



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 39 OF 2017

BETWEEN

JANE AWINO ONYANGO APPELLANT

AND

NORAH ADONGO ONYANGO 1ST RESPONDENT

GLORIA APIYO ONYANGO 2ND RESPONDENT

PAUL ONYANGO ACHOLA 3RD RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. H. Adika, SRM

dated 27th March 2017 at the Chief Magistrates Court

at Kisumu in Civil Case No. 56 of 2016)

RULING

1. The application before me is a Notice of Motion dated 16th February 2018 seeking the following orders:

[3] THAT the burial of the deceased, STEPHEN ONYANGO ACHOLA be stopped pending the hearing and determination of this application.

[4] THAT the OCS Kondele Police Station do enforce the orders of this Honourable Court.

[5] THAT the Judgment delivered on 7th February 2018 be set aside pending hearing of the intended appeal by the applicants.

2. The applicants, who are the 1st and 2nd respondents, in this appeal are the daughters of the deceased through his first wife, Penina Juma Nyithiga, who is also deceased. This appeal arises from a suit filed in the Subordinate Court where the respondents applied to stop the deceased's surviving widow, Jane Awino Onyango, from burying the deceased. After long drawn out proceedings, they succeeded on grounds that the deceased ought to be buried under Luo Customary Law at a spot in his father's homestead identified and decided upon by the elders.

3. I heard the appeal and by a judgment delivered on 7th February 2018, I allowed it and made the following orders:

(a) THAT the deceased STEPHEN ONYANGO ACHOLA shall be buried on his homestead situated on KISUMU/NYALUNYA/1638 located in Ofunyu village, Nyalunya Sub-location, Central Kolwa Location, Kisumu County.

(c) THAT the appellant, JANE AWINO ANYANGO, as the deceased surviving widow shall lead the funeral arrangements together with her children and those of the deceased first wife and shall all ensure participation of entire family in the funeral and burial arrangements.

4. The gravamen of the applicants' case is that they never instructed Mr K. Omollo, Advocate to act for them or prosecute the appeal. That they were never informed that the appeal was coming up for hearing and only realized that this matter had been disposed of when the deceased was being buried. In his brief oral submissions, Mr Odumbe, counsel for the applicants, submitted that they were being denied a fair hearing. He contended that the respondents were apprehensive that under Luo Customary Law, the applicants would be excluded from

the funeral.

5. In response, Mr Omondi, counsel for the respondent, submitted that the application lacked any merit at all. He stated that in fact the firm of *Mauwa and Company Advocates*, who filed that application on the applicants' behalf were not properly on record as the firm had not complied with **Order 9 Rule 9** of the **Civil Procedure Rules** which requires consent of the previous advocate or leave of the court for the new advocate to come on record after judgment has been entered.

6. I would have dealt with this case on the preliminary point about non-compliance with the rules but it is in the interests of justice to determine the application on merits as this matter concerns the deceased who died in 2016 and has yet to be laid to rest due to litigation and it is in the interests of justice that the matter is dealt with fully and with finality.

7. The issue is whether the firm of *Ken Omollo and Company Advocates* was on record for the applicants. It is not in dispute that *Ken Omollo and Company Advocates* acted for the plaintiffs, who are the respondent's herein, before the trial Court. Under **Order 9 Rule 5** of the **Civil Procedure Rules**, such an advocate remains on record, "**until conclusion of the cause or matter including review or appeal.**" Thus *Ken Omollo and Company Advocates* advocate could only cease to be on record if another advocate filed a Notice of Change of Advocates or a Notice to Act in Person in the course of proceedings but before judgment. Alternatively, the advocate could make an application for leave to withdraw from acting in compliance with **Order 9 Rule 13** of the **Civil Procedure Rules**.

8. I would also point out that when the appeal came up for hearing on 5th February 2018, I directed Mr Omollo to file an application to cease acting for the respondent but when he came to court on 6th February 2018, he indicated to the court that he had instructions from his clients and was prepared to proceed with the appeal. I therefore find and hold that the firm of *Ken Omollo and Company* is still on record and continues to act for the respondents in this appeal by dint of **Order 9 Rule 5** of the **Civil Procedure Rules**.

9. An advocate who acts for a party has ostensible authority to bind his clients. I cannot therefore accept the case that he had no instructions or did not consult his clients. If he did not, then that is an issue between him and his client. It does not affect the course of proceedings between the parties and the court. In the circumstances, there is no ground to set aside the Judgment or otherwise interfere with proceedings.

10. The 2nd respondent herein testified as PW 1 before the trial court and was led in evidence by Mr Omollo. After the judgment in the respondent's favour, the appellant obtained a stay of the burial which has been in force for almost a year. It therefore beats logic that the applicants would feign ignorance of appeal proceedings since the only reason their father was not buried was because of the stay. In this day, the law and in particular the overriding objective of the **Civil Procedure Act** also imposes an obligation on clients to keep up and follow up their cases in court. If the applicants were lulled into a slumber, then they must take the consequences of their inaction.

11. Mr Odumbe emphasized in his arguments that the deceased's daughters would be excluded from the funeral in accordance with Luo customary laws. I need only emphasise what I stated in my judgment particularly the orders which I have recited elsewhere in this judgment and stress the need for the family to come together to give the deceased a decent send off.

12. For the reasons I have stated above and for the additional reason that the firm of *Mauwa and Company Advocates* are not properly in the absence of compliance with **Order 9 Rule 5** of the **Civil Procedure Rules**, I hereby dismiss the application.

13. For avoidance of doubt, interim orders issued by Njagi J., on 16th February 2018 restraining the appellant from proceeding to bury the deceased are hereby discharged.

DATED and DELIVERED at KISUMU this 27th day of February 2018.

D.S. MAJANJA

JUDGE

Mr Omondi instructed by Omondi, Abande and Company Advocates for the appellant.

Mr Odumbe instructed by Mauwa & Company Advocates for the respondents.