



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 11 OF 2019

IN THE MATTER OF THE BURIAL OF MUSA MAGODO KEYA (DECEASED)

GLADYS NEKESA PETER.....PLAINTIFF/RESPONDENT

VERSUS

ALICE INGAIZA SIAHI.....DEFENDANT/APPLICANT

RULING

1. The deceased Musa Magodo Keya died on 2nd September, 2019 and the defendant/Applicant herein began burial preparations. On 11th September, 2019 the Plaintiff/Respondent filed an application seeking injunctive relief to stop the impending burial of the deceased without her involvement. Temporary injunctive orders were granted which precipitated to the current burial dispute. On various dates, parties filed affidavits in support of their case on by who and where the deceased should be buried. Several witnesses have since testified including Jackline Kanaiza Adenya in respect of the affidavits filed.

2. On 22nd November, 2019 the defendant filed a Notice of Motion application brought under Order 14 Rule 6(2), (3) & 7 of the Civil Procedure Rules 2019, Sections 1A and 3A of the Civil Procedure Act and Section 4 of the Contempt of Court Act, No. 4 of 2016 and all other enabling provisions of the Law seeking the following orders:-

- i. That Makadara Health Centre do furnish the Defendant/Applicant and/or produce before this Court the medical, maternity, admission, treatment and child delivery records and documents of one Jackline Kanaiza Adenya for the year 2014.
- ii. That the supplementary affidavit sworn by one Jackline Kanaiza Adenya dated 05/11/2019 and the testimony given in court on 07/11/2019 be expunged from the Court records for perjury.
- iii. That the Jackline Kanaiza Adenya be committed to civil jail for the commission of perjury and/or giving false information under oath.
- iv. Costs of the application be provided for.

3. The application was supported by the affidavit of the applicant Alice Ingaiza Siahi sworn on 22nd November, 2019. The applicant alleged that the said Jackline Kanaiza Adenya committed perjury when she knowingly and willfully made a statement under oath which was false in material and particulars in an attempt to get orders for DNA samples to be taken from the deceased. The applicant deponed that the false statement was made through a supplementary affidavit dated 05/11/2019 to the effect that Jackline was admitted at Makadara Health Centre and gave birth on 27th January, 2014 to a healthy baby who was subsequently exchanged for a sick baby by the Hospital in collusion with the Applicant herein. Rogers Sammy Lukose, Neema Masite and Truphena Ombina all swore affidavits dated 22nd November, 2019 in support of the Application.

4. In response to the application, the plaintiff/respondent filed grounds of opposition dated 18th December, 2019. The grounds raised were that:-

- i. The application was made in bad faith to scuttle the continued hearing of this case which is ongoing and currently part heard and to prejudice the plaintiff's interest contrary to Section 6 of the Civil Procedure Act and Order 51 Rule 14 of the Civil Procedure Rules 2010.
- ii. The defendant's/Applicant's prayer's against the Plaintiff's witnesses are in violation of the plaintiff's fundamental rights and freedoms as provided in Article 25(c) of the right to a fair trial, Article 50(1) and (2)(k) on the right to a fair hearing and Article 48 of the Constitution of Kenya

iii. The rules of procedure and evidence already provide for directions to be followed by parties when seeking discovery in suits and hence this application is unnecessary, bad in law and an abuse of the court process

iv. The application is unmerited, misconceived and an abuse of the court process and should be dismissed with costs.

5. When the matter came for hearing, Mrs. Kimeto learned counsel for the respondent sought and was granted leave to withdraw the affidavits by Jackline Kanaiza Adenya dated 5th November 2019, Humphrey Onyango Ngoga and Antony Fundia Simbiri both dated 18th December 2019. No objection was made by Mr. Muga learned counsel for the Applicant to the withdrawal of the affidavits. He however prayed for costs of the application. The court observed that all evidence in relation to the issues raised by Jackline Kanaiza Adenya did not relate to the burial dispute and it was expunged from the record.

6. From the foregoing and in the circumstances of this case, there is no material for this Court to consider, the evidence upon which this application was predicated having been expunged from the record. The application dated 22nd November, 2019 is lacking in substratum and can therefore not stand and is consequently dismissed. The costs of this application shall abide the outcome of the main suit.

SIGNED DATED AND DELIVERED IN OPEN COURT THIS 20TH DAY OF FEBRUARY, 2020.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Defendant/Applicant

In the presence ofAdvocate for the Plaintiff/Respondent