



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 448 OF 2015

MARY NYANG'ANYI NYAIGERO.....1ST PLAINTIFF

BENJAMIN MAOGA NYAIGERO..... 2ND PLAINTIFF

VERSUS

THE KAREN HOSPITAL LIMITED..... 1ST DEFENDANT

MONTEZUMA MONALISA FUNERAL

HOME LTD..... 2ND DEFENDANT

RULING

1) Mary Nyang'anyi Nyaigero and Benjamin Maoga Nyaigero, herein after referred to as the 1st and 2nd applicants sued the Karen Hospital Ltd and Montezuma Monalisa Funeral Home Ltd hereinafter referred to as the 1st and 2nd respondent vide the plaint dated 22nd December 2015. In the aforesaid plaint the applicants' sought for judgement in the following terms.

- i. ***An injunction to restrain the defendants by themselves, their directors, servants, agents or otherwise howsoever from continued detention of the corpse/remains of the late Freddy Chief Nyaigero as security for payment of incurred Hospital bill and mortuary fees.***
- ii. ***An order directing the defendants by themselves, their servants or agents to forthwith unconditionally release/deliver to the plaintiffs the remains/corpse of the late Freddy Chieff Nyaigero for burial;***
- iii. ***A declaration that the defendants' remedy is by enforcement through a civil suit for recovery against the deceased's legal representatives.***
- iv. ***A declaration that it is contrary to public policy and health to detain a corpse of remains of the dead as security for payment of a debt, hospital bill and mortuary fees.***

2) The applicants have now taken out the motion dated in which they sought for the following orders.

- a. ***The application be placed before a duty judge for certification as being extremely urgent that requires to be disposed off on an urgent basis at the earliest date in January, 2016 inter partes.***
- b. ***An order directing the defendants by themselves, their servants or agents to forthwith unconditionally release/deliver to the plaintiffs the remains/corpse of the late FREDDY CHIEFF NYAIGERO for burial;***
- c. ***An injunctive order restraining the defendants by themselves, their servants or agents or otherwise from detaining or continuing with the detention of the remains/corpse of the late FREDDY CHIEFF NYAIGERO.***

d. That costs of the application to be provided.

3) The motion is the subject matter of this ruling. The motion is supported by the affidavit of Benjamin Maoga Nyaigero, 2nd applicant. The respondents opposed the motion by relying on the replying affidavit of Rufus Ndaini, the 1st respondent's finance manager.

4) Mr. Mogaka, learned advocate for the applicants, argued that the respondents have unlawfully detained the body of the late Freddy Chieff Nyaigero to act as security or collateral for both the hospital and mortuary fees against public policy and contrary to the provisions of Section 137 of the Penal Code. The learned advocate further argued that the applicants being the deceased's mother and brother respectively are entitled to custody, control and possession of the deceased's remains as opposed to the respondents whose only interest is the outstanding hospital and mortuary fees. He further pointed out that the 1st respondent without the consent or authority of the applicants transferred the deceased's body to be preserved in the premises of the 2nd respondent Mr. Mogaka further pointed out that the respondents contractual rights can lawfully be enforced against the deceased's legal representatives once they are appointed. He also argued that the respondents are obliged to mitigate their losses by immediately releasing the deceased's body to the applicants for interment.

5) Mr. Kariuki, learned advocate for the respondents beseeched this court to dismiss the motion in view of the fact that the applicants have not made any proposals nor arrangements to have the outstanding debt settled. He pointed out that the 1st respondent and the applicant held meetings in which the applicants created the impression that they were capable of settling the deceased's bills. The learned advocate also argued that the applicants filed this suit as an afterthought and in bad faith. He further argued that the applicants have intentionally failed to take up letters of administration in respect of the deceased estate with a view of making it difficult for the respondents to pursue their claim. Mr. Kariuki, further urged this court to balance the interests of the parties and direct the applicants to make undertakings on how to settle the outstanding debts left behind by the deceased.

