



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MIGORI
CIVIL APPEAL NO. 67 OF 2017

1. KENNEDY OLELA

2. JAMES OLELA.....APPELLANTS/APPLICANTS

-versus-

JOHN OKOMBO.....RESPONDENT

(Being an appeal arising from the ruling and order by Hon. E. M. Nyagah, Principal Magistrate in Migori Chief Magistrate's Civil Case No. 40 of 2017 delivered on 22/06/2017)

RULING

1. By the Notice of Motion dated 22/06/2017 the Appellants/Applicants are seeking the following orders:

(1) THAT this Application herein be certified as urgent and the same be heard on priority basis.

(2) THAT the Defendant's /Respondents and their servants, or anybody under their directions and authority be temporarily restrained from taking burying or in anyway, interring the body of HELLEN ATIENO OKOMBO at Kanyidoto Village and the body be brought back and preserved at Migori Level Four Hospital Mortuary for preservation pending hearing of the application interparties.

(3) THAT the Defendant's /Respondents and their servants, or anybody under their directions and authority be temporarily restrained from burying or in anyway, interring the body of HELLEN ATIENO OKOMBO at Kanyidoto Village and the body to be brought back at Migori Level Four hospital Mortuary for preservation pending the hearing and determination of this case.

(4) THAT cost of this application be borne by the Defendants/Respondents

2. The application is premised on six grounds appearing on the body of the said Notice of Motion. It is supported by the Affidavit of the first Applicant/Appellant herein, Kennedy Olela sworn on 22/06/2017.

3. The Respondent strenuously opposed the application through a Replying Affidavit sworn on 27/06/2017 and filed in Court on 28/06/2017 wherein he so well brought up the history of the matter by annexing all the documents filed by the parties in **Migori Chief Magistrate's Civil Case No. 40 of 2017** (hereinafter referred to as '**the suit**').

4. The application was heard by way of oral submissions. The brief background to the application is that

one **Hellen Atieno Okombo** (hereinafter referred to as '**the deceased**') died on 10/04/2017 and her remains were preserved at St. Joseph's Memorial Hospital Mortuary in Migori town pending burial. A Permit for Burial No. [particulars withheld] was issued to one **Oginga David** who is one of the children of the deceased. The body of the deceased was later removed from the said Mortuary on 01/05/2017 and was interred that night at **Kanyidotto village** within **Homa Bay County**.

5. The Respondent filed the suit on 02/05/2017 together with an interlocutory application seeking an injunction to restrain the interment of the deceased and that the body of the deceased be preserved at Migori County Level Four Hospital Mortuary pending the outcome of the application. The lower court heard the application which had been brought under certificate of urgency and granted the interim injunction as sought. That application was set for an *inter partes* hearing on 09/05/2017. The formal order was extracted for service.

6. A Process Server one **Julius Juma Otindo** effected service of the order and filed a Return of Service on 08/05/2017. He clearly stated that he left Migori town on 02/05/2017 and rushed to the place where the deceased was to be interred and that he reached there by around 01:00pm only to learn that the deceased had been buried the previous night.

7. That obtaining position led the Respondent to return to the lower court and file the Notice of Motion dated 08/05/2017 wherein he sought for leave to amend the Plaintiff and an order for the exhumation of the body of the deceased and that the body be thereafter preserved at Migori County Level Four Hospital Mortuary pending the determination of the suit. That application was heard and allowed vide the ruling delivered on 22/06/2017 which is now the subject of the instant appeal.

8. The Applicants are aggrieved by the order made on 22/06/2017. They contend that the burial of the deceased was not done in disobedience of a court order to warrant its exhumation. That the Respondent was aware of all the plans towards the burial and if he felt discontented in any way he ought to have timeously invoked the court process. They further contend that the basis upon which the Respondent claims the right to bury the deceased is on an alleged marriage which according to them, the deceased was married to another husband one **Phillip Oginga Ogara** who died earlier and was survived by the deceased. As such the issue of marriage remain so hotly contested and is for determination in the suit and that the way the lower court casually handled that aspect in the impugned ruling is one of the grounds in this instant appeal.

9. It was also submitted that if the body is exhumed then there will be nothing left in the suit for determination as the prayers sought for in the Notice of Motion dated 08/05/2017 are similar to those in the suit hence the suit will have been summarily determined. The Applicants pray that the application be allowed.

10. The Respondent is opposed to the orders sought. On his part, he contends that the record clearly confirms that the deceased was his wife and that since the Applicants are in dispute then the best way forward is to preserve the body of the deceased pending the determination of the suit since if he succeeds in the suit then he will have the right to bury the deceased. He further contends that the burial was done in disobedience of a court order and as such the exhumation ought to be ordered and that no one will be prejudiced by the preservation of the body. He prays that the application be disallowed.

