



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCA NO. E019 OF 2021

THOMASA MUINDU LILI APPLICANT/APPELLANT

-VERSUS-

FAITH MUENI1ST RESPONDENT

GEORGE MAINGI 2ND RESPONDENT

PETER NZIOKA 3RD RESPONDENT

RULING

1. Before me is an application by way of Notice of Motion dated 20th April 2021 brought under Order 42 Rule 6(1), (2), (3) and Order 51 Rule 1 of the Civil Procedure Rules, as well as section 1A, 1B and 3A of the Civil Procedure Act (Cap.21).

2. The application seeks the following orders –

1) That the application be certified as urgent and the same be heard ex-parte in the first instance.

2) That the court do issue temporary restraining orders against the respondents, their agents or anyone else under their instructions from conducting a Kamba dowry ceremony or anything related to it at the home of MUTHENGI LILI built on the land parcel situated at Kikiki village, Nunguni in Makueni County pending the hearing and determination of this application.

3) That the court do issue a temporary restraining order against the respondents, their agents or anyone else under their instructions from conducting a Kamba dowry ceremony or anything related to it at the home of MUTHENGI LILI built on land parcel Kikiki village, Nunguni in Makueni County pending the determination of the entire appeal.

4) That the costs of this application do abide the outcome of the appeal.

3. The application has grounds on the face of the Notice of Motion that the applicant is the administrator *ad litem* of the estate of his late father MUTHENGI LILI, that the 1st respondent is a niece of the applicant, that the 1st respondent is married to one BENSON KAUYU with whom they have two children and that due to disagreements BENSON KAVYU had threatened to conduct a Kamba traditional oathing called “KITHITU” if dowry was accepted without him being compensated and refunded his dowry and expenses.

4. The application was filed with a supporting affidavit sworn by Thomas Muindi Lili which amplifies the grounds of the application.

5. The application is opposed through a replying affidavit sworn by Faith Mueni the 1st respondent on 5th May 2021 in which it is deponed that an application for stay of execution in the trial court had been dismissed, that this application is not deserving as it does not fall within the confines of Article 24(1) of the Constitution, that her husband having died she had liberty to enter into a new marriage union and that she had no intention for conducting the ceremony at the portion of the applicant’s land and that the applicant appears set on disentiing her from parcel No. 1014 Muthengi B.

6. The application proceeded through filing written submissions. I have perused and considered the submissions of DM Mutinda for the applicant, and Wachenje Mariga & company for the respondents.

7. This is an application for restraining orders, following the decision of the trial court. I can say straight away that prayer 1, and 2 of the application have been spent.

8. The application being an application filed pending the hearing and determination of appeal, would ordinarily be an application for stay of execution of judgment or decree pending appeal under Order 42 Rule 6 of the Civil Procedure Rules. However, the applicant has chosen to bring this application for restraining orders, maybe because his suit in the trial court was dismissed.

9. In my view, a request for restraining orders is similar to an application for a temporary injunction. In that event then, the principles stated in the case of **Giella –vs- Cassman Brown Ltd (1973) (E.A 358)** will apply. First, an applicant has to show that he has a prima facie case with probability of success. Secondly, an applicant has to show that he will suffer irreparable loss if the injunctive orders sought are not granted. Thirdly, if the court is in doubt, it will determine the application on the balance of convenience.

10. The substantive matter herein is an appeal. Does the applicant have a prima facie appeal with probability of success? I have perused the judgment of the trial court and the grounds of appeal. The applicant relies on the stand of one Benson Kavyu who is alleged to have threatened to conduct a Kamba oath of KITHITU. However, that Benson Kavyu is now said to be deceased and there is no independent evidence on record with regard to that oath.

11. There is also no allegation that the applicant must participate or receive the alleged dowry, nor that the ceremony was intended to be conducted in his home. Without going into the merits of the appeal, as I do not have the trial court evidence and am not entitled to do so at this stage, I can say that the applicant has not placed before this court in the application evidence of a claim with probability of success.

12. I now turn to whether the applicant will suffer irreparable loss that cannot be adequately compensated in damages if the restraining orders sought are not granted. The allegation of the applicant herein is that the KITHITU oath will adversely affect the whole family. Again, here no tangible evidence was placed before me in the application about the effect of the KITHITU oath, such as an affidavit from a known expert in Kamba custom. I thus find that the applicant has not demonstrated that he will suffer irreparable loss if the restraining orders sought are not granted.

13. On the balance of convenience, I find no compelling reason to decide in favor of the application than disallowing the same. The balance of convenience is thus not in favour of allowing the application. However, no marriage ceremony should be conducted in the homestead of the applicant, and the applicant cannot and should not be required to participate in any of the intended marriage ceremony or to receive dowry or bride price.

14. For the above reasons, I find no merits in the application and dismiss the same. The costs of the application will abide the decision in the appeal.

Delivered, signed & dated this 30th day of November, 2021, in open court at Makueni.

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George Dulu

Judge