



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
CIVIL SUIT No. 9 OF 2017
IN THE MATTER OF THE BURIAL OF N M M (DECEASED)

RULING

1. The Application before the Court is brought by F H O. The Applicant states that he is the “legal husband” of the Deceased. The Application was filed on 14th September 2017 under a Certificate of Urgency. It was certified as urgent before Hon W. Musyoka J when it came before him on that date. In the Application, the Applicant is seeking the following additional orders:

“3. THAT a temporary injunction do issue restraining the Respondent, either by herself, her agents, family members, relatives and/or any other person whomsoever acting under her instructions from removing and disposing of the body of the deceased N M M from AIC Kijabe Hospital Mortuary or wherever the body would be transferred, interring the remains of the deceased and/or interfering with the said body in any manner whatsoever pending the inter partes hearing and determination of this Application

4. THAT a temporary injunction do issue restraining the Respondent, either by herself, her agents, family members, relatives and/or any other person whomsoever acting under her instructions from removing and disposing the body of the deceased N M M from AIC Kijabe Hospital Mortuary or wherever the body would be transferred, interring the remains of the deceased and/or interfering with the said body in any manner whatsoever pending the hearing and determination of the suit filed herein.

5. The Officer Commanding Station of the nearest Police Station to ensure compliance.”.

The Learned Judge made the Orders sought on an interim basis and also ordered that the Matter be heard inter partes on 21st September 2017.

2. The Applicant was also ordered to serve the Application and Order on the Parties affected. The Court file shows that AIC Hospital was served on 14th September 2014 because there is a date stamp on the copy. The Defendant/ Respondent was not served personally. What the process server did was visit a village called [*Particulars Withheld*] in Muranga County. He says he met “the son to the deceased”. He does not say how he knows that statement to be correct. Further, he does not inform the Court whether or not the person given the documents was old enough to understand their importance. It is correct that a copy of the Order is endorsed with the names “K K M” as stated.

3. The Application was brought on the following grounds:

1. THAT the applicant is the legal husband of the deceased and married her under Kikuyu

Customary Law in 2014 A copy of the "Dowry acknowledgement" is exhibited as **FHO1**

2. There were two children of the union A O was is 13 years old and B A who is 11. The deceased died on 8th September 2017

3. The remains of the deceased are now preserved at AIC Kijabe Hospital Mortuary

4. THAT the Respondent is the Mother of the deceased and has denied the Applicant access to the deceased's remains or even involve him in the burial arrangements and now intends to remove the body from the mortuary for the purposes of internment at his rural home in [particulars withheld] Village, Kandara Constituency, Muranga County. There is no direct evidence of this intention

5. The Applicant is entitled to inter the remains of the deceased as he has the closest proximity with the deceased by virtue of being her husband

6. The Applicant has the means to give the deceased a decent burial and he has made all the necessary arrangements for the burial.

7. The Applicant also relies on the ground that he has a prima facie case with a probability of success.

3. The Application is Supported by the Affidavit of the Applicant who informs the Court that he is a resident of Nairobi County. Surprisingly, he is unable to be more precise. He repeats what is set out in the Grounds however, he says that he "approached the Respondent together with her family over the burial issues but they have remained adamant and have insisted on burying my late wife without involving me". He provides very few details of this approach. Nothing is said of the date or place the alleged conversation was held. He also neglects to state whether or not he was given a reason for that denial or refusal. He wishes to bury the Deceased according to the rites of Luo Customary Laws and Practice. He does not explain how those are different from the Respondent's. He also does not state in the affidavit where he intends to bury or inter the remains of the Deceased. The Supporting Affidavit states that the Applicant and the Deceased co-habited for 12years, that suggests that they were together until 2014. A question arises as to what happened after that. Part of the answer is contained in the Witness Statement of P A O who says that at some point in 2015 the Applicant and the Deceased separated. The Deceased and the Children moved to Kahawa West Estate and then Ngong Estate whereas the Applicant remained in Kariobangi Estate. There is no reason given for this arrangement nor its duration. However, it does raise questions of fact. In addition, why was the Deceased at the AIC Hospital in Kijabe. The Applicant has exhibited as "**FH03**" a letter dated 10th September 2017 from AIC Kijabe Hospital. It is addressed to Whom it May Concern. It is also incomplete as it has not been signed. It is handwritten and largely illegible.

4. The Application came before this Court for Hearing on 21st September 2017. The Applicant was represented and there was Counsel in Court, Mr Kuria claiming to have been instructed by the Respondent. He had not filed a Notice of Acting on that date and nor has he done so since. On 21st September he informed the Court that the Respondent was in Hospital and had only been discharged on the preceding Monday. She had not been served personally. She was said to have been disputing the marriage. The Court gave directions for the Respondent to file a response to the Application within 14 days.

5. The Matter came before the Court again on 18th October 2017. It had been listed ex parte by Messrs Anyango Ogutu & Co. It was listed for a "Mention for Directions". However at that day the Advocate appearing for the Applicant argued that because the Respondent had not filed any response to the Application he was "requesting the Court to grant prayer 4 of the Application and give a new date for Hearing of the main suit. The Plaintiff seeks the following prayers:

"(a) A declaration that the Plaintiff is entitled to inter the remains of the deceased N M M

(b) An order directing that the Plaintiff inter the remains of the deceased at his rural home in Kajulu, Kadero, Kisumu County.

(c) Costs in this suit

(d) Any other relief that this court may deem fit to grant."

Prayer 4 of the Notice of Motion seeks a temporary injunction. That Order has already been made by Hon W. Musyoka J.

6. On 18th October the Applicant was given an opportunity to file further evidence of proof of marriage. His Advocate submitted that he does not wish to file any further evidence.

7. In the circumstances and for the reasons set out above, this Matter, whether the Application or the Suit is not sufficiently ready for the Court to be able to make substantive orders on entitlement, nor findings on the status of the Applicant and the Deceased. The Court has also been made aware that the Deceased has another Child who is also entitled to be heard on the issues. It is therefore Ordered and Directed THAT:

(1) The Application be listed for Hearing with viva voce evidence;

(2) The Child of the Deceased K K M be and is hereby added as a Respondent to the Application and a Defendant to the Suit;

(3) The Respondents to file and serve any response they wish within 7 days of service. In the event that they do not serve an reply they shall be deemed to not wish to do so.

(4) The Plaintiff be and is hereby granted leave to file a Supplemental Affidavit exhibiting evidence of the subsistence of the marriage after 2015.

(5) In the meantime, the Defendants are forbidden whether through their respective servant agents or any family members from removing or attempting to remove the body of the Deceased, N M M from AIC Kijabe Mission Hospital Mortuary or from any other Mortuary where the body may have been transferred to or from interring the said remains or interfering in any manner whatsoever with the said body pending the inter partes hearing of the Application.

(6) The Officer in Charge of Kijabe Police Station is hereby directed to ensure compliance with paragraph 5 above.

Order accordingly,

FARAH S.M AMIN

JUDGE

DATED, Signed and Delivered at Nairobi this 30th day of October 2017

In the Presence of:

Court Clerk: Patrick Mwangi

Applicant: Mr Amolo HB for Mr Onyango Obuto

Defendant/Respondent: Mr Kuria