11. I have carefully perused the application and the reply alongside all the annexures thereto. I have equally considered the parties' submissions and I fully understand the nature and gravity of this matter.

12. The conditions to be considered in dealing with an application seeking a stay of execution pending appeal in the High Court are clearly provided for under **Order 40 Rule 6** of the **Civil Procedure Rules 2010**. They are: -

a) The Applicant should demonstrate substantial loss that may result if stay is not granted;

b) There should be no delay in the making of the application; and,

c) The Applicant must provide security for the due performance of such decree or order which the court may ultimately grant.

13. **On the issue of substantial loss**, the Applicants contend that the family of the deceased incurred costs, time and expenses in planning and conducting the burial of the deceased and that all along the Respondent was aware of those preparations. He chose not to act timeously. It is further contended that the burial preparations and ceremony were very elaborate and were carried out in accordance with the Luo customs and undoing all that with no guarantee that the suit will succeed will make the Applicants and the large community to suffer colossal expenses in terms of mortuary expenses, the cost of maintaining the mourners including the agony of a protracted litigation which has a possibility of finding that there was no marriage between the Respondent and the deceased. The Applicants aver that the loss is substantial and unless the prayers sought are granted they stand to suffer irreparably.

14. The Respondent undertakes to shoulder all the resultant expenses and costs once the application is disallowed.

15. I have considered the rival submissions. Whereas the Respondent undertakes to shoulder the monetary expenses involved in exhuming the body of the deceased and accordingly preserving it, I note that this is a matter where the loss goes beyond what can be quantified in monetary terms. The Applicants are faced with the agony of the exhumation of the body of the deceased with a possibility of burying her again in the event the suit fails. As all that happen, the Applicants remain innocent as they did not disobey the order of the lower court since at the time of service the burial had been conducted the night before. Infact by the time the burial was conducted the suit had not even been filed. The loss and suffering likely to be occasioned if the exhumation of the body of the deceased is not stayed, in the unique circumstances of this case, can only be described as quite substantial. However, had the Applicants acted in disobedience of a court order there would be no loss of any kind in making orders to ensure that the orders of a court are fully respected and obeyed. There can never be any loss in upholding the rule of law.

16. **On the issue of delay**, the order appealed against was made on 22/06/2017 and the Applicants prepared the appeal on the same day and filed it on 23/06/2017. I find no delay on their part.

17. The last issue of consideration is that of **security**. In this type of a case an undertaking by the Applicants that they will not interfere with the grave where the body of the deceased was interred can serve as adequate security.

18. Having dealt with the main conditions in stay applications in the High Court, it is appropriate to address the issue as to whether in allowing the Notice of Motion dated 08/05/2017 the court rendered the suit compromised. I do not think so. I have looked at the Plaint and the Amended Plaint and noted that the Respondent prayed for other orders over and above the injunctive ones. For instance, the Respondent seeks to be allowed to bury the deceased on account of being the husband. That position has ignited the tug-of-war on whether there was any marriage between that Respondent and the deceased. The issue is yet to be determined. The Applicants contention is therefore for rejection.

19. As I come to the end of this ruling, I call upon the Counsels and their parties to seriously consider taking positions which will lead to determining the main issue in this matter which is whether the Respondent was married to the deceased.

20. Finally, the following orders do hereby issue: -

a) There shall be a stay of execution of the order made on 22/06/2017 in Migori Chief Magistrate's Civil Case No. 40 of 2017 pending the determination of this appeal or further orders of this Court. For clarity purposes, the body of Hellen Atieno Okombo which was buried on 01/05/2017 at Kanyidotto village within Homa Bay County shall not be exhumed pending the determination of this appeal or further orders of this Court.

b) Each of the Applicants herein shall within 2 days of this ruling file and serve a written

undertaking not to interfere with the grave where the body of Hellen Atieno Okombo was buried and to further undertake to take all necessary measures to ensure that the grave is not interfered with in any way by any one whatsoever.

c) In the event the Applicants or any of them fail to file and serve the undertaking in (b) above, the stay orders in (a) above shall lapse and the Applicants' Notice of Motion dated 22/06/2017 shall be deemed dismissed accordingly and that the Respondent shall be at liberty to execute the order made on 22/06/2017 in Migori Chief Magistrate's Civil Case No. 40 of 2017.

d) Costs of the application shall abide the outcome of the appeal.

e) Parties shall today take directions on the appeal.

Those are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 30th day of June 2017.

A. C. MRIMA

JUDGE