6) Mr. Mogaka urged this court to reject the respondent's arguments by stating that the respondents can as well take up citation proceedings with a view of enforcing their claim. He further argued that the respondents will not suffer any prejudice because their contractual rights can only lapse at the expiry of 6 years from the date of accrual.

7) I have considered the material placed before me and the rival oral submissions. The background of this dispute appears to be short and straight forward. The Late Nyaigero Fred Chieff was in August 2015 admitted to the 1st respondent's hospital and allocated an ICU bed no. 1050. The admission form attached to the replying affidavit indicates, that one Mercy Chieff, the deceased's kin committed herself to settle the patient's medical bills. The patient eventually passed on leaving an outstanding bill of kshs.17,500,250/=. When the late Nyaigero Fred Chieff passed on, the 1st respondent decided to have his body preserved at the 2nd respondent's morgue. The 1st respondent does not deny the allegation that it never sought the approval of the applicants before making the decision to have the deceased's body transferred to the 2nd respondent's morgue. Arising from the submissions and the material placed before this court the following issues interalia remain uncontested.

First, that the deceased's body is being detained to force the deceased's relatives and or kin make proposals on how to settle the bill left behind by the deceased.

Secondly, both sides of this dispute agree that the deceased's body has no monetary value.

Thirdly, that the deceased's estate owes the respondents outstanding bills in excess of ksh.17 million.

Fourthly, that the applicants are by virtue by their kin relationship with the deceased are entitled and bound to the custody the deceased's body for burial.

8) The main order sought vide the aforesaid motion is an order of mandatory injunction to compel the

respondents to unconditionally release and or deliver to the applicants, the body of the late Freddy Chieff Nyaigero for burial. The principles to be considered before granting an order for mandatory injunction are well settled..

9) In the case of **Locabail International Finance Ltd =vs= Agroexpot and others (1986) 1 A.KER 901** the court of appeal held inter alia

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

10) I have already stated the orders the applicants are seeking from the court.

11) The dispute between the parties revolves around the outstanding debt owed to the respondents by the estate of Nyaigero Fred Chieff, deceased.

12) The debt is in respect of the outstanding hospital and mortuary fees. It is tersely averred in the replying affidavit of Rufus Ndaini that the respondents are holding the deceased's body as a lien. In other words the respondents are holding the deceased's body as a collateral to compel the deceased's kin or legal representatives to settle the debt before the body can be released. The applicants are now before this court beseeching it to grant the orders to compel the respondents to release the body to them. The respondents have stated on oath that they are aware that the applicants are entitled to have possession and custody of the deceased's body. They have however averred that they are equally entitled to be paid the expenses incurred by the deceased.

13) The question which presents itself to be answered is whether the respondents are entitled to continue holding the deceased's body pending payment of the outstanding debt?

14) There is no dispute that a dead body has no property value hence it cannot be used as a collateral to secure a debt. The continued detention of a dead body will continue to attract morgue charges instead to the utter detriment of the deceased's estate. It has been argued that if the body is released to the applicants, the respondents will suffer loss in that the applicants will not feel bound to settle the debt. In my humble view I do not think the respondents will have lost the right to recover their debt.

15) There is no dispute that no one has so far applied for letters of administration in respect of the deceased's estate. In such a case the respondents are entitled to take out citation proceedings to enable them file recovery proceedings against the estate. In this case, Mercy Chieff, the deceased's kin had signed the admission form and pledged to settle the deceased's hospital bills. In my humble view, I do not think in the circumstances, the respondent will lose the right to file recovery proceedings against the estate and from the deceased's kin who signed the admission form to settle the bill. Having come to the conclusion that there is no property in a dead body, therefore it doesn't make sense for the respondents to continue detaining the deceased's body. In *Halsbury's laws of England, 4th Edition Vol. 10 at page 488*, reference is made to the decision in *R =vs= Fox (1841) 2QB 246* in which it was held inter alia that

“A creditor is not entitled to retain the dead body of his debtor as a security for his debt.”

