



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLICATION NO. 91 OF 2019

BERNARD NDUNG’U NGIGI.....APPLICANT

-VERSUS-

THE HON. ATTORNEY GENERA.....1ST RESPONDENT

CHARITY WAMBUI NGIGI.....2ND RESPONDENT

RULING

1. This ruling is in respect of the Notice of Motion dated 1st February, 2019 brought by the applicant herein and supported by the grounds set out on its body and the facts deponed in the affidavit sworn by the said applicant. The substantive order being sought is for the exhumation of the body of one Michael Ngigi Kamami (the deceased) from Lang’ata Cemetery and its subsequent burial on Plot No. Chania/Makwa/1174, together with costs of the Motion.
2. The Motion is opposed by way of the replying affidavit sworn by the 2nd respondent, to which the applicant rejoined with a supplementary affidavit. The 1st respondent did not file any reply to the motion nor attend court for the interpartes hearing of the same.
3. *Miss Githinji*, learned advocate for the applicant while relying on the grounds set out on the face of the Motion and the facts presented in the respective affidavits supporting the same, argued that the deceased ought to have been buried in accordance with the Kikuyu Customary Laws which according to her override his will.
4. In opposition, Mr. *Gachichio* learned counsel for the 2nd respondent submitted *inter alia*, that the applicant lacks the necessary *locus standi* to be before this court by virtue of the fact that he is neither the biological son of the deceased nor the legal representative of the deceased’s estate.
5. Mr. *Gachichio* also argued that the deceased had, prior to his death, expressed his desire to be buried at Lang’ata Cemetery, further contending that the deceased had prepared a written will which has not been challenged to date.
6. In her response *Miss Githinji* stated that the applicant has *locus standi* drawing from his status as both a son of the deceased and one of the beneficiaries to his estate. The learned advocate further admitted that the will did not include the applicant as a beneficiary and that the same has not been formally challenged.
7. I have taken into consideration the grounds presented in the Motion; the facts deponed in the affidavits supporting and resisting the same; and the rival oral arguments made by the parties’ advocates on record.
8. It can be discerned from the material placed before this court that the deceased passed away on 14th January, 2019 and was thereafter buried at Lang’ata Cemetery. It is clear from the above that the place of burial constitutes the subject matter of this dispute.
9. In determining the subject of *locus standi*, I have perused the documents annexed to the application, particularly the funeral arrangement meetings and minutes, note that the applicant was present in both the meetings held on 18th January, 2019 and 27th January, 2019.
10. It is apparent from the minutes recorded on 18th January, 2017 the issue of paternity of the applicant and one Jacinta Wangari Ngigi was raised and subsequently, it was agreed that they would be included in the eulogy. It remains unclear whether or not the abovementioned

persons were deemed to be the deceased's children.

11. I have noted from the applicant's averment that he had obtained consent and authorization from the other beneficiaries to swear the affidavit in support of the application. However, no evidence has been availed before this court to support such position.

12. It has also not been shown whether or not the applicant is either a personal representative or a beneficiary and under what authority he has brought the application. It is therefore clear that the applicant has failed to prove that he has the requisite locus standi to bring these proceedings.

13. The provisions of **Section 146** of the **Public Health Act** provides interalia as follows:

“(1) Subject to the provisions of section 147, it shall not be lawful to exhume any body or the remains of any body which may have been interred in any authorized cemetery or in any other cemetery, burial ground or other place without a permit granted in manner hereinafter provided.

(2) Such permit shall be granted only to the legal personal representative or next of kin of the person buried, or to his or their duly authorized agent.”

14. In respect to the deceased's will, I have perused a copy of the same annexed to the replying affidavit. In paragraph 2 the deceased expressed his wish wishes to be buried at Lang'ata Cemetery. That being the case and coupled with the fact that there is no evidence to prove the applicant's *locus standi*, I have no basis on which to grant the order sought.

15. In the end, the Motion is found to be without merit. It is dismissed with costs being awarded to the 2nd respondent.

Dated, Signed and Delivered at Nairobi this 25th day of September, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the 1st Respondent

..... for the 2nd Respondent