



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT CIVIL APPEAL NO. 14 OF 2018

DOMINIC NZYOKA MUTUA & OTHERS..... APPELLANTS

-VERSUS-

SAMMY MUTUA & OTHERS..... RESPONDENTS

RULING

INTRODUCTION

1. By a Notice of Motion dated 01/02/2018, the Applicants seek principally an interim stay of execution of the judgement in Makindu PMCC 410/2017 pending hearing and determination of the instant civil appeal and an order for respondents and/or DIRECTOR KILOME NURSING HOSPITAL LTD their servants or agents to allow samples be taken from body of FRANCIS MUTUA NDAMBUKI deceased for the purposes of DNA test to ascertain whether the applicants are biological sons of the deceased *inter alia*.
2. The same is premised on grounds that, the instant appeal has overwhelming chances of success, the body may be buried if orders are not granted and the applicants will be deprived right to participate in burial and thus the appeal will be rendered nugatory.
3. The application is supported by the affidavit of DOMINIC NZYOKA MUTUA sworn on 01/02/2018 and a further affidavit he swore on 08/02/2018.
4. The application is opposed and the Respondents have filed a replying affidavit sworn by Kilonzo Mutua on 06/02/2018.
5. When matter came for directions, the parties agreed to canvass the application via written submissions which they filed and exchanged. The same were highlighted by both sides.

BACKGROUND

6. The applicants lodged Makindu PMCC No 410 of 2017 via a plaint dated 29/12/2017 seeking the reliefs that;
 - An order directing defendants to halt the burial of the deceased pending agreement of the 2 families.
 - An order directing the defendants to include the 1st family together with plaintiffs in the burial arrangements of the deceased.

Inter alia.

7. The applicants further contemporaneously with filing of plaint filed application to stop burial of the deceased pending hearing interpartes and an order directing the defendants to involve the plaintiffs/applicants in the burial arrangements of the deceased.
8. The trial court opted to hear the suit in lieu of the motion and rendered judgement dismissing suit and allowing burial of deceased to proceed. Being aggrieved by the aforesaid decision, the applicants lodged instant appeal together with instant motion.
9. The applicants case is that they are sons of the deceased and thus have right to be involved in his burial arrangements. They claim that they are deceased sons on the basis that their mother was first wife of deceased.
10. On the other hand the Respondents response is that they 1, 2 and 3 respondents are sons of the deceased and respondent No 4 the widow of the deceased. They lived with deceased in matrimonial home till his death. That the applicants never lived with deceased as a family and their claim surfaced after the death of the deceased.

11. The applicants lived in Kibwezi where their mother who is deceased was buried. The applicants are now 57 and 53 respectively in age and strangers to the respondents.

SUBMISSIONS

12. The applicants' submission is that the trial court ought to have ordered the DNA test to be conducted to establish whether the applicants were sons of the deceased. Without such a test the applicants may be denied their right to inherit the deceased estate. They submit that they have met the threshold for grant of stay under provisions of ORDER 42 (6) CPR.

13. On the respondent side, it is submitted that the issue of the DNA test was not pleaded and is only raised in the submissions. The applicants lived for over 50 years without family contact with the deceased thus no prejudice is to be afflicted on them if deceased is buried.

THE LAW

14. The principles guiding the grant of stay of execution pending appeal are well settled.

15. Under Order **42 Rule 6(2) of the Civil Procedure Rules**, an Applicant should satisfy the Court that:

- i. Substantial loss may result to him unless the order is made;**
- ii. That the Application has been made without unreasonable delay; and**
- iii. That the Applicant has given such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him.**

16. In the case of **JASON NGUMBA KAGU & 2 OTHERS V INTRA AFRICA ASSURANCE CO. LIMITED** the court held that:

“The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal.

Even though many say that the test in the High court is not that of “the appeal will be rendered nugatory”, the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process.”

17. In the case of **BUNGOMA HC MISC APPLICATION NO 42 OF 2011 JAMES WANGALWA & ANOTHER v AGNES NALIKA CHESETO** the court held that:

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail...”

18. The court defined substantial loss as outlined above as factors which show that the execution of the judgement will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal.

19. In **JAMES WANGALWA & ANOTHER V AGNES NALIKA CHESETO MISC APPLICATION NO 42 OF 2011 [2012] eKLR (Gikonyo J** as he then was) stated that:

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

20. **ON PLEADINGS**, it is trite that parties are bound by their pleadings. The apex courts of this country including this court have on numerous occasions stated so. The Court of Court of Appeal in **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule (Supra)** faulted the decision of the superior court for taking into consideration matters that had not been pleaded. The Court stated thus:

21. First, in **ADETOUN OLADEJI (NIG) LTD Vs. NIGERIA BREWERIES PLC S.C. 91/2002**, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows;

“...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.” Other judges on the case expressed themselves in similar terms, with Judge Christopher Mitchell J.S.C. rendering himself thus; “In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no

opportunity is given to the other party to meet the new situation.”

22. As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce.

23. The issue of DNA testing was neither pleaded nor sought as a relief/order. The applicants only pleaded that they are deceased children, annexed copies of the ID CARDS and proceeded to seek to be involved in the burial arrangements of the deceased. They never amended their pleadings to add DNA test as an issue nor seek same in the plant or the motion. The evidence was thus tendered on the pleaded matters. It is now being sought as a relief in an application in the appeal.

24. The applicants’ apprehension is that in absence of such test, there will be no prove of their relationship with the deceased and thus they will be disinherited. Of course we are not in the probate and administration matter to deal with administration and distribution of the deceased estate. Same will be determined on the applicable law of the succession.

25. For now we are dealing with the issue as to whether the stay of the lower court decree should be granted pending appeal. If the stay sought is denied, the burial of the deceased will proceed. The question is –will substantial loss result to applicants unless the order is made?

26. The court perused the record of the trial court and noted that for over 50 years the applicants were not living with the deceased and he never brought them up but their deceased mother did away from the deceased. They had no personal contact with the deceased and they have just surfaced after his demise. They never sought any help or claimed anything from the deceased when he was a life.

27. If they needed to confirm paternity, they had nothing that stopped them to seek to have same done in his (deceased) live time. The court has found that the appeal was filed timeously as it was filed the same day of the judgement. The court has also noted that the applicants submitted that they would offer any security the court may order to be provided.

28. However on the element of substantial loss, the court finds that same has not been proved that applicants will suffer substantial loss if burial of the deceased proceeds. The people who are suffering psychologically and financially are the ones who lived with him till his demise.

29. Thus the court finds no merit in the application and makes the following orders:-

- 1) The application is hereby dismissed and trial court decision is upheld.**
- 2) Temporary orders issued herein are discharged.**
- 3) Costs in the main appeal.**

SIGNED, DATED AND DELIVERED THIS 19TH DAY OF FEBRUARY, 2018.

HON. C. KARIUKI

JUDGE

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