16) It is important to restate at this juncture that the respondents are entitled to recover their debts from the estate of the deceased or from whoever executed the agreement pledging to settle the hospital bill. It must be appreciated that the respondent incurred various expenses to treat the deceased and later by preserving the deceased's body. Individuals, companies or institutions running and managing hospitals, morgues and health facilities should adopt the best practices in their operations so that rather detaining

dead bodies in an attempt to compel parties to settle their debts they adopt other humane and lawful methods to recover the same. It is also not in dispute that no law has been passed to authorise hospitals and health facilities to detain corpses as a lien over outstanding bills.

17) Learned counsel appearing in this dispute ably argued over public policy. It is the submission of Mr. Mogaka that public policy dictates that dead bodies should be buried as soon as possible. He further argued that any person going against such a policy risks breaching the provisions of Section 137 of the penal Code. Mr. Kariuki agreed with the arguments of Mr. Mogaka although he was of the view that Section 137 of Penal Code does not apply in the circumstances of this case. Public policy has been broadly defined in **Black's Law Dictionary** as **“The principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society.”** There is no doubt it is a fundamental principle of public policy that dead bodies should be disposed of as quickly as possible if there is no dispute as to who is entitled to take possession for burial or cremation like in this case. With respect, I agree with Mr. Kariuki, that the provisions of Section 137 of the Penal Code cannot be used against the respondents. The respondents are under a mistaken view that they are entitled to hold the deceased's body as a lien over the outstanding bills incurred by the deceased's estate. They do not have the criminal intent to hinder the burial the deceased's body.

18) Mr. Mogaka, cited two decisions rendered by this court to buttress his arguments.

19) In the case of **Ludindi Venant & Another vs= Pandya Memorial Hospital 1998 eKLR** Justice P.N. Waki (as he then was) expressed himself in part as follows:

“Simply put, there is a veiled threat by the hospital that if it is forced to release the body of the deceased, it will not in future admit and treat poor persons in this country. As a private commercial institution, there is nothing to stop the hospital from making good such threat. And there is no denying that the effect would be devastating since the majority of the citizens of this country live below the poverty line and can hardly afford good medical services although they deserve them no less than the rich. I am not oblivious to such consequences. But my judicial conscience is troubled. For I think, with utmost respect to the hospital, that on any view it would be equally repugnant to public policy to sanction the use of dead bodies as objects in the game of Commercial ping pong. Dead bodies are for interment or cremation or disposal without delay unless there is a dispute on where to dispose them or who should do it. The dead ought to “REST IN PEACE” while those who are left alive struggle with the realities of life such as payment of debts.

In this particular case there is no dispute as to who should bury the deceased or where he should be buried. The dispute is on a debt for medical services solicited for by someone who is still alive, not the deceased, and there are legal ways of binding such person to pay the debt owed. The dead body of the deceased ought not be part of that equation. For it is trite law that there is no property in a dead body. It cannot be offered or held as security for payment of a debt. It cannot be auctioned if there is a default. It cannot be used to earn rental income in a cold-room. In sum there is no legal basis for detaining it, and it would be callous and sadistic to hold otherwise.”

20) I share the sentiments expressed by the honourable judge. There is no property in a dead body. However, society and particularly the relatives have sentimental attachment to it. Some communities, believe that if the body is not properly interred, a curse may be visited on them.

