



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. 178 OF 2015

MALULA MAVUTI.....1ST APPLICANT
CHRISTINA MUTIE.....2ND APPLICANT
CATHERINE MAVUTI.....3RD APPLICANT
COSMAS MUTUA MAVUTI.....4TH APPLICANT

VERSUS

PAUL MUSANGO MAVUTI.....1ST RESPONDENT
PHILLIP JUMA MAVUTI.....2ND RESPONDENT
MESHACK MUTUNGA MAVUTI3RD RESPONDENT
JEREMIAH WAMBUA MAVUTI.....4th RESPONDENT
JUSTUS NGUYO MAVUTI.....5TH RESPONDENT

RULING

APPLICATION

1. The Appellants moved court through a Notice of Motion dated 18th November 2015 for stay of execution pending appeal from an order of the trial court made on the 11th November 2015 for the reburial of their deceased father in same burial site where the body had, at the applicants' request, been exhumed for purposes of post-mortem examination. The applicants and the respondents are children of deceased by different mothers.
2. The applicants sought orders that there be a stay of execution of the orders given by court through the ruling delivered on 11th November 2015 pending the hearing and determination of the applicants' application. They also prayed that the costs be provided.
3. The grounds for the application were that:

1. *The applicants have filed a memorandum of Appeal against the court's ruling of 11.11.2015.*
2. *Execution of the Orders passed herein by the ruling of 11th November against the*

plaintiff/applicants was imminent.

3. *Despite the applicants appeal, the mere effluxion of time compels the applicants to satisfy the Order they are challenging.*
4. *If stay of execution is not granted the applicants will suffer irremediable loss and damage.*
5. *Unless the application is granted the respondents may initiate adverse proceedings against the applicants to the detriment of the applicants.*
6. *Substantial loss will result to the applicants unless the orders sought are granted.*
7. *The application has been made without any unreasonable delay.*
8. *The application ought to be granted in the interest of Equity and Justice.*

4. In support of the application the applicants filed a supporting affidavit sworn by Christina Mutie dated 18.11.15 as follows:

1. *On 11th November 2015 the court delivered a ruling to the defendants application dated 4.09.15 whereby the court ordered the plaintiffs to perform the exhumation and reburial of the deceased before the end of 18.11.15.*
2. *Being aggrieved and dissatisfied with the said judgement they appealed against the same by filing a Memorandum of Appeal on 18th November 2015 and applying for certified copies of the proceedings vide a letter dated 16th November 2015.*
3. *They were willing to issue such security as the court may order for the orders of stay to be granted.*
4. *If they are compelled to perform the orders of the court their children and they will be accursed for performing the abominable act of reburying into a grave contrary to Kamba custom which they ascribe and follow and no success on appeal shall save them from such a curse.*

5. The respondents in reply filed a replying affidavit sworn by Justus Nguyo Mavuti wherein he swore that:

1. *Their father passed away on 25th March 2015 and his family buried him at his matrimonial home.*
2. *The applicants in the matter then filed a suit at Tawa Law Court claiming that their late father's remains be exhumed and post-mortem done. That their grievances did not include grave position or location.*
3. *After the hearing of the case the court ordered that their late father's body be exhumed and a post-mortem be done and after the post-mortem his remains be buried at the same grave.*
4. *After the post-mortem was done the appellant herein then proceeded and reburied their late father at the home of the 4th Appellant/applicant which was contrary to the order of the court.*
5. *They then proceeded and made an application for their late father to be re-exhumed and reburied at his original grave which the applicants had left open and unattended.*
6. *The applicants instead of complying with the court order appealed in this court.*
7. *The applicants were in contempt of court orders dated 17th November 2015 and their late father was entitled to be buried at his matrimonial home as ordered by the court and was his choice before passing on.*
8. *The applicants will not suffer prejudice if the application is not allowed.*
9. *The applicants have not satisfied court that substantial loss may result to them unless the order is made and that the application has not been made without unreasonable delay.*
10. *The applicants have not set security as court orders.*
11. *The filing of the application on 16th November 2015 was meant to derail the process of justice by delay and failing to implement the court order.*
12. *Filing of the memorandum of appeal on 18.11.15 was after the lapse of the execution window hence null and void.*
13. *Burying the deceased in different site, grave, location was blatant disrespect to the court's authority and in itself was a contempt of court and the failing to re-exhume and rebury was an act of impunity.*
14. *The applicants had from the first instance displayed the ability to meet any costs relating to re-exhumation/ re-burial and post-mortem and moving to the higher court did not extinguish the existence of the said costs and subordinate court orders.*

