

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISCELLANEOUS CIVIL APPLICATION NO. E10 OF 2020

LUVISA MAKOKHA JAPHTER.....1ST APPELLANT

ERNEST ELEWA NAMUNYU.....2ND APPELLANT

VERSUS

LONAH VILKAH NDOMBI.....1ST RESPONDENT

CHRISTOPHER CHEMUKU.....2ND RESPONDENT

LEONIDA ANDEYO.....3RD RESPONDENT

LIVING ROOM INTERNATIONAL.....4TH RESPONDENT

RULING

1. On 23rd October 2020, Njagi J. granted temporary orders herein on an application, dated 22nd October 2020, barring the 1st, 2nd and 3rd respondents from burying or in any way dealing with the remains of the late Japheth Namunyu Welesa. The application was then fixed for hearing on 29th October 2020 before me.

2. When the matter came up of 29th October 2020, Mr. Otieno, advocate for the applicant, informed me that the application had been overtaken by events, since the burial had happened. He asked me to allow the application in terms of prayers (d), (e), (f), (g) and (h), since the same, although served, was not opposed.

3. The order of 23rd October 2020, was extracted on the same date. There is an affidavit of service, sworn on 26th October 2020, by Dennis Anyira, a court process server, who details how he served the said court order, as well as the application, on the 1st, 2nd and 3rd respondents, all of whom accepted service but declined to sign the papers. Curiously, the documents that were allegedly served were not returned, by way of annexure to the affidavit of service. An affidavit of service that does not return the documents that it alleges were served does not meet the law on service, and it is not a proper affidavit of service, for it does not provide proof of what was purported to have been served.

4. Be that as it may. A notice of appointment of advocate was lodged at the registry on 29th October 2020, dated 28th October 2020, by Messrs. Wabomba Masinde & Associates, for 1st, 2nd and 3rd respondents. However, at the appearance in open court on 29th October 2020, no one from the said law firm attended court on behalf of the said respondents.

5. The prayers in the application, that Mr. Otieno urged me to grant, relate to an exhumation order should the three respondents hurriedly bury the remains, an order of injunction to compel the 4th respondent to receive and preserve the body after the exhumation, and an order directing the Officer Commanding the Lumakanda Police Station to implement the exhumation order. The exhumation prayer is, ostensibly, made should the respondents ignore the court order of 23rd October 2020 and proceed to bury the remains, or should they proceed to dispose of the remains hurriedly to defeat service of any orders obtained to bar them from disposing of the remains.

6. Mr. Otieno informed me, from the bar, that the application had been overtaken by events, since burial had happened. I do not know what he exactly meant by that, since, despite that, he went on to urge me to grant the orders prayed for in the same application. If the application had been overtaken by events, on what basis should I proceed to grant orders based on it.

7. I have scrupulously gone through the record of papers before me, looking for an affidavit by the applicant, deposing to the fact of the burial having taken place, and disclosing the date when the event happened. I have not seen any such affidavit. Mr. Otieno did not direct me to any. I have no evidence on oath before me, indicating that the remains were, indeed, disposed of in the manner envisaged under prayer (d) of the application, to warrant the making of the orders sought in prayers (d), (e), (f), (g) and (h) of the application. All I have is a statement made from the bar by the advocate for the applicant. An unsworn statement from the bar by an advocate cannot pass as proof of an alleged fact, and it cannot possibly form basis for grant of prayers of the nature sought by the applicant.

8. In view of the foregoing, it is my finding and holding that I have no material before me, upon which I can grant prayers (d), (e), (f), (g) and (h) of the application. Consequently, there is no merit in the application, with respect to the said prayers, and I have no option, in the circumstances, but to dismiss the same

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30th DAY OF October, 2020

W. MUSYOKA

JUDGE