



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. 7 OF 2016

JOHNSTONE KASIM MUUMBO1ST APPELLANT

ALEX MUNYASYA MUUMBO2ND APPELLANT

CAROLYN KALUNDE MUUMBO.....3RD APPELLANT

VERSUS

BILLY MBUVI MUUMBO1ST RESPONDENT

MWINZI MUUMBO2ND RESPONDENT

RULING

1. The matter before me is a longstanding one concerning the family of Timothy Mwandi Muumbo (the deceased) who died on 22.6.15. The remains of the deceased were held at Lee Funeral Home from the date of his demise until 7.11.2020 when they were released for interment. This state of affairs was caused by a dispute between the Appellants and the Respondents regarding the burial place of the deceased. The Appellants had sought to have the deceased buried in his land Title No. Thitani/Migwani/1498 (Nzatani) next to his 1st wife while the Respondents claimed that the deceased in his oral will expressed his wish to be buried on Title No. Mwingi/Nzeluni/318 (Mbakini). In its judgment of 13.1.16, in CMCC No. 3773 of 2015, filed by the Appellants, the Court directed that the deceased be buried in Mbakini.

2. Being aggrieved by the decision of the trial Magistrate, the Appellants preferred the appeal herein. In her Judgment of 6.8.18, Muigai, J. set aside the lower Court order of 13.1.16 and directed that the deceased be buried at his ancestral home in Nzatani. The mortuary fees which the Court said at the time amounted to Kshs. 3,000,000/= was to be paid from the amount kept by the deceased in the house. If available, contributions made towards funeral arrangements, contributions from the immediate and larger family and clan, fundraising and from the estate.

3. In the application before me dated 21.1. 21, the Appellants seek the following orders:

1. Spent.

2. THAT the Court be pleased to order the Respondents to release all funds in their custody and have been collected from the estate of the deceased since the said deceased met his demise.

3. THAT the Court be pleased to order the immediate release of Kenya Shillings Seven Million say (Kshs. 7,000,000/=) to meet the cost of burial which included morgue preservation charges.

4. THAT the Respondents do meet the costs of this Application.

4. The grounds upon which the Application is premised as set out in the affidavit of Carolyn Kalunde Muumbo, the 3rd Appellant are that the Respondents who have been in control of the estate's income of the deceased have refused to avail funds for the deceased's burial costs; that the burial of the deceased took place on 7.11.2020 without the assistance and participation of the Respondents who were hell bent on derailing the same; that the remains of the deceased were released for burial after the Appellants entered into a consent with Lee Funeral Services Limited regarding the bill which stood at Kshs. 4,797,500/=; that the Appellants paid the sum of Kshs. 2,930,000/= and the balance of Kshs. 2,197,000/= to be paid by 7.4.21; that the 2nd Appellant took a loan to settle part of the mortuary bill and also deposited Title No. Mwingi/Kiomo/201 in the Court as security for the balance of the mortuary bill; that despite the order issued in P&A No. 1673 of 2015 directing that parties do proceed with speed and inter the remains of the deceased in accordance with the orders, the Respondents have

refused to comply. It is the foregoing circumstances that have prompted the Appellants to move the Court to order the release the sum of Kshs. 7,000,000/= from the Respondents who are in possession of proceeds of rent from the estate and of Kshs. 60,000,000/= being proceeds of sale of L. R. No. 209/3271/7 which they sold in October 2015.

5. In their grounds of opposition dated 4.2.21, the Respondent contended that the Application is *sub judice* and offends the provisions of Section 6 of the Civil Procedure Act in that the Applicants have filed a similar application dated 17.11.2020 in Succession Cause 1673 of 2015, seeking Kshs. 15,000,000/= to meet burial costs which is due for hearing on 24.2.21 (now past). The Respondents contended that this is an abuse of the Court process and the Court has no discretion but to stay the subsequent suit. The Respondents further contended that this Court has no jurisdiction to order for accounts of the estate of the deceased as the same is within the preserve of the Family Division and more particularly within Succession Cause 1673 of 2015.

6. Directions were taken for the filing of written submissions. However, only the Applicants complied.

7. This Application will turn on the issue as to whether the same is *sub judice*. The doctrine of *sub judice* is captured in Section 6 of the Civil Procedure Act provides as follows: -

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

8. Section 6 deprives Court of jurisdiction to entertain a suit in which the subject matter is also directly and substantially in issue in a previously instituted between the same parties. The rationale of this bar is to avoid abuse the Court process and to avoid issuance by Courts, of conflicting decisions over the same matter.

9. The test for the *sub-judice* rule was aptly stated by Mativo, J. in the case of Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR, as follows:

The test for applicability of the sub judice rule is whether on a final decision being reached in the previously instituted suit, such decision would operate as res-judicata in the subsequent suit.

10. It is to be noted that both this cause and Succession Cause No. 1673 of 2015 relate to the estate of the deceased Timothy Mwandu Muumbo, the late father of all the parties herein. The application filed by the Appellants in the Succession Cause was filed before the present application. The final decision in that application will render the Application herein *res-judicata*. The doctrine of *sub-judice* is accordingly applicable herein.

11. In its advisory opinion in the case of Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR, the Supreme Court pronounced itself on the doctrine of *sub-judice* as follows:

The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

12. It is not in dispute that Succession Cause No. 1673 of 2015 in respect of the estate of the deceased is pending before this Court. It is also not disputed that the Appellants filed in that cause, the application dated 17.11.2020 against the Respondents, seeking substantially the same orders as those sought herein. That application was filed first in time and is still pending before this Court. It follows therefore that the Court is barred under Section 6 of the Civil Procedure Act, from proceeding with the present Application.

13. In the result and for the reasons stated, my finding is that the Application dated 21.1.21 is an abuse of the Court process and the same is hereby struck out. This being a family matter, each party shall bear own costs.

DATED, SIGNED and DELIVERED in NAIROBI this 23rd day of April 2021

M. THANDE

JUDGE

In the presence of: -

..... for the Appellants

..... for the Respondents

.....

Court

Assistant