15. *The applicants had no respect for traditions or customs since they left the grave open to date after exhuming their deceased father. Further the applicants by burying the deceased in the home of the 4th applicant were in disregard of the right legal wife of the deceased from whose the body was exhumed before post-mortem and the subsequent illegal reburial. That the deceased had a home where he had directed to be buried. The deceased according to customs and best practices, ought to have been buried at his matrimonial home where he lived to his last days and subsequently buried on 2nd April 2015.*
16. *The reburial was supposed to be carried out in consultation with the respondents but the applicants secretly organised and reburied him which was not just for them.*
17. *The reburial of the deceased needed to consider the rights of other parties including sisters of the deceased who were not able to attend the reburial in the alien location.*
18. *The matter of final resting place of their father was not a preserve of the applicants and the 5 respondents. That the future generation had a right to access their ancestors grave without intimidation.*

6. In response, the applicants filed a further affidavit dated 14.12.15 sworn by the Christina Mutie where she deponed that:

1. *Indeed the entire appeal was premised on an order for re-burial dated 8.05.15 which was express and the appeal is premised on the interpretation of the order by the trial court of 11.11.2015 and especially the subsequent court that took over from the court that issued the order of 8.05.15.*
2. *The Hon. W. Cheruiyot order dated 8.09.15 sub 8 stated that the deceased was “to be buried on the same parcel of land currently buried”, for the subsequent court hearing the matter to state that the order of the court was that the deceased’s body be “re-buried to the same grave where it was previously exhumed” was propagating injustice against them and to hold them to a different standard than what is required.*
3. *That in Kamba customary law a deceased person is not permitted to be reburied into a grave from which a body is exhumed.*
4. *When they moved the trial court on 18.11.15 for orders of stay they were not heard on the same day as the officers of the court were in a meeting and the filed had been locked away and hence they accepted to appear before court on the following day to canvass their application.*
5. *After the court declined to grant them temporary reprieve they were advised by their advocate on record that they had no choice but to exhume the body and rebury into an earlier grave as ordered by court in its ruling of 11.11.15. That if they did not do so they would be in contempt of court orders and would have no right of audience.*
6. *They were also advised by the advocate on record that they could not move the lower court and high court in the same instance unless they abandoned their application. They abandoned the application in the lower court to lodge the application before the High Court.*
7. *They had done things in good faith, within the law and within reasonable parameters of time, to the best of their ability and their application was properly before court.*

The respective submissions of the Parties

7. The Court heard the counsel for the applicants, Mr. Kanui, and the respondents in person. In seeking an order for stay of execution, the applicants claimed that they failed to rebury the deceased in the same grave as it is contrary to Kamba Customs. The respondents countered that the Kamba Customary Law provided that a deceased person should be buried in his home stated unless he expressly wished otherwise which was not the case here. The respondents objected that they did not know where the new burial site was and could not access it, and contended that the deceased should be buried where all the members of his family could access.

The principles for the grant of stay of execution

8. Under Order 42 rule 6 (2) of the Civil Procedure Rules stay of execution can only be granted upon fulfilment of two conditions, namely that the applicant demonstrates that he would suffer substantial loss if stay is not granted and secondly that the applicant [provides such security as the

court may order for the performance of the order of the Court as mat eventually be binding o n the applicant.

