is to demonstrate it.

12. Related to or in connection with substantial loss, both sides did address me at length on exhumation, in the sense that instead of delaying burial pending appeal, the court ought to allow the burial to go on, and, should the appellant succeed in her appeal, there would find no difficulty in allowing exhumation of the body to enable the body to be interred at the place or spot to be ordered by the appellate court. The appellant is not in favour of that, while the respondents are of the view that that should be the way to go. In *Norah Adongo Onyango & another vs. Jane Awino Onyango* [2018] eKLR (Githinji, Okwengu & J. Mohammed JJA), the Court of Appeal was of the view that interment of the body of the deceased does not prevent the appellant proceeding with the appeal. In short, the court was saying, with respect to burial disputes, disposal of a body, by way of burial, does not render an appeal, on the right to bury or the place of burial, nugatory, and, therefore, the issue of substantial loss should not arise, should the body be interred before the appeal is disposed of.

13. On security for costs, the appellant has stated that she would be ready to abide by any order on security for costs as the court may make. She has made no offer. But there is no legal requirement for the making of such offer, for the applicant is required only to meet such conditions, on security for costs, as the court may impose or require. I agree with the respondents, that where substantial loss is not demonstrated, there would be no reason to call for security. See *Malula Mavuti & 3 others vs. Paul Musango Mavuti & 4 others* [2016] eKLR (Muriithi J).

14. On whether there is an arguable appeal, which both sides have addressed, which would be rendered nugatory, if the orders sought are not granted, I shall refrain from training my mind on that, for it is not a requirement under Order 42 rule 6(2) of the Civil Procedure Rules, but Rule 5(2) (b) of the Court of Appeal Rules, which do not apply to an appeal before this court. So, whether the appeal is arguable or reasonable or substantial or not, is neither here nor there.

15. Overall, therefore, I do not find merit in the Motion, dated 6th January 2022, and I hereby dismiss the same. Costs shall be in the appeal. Directions, on an expedited disposal of the appeal, shall be given by the Judge, who shall ultimately be seized of the matter at the High Court at Kisumu. It is so ordered.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 13TH DAY OF JANUARY, 2022

W. MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant

Mr. Okoth, instructed by Messrs. OJ Okoth & Company, Advocates

Mr. Odongo, instructed by Messrs. Odongo Awino & Company, Advocates