



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CIVIL APPEAL NO. 21 OF 2018**

**TERESIA MUKAI MUTUI.....APPELLANT**

**VERSUS**

**JANE KATUNGE MUTUI.....RESPONDENT**

**R U L I N G**

1. By way of Notice of Motion dated the 31<sup>st</sup> day of May, 2018 the Applicant seeks Stay of Execution of the Ruling and orders in **Kitui Chief Magistrate's Court Civil Case No. 117 of 2018** dated 30<sup>th</sup> May, 2018 pending hearing and determination of the Appeal filed herein. That the Respondent either by herself or agent, principals, proxies or anyone under a group known as **Anzauni Clan** be restrained from collecting the body of **Timothy Mutui Ivita** from **Kenyatta University Funeral Home** or burying or disposing the same in any manner until hearing and determination of the Appeal. That the Respondent, one **Kiano Kyungu** and one **Paul Mutui Masaku** be ordered to deposit the last will of the late **Timothy Mutui Ivita** with the Deputy Registrar until further orders.

2. The application is premised on grounds that the Appeal has high chances of succeeding; the Applicant/Appellant and the entire Estate of the Deceased stand to suffer substantial loss if execution in the Chief Magistrate's Court proceeds; the Respondent and the **Anzauni Clan** are likely to commit an illegality in execution of the said orders; the application has been filed without undue delay and the Appeal will be rendered nugatory unless the application is granted.

3. The application is supported by an affidavit sworn by **Teresia Mukai Mutui**, the Applicant/Appellant where she deposed *inter alia* that the Respondent sued her in the Lower Court alleging that she stopped her from participating in the burial of **Timothy Mutui Ivita** (Deceased). That she (Applicant) was the wife of the Deceased having married him on the 2<sup>nd</sup> day of May, 1964. That the Respondent obtained injunctive orders restraining her from removing the body of the Deceased from **Kenyatta University Funeral Home** until hearing and determination of the suit, a Court order that was served upon her a day before the date slated for burial and she complied.

4. Further, that her Advocate raised a Preliminary Objection that was dismissed. The learned Magistrate made further orders thus:

**“a) The preliminary objection was dismissed with costs.**

**b) The deceased had two wives.**

**c) This was a clear case which can easily be dealt with by the clan where the deceased hailed.**

**d) Clan to listen to both families (plaintiff & defendant) and decide the place of burial and date of burial after hearing both families.**

**e) The District/Sub County chairman of Anzauni clan to file his report within 7 days.**

**f) Costs of the decision by clan to be met by either families or the family to use deceased's assets to pay the clan costs related to meetings, food and travel.**

**g) Mention on 30<sup>th</sup> May, 2018 for directions.**

**h) Interim orders extended.”**

5. That when the matter came up for mention two (2) persons purporting to be officials of the **Anzauni Clan** brought a report that neither her or her Advocate had seen. That the report contained extraneous and outrageous allegations that had not been put to test. That it was surprising how the Magistrate knew the clan of the Deceased. That the Court order made orders as following:

**“a) The deceased shall be buried by the clan.**

**b) The clan shall decide the place and date of burial.**

**c) The plaintiff and defendant shall be allowed to participate in the burial.**

**d) The cost of the burial to be met by the clan through selling the assets of the deceased.”**

6. That the clan can decide and set any amount as cost of the burial that may be beyond the net value of the Estate.

7. She concluded by stating that a day before the demise of the Deceased he told her that he left a will in custody of **Kiano Kyangu** and **Paul Mutui Masaku**, his friends which they have concealed from his family an issue that the learned Magistrate failed to address.

8. In response, the Respondent, **Jane Katunge Mutui** filed a Replying Affidavit where she deposed that she is also a wife of the Deceased having married under the customary law. That it was wrong for the Applicant to infer that the learned Magistrate had prior knowledge of the clan to which the Deceased belonged. That when there is no dispute, it is the Estate of the Deceased or his immediate family that covers expenses of a burial and in this case it could be included as part of the liability to the Estate during succession. That the issue of the will was not discussed and persons mentioned are not parties to this suit. She asked the Court to order the Applicant to deposit **Kshs. 1.5 Million** as security if at all the earlier sought orders were to be granted. That the clan is not a party to the suit therefore if orders sought are granted.

9. The application was canvassed by way of written submissions that I have taken into consideration.

10. Principles required for staying execution are set out in **Order 42 Rule 6** that provides thus:

**“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**

**(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.**

**(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.**

**(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.**

**(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.**

**(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”**

In the premises the Applicant was duty bound to demonstrate that:

i. Substantial loss may result unless the order is made;

ii. The application was made without unreasonable delay;

iii. Such security as the Court may order for due performance of such a decree or order as may ultimately be binding on him has been given by the Applicant.

It has been stated now and again that 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 (**See Silverston vs. Chesoni (2002) eKLR; Joseph Simiyu Mukenya vs. Agnes Naliaka Cheseto, Bgm High Court Misc. Application No. 42 of 2011 (2012) eKLR**).

In the case of **James Wangalwa & Another vs. Agnes Naliaka Cheseto (Supra)** it was also 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 care of the Applicant as the successful party in the appeal. This is what substantial loss would entail.....”**

It is argued that the relief sought by the Respondent in the Lower Court was injunctive in nature. Without giving a hearing to the parties in the matter the Court granted the clan that was not a party to the suit the authority of burying the Deceased instead of granting the opportunity to the legal wife, the Applicant herein.

11. What has been demonstrated is the fact that the Court granted final orders without hearing the parties. A purported Alternative Dispute Resolution seem to have been adopted without the involvement and consent of the parties. The Applicant who alleges to be the legal wife of the Deceased has indeed established that if the order sought is not granted she will be condemned unheard. Another issue raised is the order of the Court directing that the expenses of the burial be borne from the Estate of the Deceased, an order that may deplete the Estate of the Deceased which should be protected by the Court. It is apparent that if the order sought is not granted the Appeal filed herein will be rendered nugatory.

12. The Ruling of the Lower Court was delivered on the **30<sup>th</sup> May, 2018**. The Memorandum of Appeal was filed on the **4<sup>th</sup> day of June, 2018** while the instant application was filed on the **6<sup>th</sup> day of June, 2018**. There was no delay in making of the application.

13. The Respondent has contended that the Applicant delved on the issue of delay and substantial loss but evaded the issue of security. It is however argued that in as much as the Applicant may be willing to give security for due performance of the decree this is a unique case where no tangible security can be deposited. I do consider the peculiar nature of this case and the fact that the parties were not given a hearing. It is a case that calls upon this Court to use its discretion to ensure that justice is seen to be done.

14. With regard to the issue of the will, I find the prayer misplaced since this is not a succession cause and the individuals mentioned are not parties to this case.

15. From the foregoing, I find the application having merit, therefore, I allow **prayer 3 and 5** of the application.

16. Costs of the application to abide the Appeal.

17. It is so ordered.

**Dated, Signed and Delivered at Kitui this 27<sup>th</sup> day of August, 2018.**

**L. N. MUTENDE**

**JUDGE**