Substantial Loss

9. The applicant has not demonstrated substantial loss if stay is not granted. No evidence by affidavit from an expert on Kamba Customs or from a treatise on Kamba Customary Law was adduced to prove the ostracization claims following reburial in the same grave. The applicants also pleaded loss by way of proceedings of contempt of court. There cannot be a valid loss for compliance with a court order. It may be aground for extension of time to comply with the order; not a ground to justify stay of execution of the order which the applicant is bound to obey.
10. The allegation that it would cost Ksh.500,000/- to carry out the reburial was also not supported by evidence. Moreover, if the appellants are successful in the appeal after having reburied the deceased on the grave site as ordered by the Court, the respondent may be ordered to repay the money in addition to reburying the deceased in accordance with the directions of the appeal court.
11. I agree with the submission by the respondent that the issue of a curse under customary law was only an after-thought as the same was not raised when the applicant first sought an order for exhumation leading to the order of 8th May 2015 in the trial court. In the supporting affidavit to the application before the lower court for exhumation sworn on 7th April 2015, the applicants in a joint affidavit annexed to the replying Affidavit herein deponed that the respondents had secretly buried the deceased without a post-mortem and without involving the applicants thereby raising suspicion, and the applicants therefore sought exhumation for purposes of post-mortem and subsequent burial with participation of all the children and relatives of the deceased in and on accordance with Christian burial rite. At paragraphs 7-10 thereof the applicants deponed:
 7. **That we have every reason to suspect foul play due to the suspicious conduct of the defendants.**
 8. **That it is our prayer that the remains of the deceased be exhumed so that a proper cause of his death is established and thereafter a decent burial where all the children and relatives of the deceased participate be conducted.**
 9. **That the deceased was a Christian and Christian rites were not conducted as there was no memorial service that was done due to the haste by the defendants.**
 10. **That we are prepared to foot the exhumation and post-mortem expenses.**
12. It would appear that the application for exhumation was only a ruse to have the body exhumed so that they could bury it at a place of their choice on the pretext of customary curse. If there were genuine fears of a curse, the applicants would have reburied the deceased in a fresh burial site adjacent to the old grave on the same parcel of land and not to bury him on an altogether new site on a different parcel of land.
13. Curiously, despite their reliance on Christian burial rites as a ground for the exhumation, the applicants then sought to front the excuse of a curse or ostracization under Kamba Customs if they complied with the order of the court to rebury the deceased after post-mortem in the same burial site.
14. Once exhumed there would be costs for the reburial of the deceased and the applicants must be taken to have undertaken to meet the expenses of the reburial also. The costs of the reburial ordered by the court by its order of 11th November 2015 flow directly from the applicants' application for exhumation. They cannot now be heard to urge the cost of proper reburial in accordance with the order of the Court as a substantial cost to warrant a stay of execution.

Whether appeal has overwhelming prospects of success.

15. Sometimes the success of the appeal is offered as a factor for consideration in the case of stay of execution. Sometimes the question is put as whether the appeal raises an arguable case, not necessarily one that will succeed. I have perused the Memorandum of Appeal, and without prejudice to the appellate court's finding upon hearing of the appeal, I am not able to hold that the trial court was plainly wrong in its decision sought to be appealed from so as to demonstrate an

appeal with an overwhelming chances of success. However, in view of the express provisions of Order 42 rule 6 (2) of the Civil Procedure Rules, the prospects, or otherwise, of an appeal is secondary to the requirements of substantial loss and provision of security.

Other consideration

16. Counsel for the applicants submitted that the applicant were ready to have the respondents rebury the body of the deceased at the previous site. The respondents seek that the deceased be buried at his matrimonial home where he is accessible to his children and his other relatives. As opposed to burial at a place where he is not accessible by some members of the family, it commends itself to order that deceased be buried at a place where he is accessible to the family. The applicants did not allege that the deceased's grave at the original site was not accessible to them. They only objected to reburial in the same grave. No explanation was given then for the burial at a completely different locale on another parcel of land. The balance of convenience lies in the deceased being restored to his grave at an accessible site. Should the appeal eventually succeed, the court will make final orders as to the resting place.

Conclusion

17. Having found that the applicants have not demonstrated substantial loss if stay of execution is not granted, there is no need to call for security or to determine whether an arguable or overwhelming case for the appeal is demonstrated. I decline to grant the stay of execution sought by the applicants.

Orders

18. Accordingly, for the reasons set out above, I dismiss the application dated 19th November 2015 with costs to the respondents.

DATED AND DELIVERED THIS 29TH DAY OF MARCH 2016.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Kanui for the Appellants

Respondents present in person

Mr. Mutero - Court Assistant.