



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 11 OF 2020

NICHOLAS KIMATHI GATOBU.....APPELLANT/APPLICANT

VERSUS

EDWARD KAIMENYI GATOBU.....1ST RESPONDENT

PHENEUS MUTUMA GATOBU.....2ND RESPONDENT

FAITH KENDI GATOBU.....3RD RESPONDENT

RULING

1. The appellant filed notice of motion dated 14th February 2020 seeking this court to issue a stay of execution of the orders made by the trial court on 13th February 2020 allowing the disintering of the remains of the late **Eliud Gatobu Mubea** (*deceased*) pending the hearing and determination of the Appeal.
2. In support of the application the appellant averred that the Ruling was issued by the trial court against his brother which in effect the trial court sought his arrest and detention for disobeying the court orders issued on 31st May 2019 and also ordered the exhumation of the body of the late **Eliud Gatobu Mubea** (*deceased*) to enable the applicants to extract DNA samples from the said body. That the Respondents have not satisfied the conditions for grant of orders of exhumation. That the family of the deceased shall suffer irreparable harm and emotional turmoil as the respondents have already expressed the desire to execute the said order.
3. The Respondents opposed the application through Replying affidavit dated 4th June 2020 sworn by **Edward Kaimenyi Gatobu**. He averred that on 30th May 2019 the trial court ordered a temporary injunction against the appellant from disposing the lifeless body of the deceased without their participation. That the appellant was served with the aforesaid order.
4. That on the eve of 30th May 2019 they were served with an application by the Appellant seeking to set aside the Orders issued. That when the application came up for hearing on 31st May 2019 the parties recorded a consent in which the Respondents were allowed to extract DNA samples from the lifeless body of the deceased before he could be buried.
5. That they proceeded to **Kiirua Mission Hospital** but in utter breach of the Orders issued by the trial court the Appellant denied the Respondents access to the lifeless body and locked them out of paying respects to their father.
6. That the actions of the Appellants were in utter disregard of the orders of the court and an application was made by the Respondent citing him for contempt. That the Appellant did not appear on 13th February 2020 hence the trial courts determination.
7. That without exhuming the lifeless body of the deceased and conducting a DNA test the Respondent will never be acknowledged as the deceased children to their detriment.
8. On 18/6/2020 the court directed the advocates for the parties to file written submissions. However, the Respondents Advocate indicated that should rely entirely on the Replying Affidavit and that they did not intend to file written submissions. The Applicants filed written Submissions on 5th August 2020 and submitted that the Appellant resides and works for gain at George town in Caymans island and was therefore not in the country as alleged by the 1st Respondent. It was submitted that the Appellant had instructed Joshua Mwitii Advocates to make an application and have the orders made on 30th May 2020 vacated and that he was not aware of any instruction to enter into a consent with the Respondent until he gave instructions to his current Lawyer on 1st July 2020. It was therefore, submitted that the Applicant/Appellant did not obey any court orders as service was effected upon him at 12.20 pm after the deceased had been buried. It was argued that the mistake of the advocate should not be visited upon him. The case of *Lucy Bosire vs Kehancha Division Land Disputes Tribunal & 2 others* 2013 eKLR and *Branco Arabe Espanol vs Bank of Uganda* [1999] 2 EA 22 was relied upon to support this contention.

In regard to the order to exhume the body of the late Eliud Gatobu Mubea, It was submitted that it is only the 1st Respondent who swore an affidavit claiming to be the biological son of the deceased but the 2nd and 3rd failed to file an affidavit to prove the said relationship with the deceased. It was further submitted that the Respondents objective is to claim from the Estate of the deceased as beneficiaries but have failed and/or ignored to prove sufficient link between them and the deceased to warrant grant of the order of exhumation. It was argued that the 1st Respondent being 50 years of age had failed to show that he had undertaken any steps during the lifetime of the deceased to prove that indeed that he was his biological son.

9. In regard to the issue of exhumation the authorities of **RE Matheson (deceased) (1958) 1 All ER 202 and George Kariuki Njoroge vs Dorcas Pedelai Ntimama [2019]eKLR** were relied upon to support the position that the dead hoped that their remains will remain undisturbed and that the court should ensure that if reasonably possible this assumed wish would be respected and that the deceased having had children who survived them DNA testing can be carried out using samples provided by them without having to disinter the remains of the deceased. The court was urged to find that the interest of the Respondent do not outweigh or override those of the deceased and the family to warrant the grant orders made in trial court.