21) **Jarred Martin and Chesray hans Arendse**, from the University of Kwa Zulu Natal conducted a research out of the trauma de-briefing program for the crew of a South African Navy Vessel after the death of a comrade during an anti-piracy operation of the East Coast of Southern Africa. In a paper titled **“Missing in action” the significance of bodies in African bereavement rituals**, the duo concluded as follows:

“This paper draws attention to the material significance of bodies in African bereavement rituals for both the deceased and bereaved. This is not done with the intent of burying the complex processes of identification for African bereavement rituals into the flesh. Rather acknowledging that there is a complex dialectic between the materiality of bodies, psychological processes, and the metaphysical realm. This is evident in the difficulties present in grieving when bodies are not present for traditional culture bereavement rituals. We found that the presence of the deceased’s body has practical significance for the initiation of a sequence of grieving processes drawn from cultural lore. Cultural lore also inter-implicates the deceased’s body in bereavement rituals which facilitate the transition of the deceased’s spirit to an ethereal realm. Hence the presence of the deceased’s body for bereavement rituals has repercussions for grieving and the understanding of future misfortunes.”

It is clear from the above excerpt that a corpse had no monetary value attached to it.

22) Mr. Mogaka also cited the case of **Norah Masitza Mamadi & Another –vs= Mombasa hospital Association T/A Mombaa Hospital (Unreported), Mombasa H.C.C.C. no. 153 of 2008** in which Justice Azangalala (as he then was) expressed himself as follows, inter alia

“The dispute between the plaintiffs and the respondent involves a dead body which must be disposed of at once. In that regard, I am of the view that this matter ought to be decided at once as special circumstances exist. The plaintiffs have demonstrated that they alone are interested in the release and burial of the remains of the deceased. I have also found that they have a right to receive those remains and bury them. The respondent does not claim such a right over those remains. Its primary interest is in its charges which it insists should be settled or a guarantee for payment of the same be made before the remains may be released. The respondent’s concern in my view should not delay the disposal of the remains of the deceased. The defendant’s claim is a charge on estate of the deceased. The deceased’s remains are not an asset that the respondent may hold as alien. The defendant cannot sell the same to recover its charges. It cannot pledge or otherwise use the remains as security. Indeed the defendant acknowledges that there is no property in the remains of the deceased. So the respondent has no basis for refusing to release the remains of the deceased at all.

The estate of the deceased will in due course be advertised before its administration is undertaken. There is no impediment to the lodging of the respondent’s claim then. Alternatively, the respondent can take out a citation in the event that no one is ready to take out letters of Administration.

As the respondent has not and will not at any time claim the remains of the deceased I find that in the circumstances that the injunction sought is directed at a simple and summary act, namely the release of the remains of the deceased for burial. The respondent’s interest in its charges does not lapse with the release and burial of the remains of the deceased. I therefore feel that at the trial it will appear that the injunction has been rightly granted.”

23) With respect, I am in agreement with the view taken by Mr. Justice Azangalala.

24) I have already outlined the principles applicable in applications for mandatory injunctions and I do not need to reproduce them here.

25) It suffices to state that such an order can only be granted in very clear cases. In the case before this court, there is no denial that there is no dispute as to who is entitled to take possession for burial the remains of Nyaigero Freddy Chieff.

26) There is also no dispute that there is a huge outstanding bill due and payable to the respondents by the

estate of the deceased and or any contractee. It is further not in dispute that the bill due to the respondents are civil debts which can lawfully be recovered by following the civil process. It is therefore clear to me that the applicants are entitled to the orders sought against the respondents since the respondents have no justification to continue holding the deceased's body.

27) In the end I grant prayer (b) of the motion. For the avoidance of doubt, this court issues an order directing the respondents Namely: **The Karen Hospital Ltd and Montezuma Monalisa funeral Home Ltd** by themselves, their servants or agents to forthwith unconditionally release/deliver to the applicants the remains/corpse of the late Freddy Chief Nyaigero for burial.

28) In the circumstances of this case, I think a fair order on costs is to direct, which I hereby do that each party bears its own costs.

Dated, Signed and Delivered in open court this 26th day of January, 2016

J. K. SERGON

JUDGE

In the presence of:

Miss Onkoba holding brief Mogaka for the Plaintiff

N/A for Njoroge for the Defendant