10. The court was urged to find that the threshold in Order 42 Rule 6 (2) of Civil Procedure Rules had been met and that orders sought in application dated 14th February 2020 be granted.

11. The main issue for determination therefore is whether the application meets the threshold of the conditions for grant of orders of stay of execution pending appeal as envisaged by the provisions of **Order 42 Rule 6 (2) of the Civil Procedure Rules**.

12. The said provision stipulates as follows:

(2) No order for stay of execution shall be made under subrule (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.

13. In **Kenya Commercial Bank Ltd –vs- Sun City Properties Ltd & 5 Others [2012] eKLR** the Court held:

“In an application for stay, there are always two competing interest that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced....”

14. I have considered the averments made by both parties. On 30th May 2019 the trial court made the following Orders;

2. that an Order of temporary injunction be and is hereby issued restraining the Defendant/Respondent whether jointly or severally, his agents, assignees, relatives and/or anybody else acting on his behalf from burying and/or disposing the lifeless body of the deceased Eliud Gatobu Mubea without the plaintiff’s active participation in the intended burial scheduled to take place on 31st May 2019 pending inter parties hearing.

15. On 31st May 2019 when the matter came up for hearing of the Appellants Application dated 30th May 2019 parties recorded the following consent;

1. That samples from the deceased body be taken for purposes of DNA test.

2. That the body subject herein be and is hereby released to the Defendant for burial.

3. That if the body of the deceased herein is in transit, the body shall be stopped at the nearest health facility and DNA samples hurriedly/urgently taken by a professional.

16. The application was made 14th February 2020 a day after the trial court decision was made. The same was therefore timeous.

17. On substantial loss the Applicant has stated that he shall suffer irreparable harm and emotional turmoil. The Applicant is the son of the deceased. The Respondent seek to prove that he was a biological son of the deceased. These are two contentious issues that weigh on emotional distress of both parties.

18. It has been alleged that the Appellant failed to comply with the orders made by the court. The Appellant averred that upon his advocate informing him that orders made on 30th May 2019 had been vacated, the body of the deceased was buried on 31st May 2019 as earlier planned. He said the advocate did not inform him that there was a consent order requiring samples to be taken from the body for purposes of DNA before the burial. He said and it was not refuted that the order was served upon him at 12.30 pm after the body of the Deceased had been buried. The Respondent’s have not clarified at what time they served the order and to whom it was served for purposes of extracting DNA samples.

19. It is clear that the orders issued on 31st May 2019 were made with the consent of the parties. The Appellant has alluded to the consent being made without his consent. He however does not deny instructing the advocate who entered the aforesaid consent and the said advocate was not caused to swear an affidavit and explain whether or not he informed his client that the consent order included the requirement that the deceased body which was apparently on transit at the time the order was being made was supposed to be stopped and DNA samples taken before the same is interred.

20. I have also considered the orders made pursuant to the applications dated 29th May 2019 and 30th May 2019 and find that there are conflicted and confusing. In the 1st order the Applicants were restrained from burying the body of the deceased without the active participation of the Respondents herein. In the order made on 31st of May it would appear that the court was aware that the body was already on transit and order was made that DNA samples be hurriedly/urgently taken by a professional at the nearest health facility. The said health facility and the professional were not identified. This court has had the opportunity to peruse the trial court file to establish upon whom the said order was served for purposes of its execution but there is no affidavit of service on the hospital in which the procedure of extracting samples was to be undertaken or the professional who was to undertake the procedure. The 2 orders appear to have been self defeating.

21. In consideration of the grounds raised in the appeal and in consideration that the body of the deceased herein was buried on 31st May 2019, considerable period of time, it would be prudent to hear the Appeal substantively before making any orders that may render the Appeal nugatory.

22. The upshot of this determination is that the appellant's application is allowed with no orders as to costs.

23. The Deputy Registrar should avail the lower court file for purposes of admission or otherwise of the appeal and taking of directions.

HON.ANNE ADWERA ONG'INJO

JUDGE

RULING DATED AND DELIVERED AT MERU ON THIS 26TH DAY OF AUGUST 2020.

HON.ANNE ADWERA ONG'INJO

JUDGE

In the presence of:-

Mr Mungai holding brief for Mr Nyamu Advocate for Appellant/Applicant

Ms Soy Advocate for Respondent.

HON.ANNE ADWERA ONG'INJO

JUDGE