



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
JUDICIAL REVIEW NO.4 OF 2015
LEAH TONU.....PLAINTIFF
VERSUS
ELIAS MWANGANGI NJOGU.....DEFENDANT
ORDERS/DIRECTIONS

(Under Article 165 (6) & (7) of the Constitution)

1. It has come to the attention of this Court that there are certain happenings in Kericho C.M.C.C No. 58 of 2015 which are disturbing.
2. Pursuant to the provisions of **Article 165 (6) & (7)** of the **Constitution** this Court has called for the said original record.

Article 165 (6) provides;

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

Article 165 (7) provides;

“For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

3. Upon perusal of the said record I have confirmed that the Plaintiff in the said file filed a Complaint on 11th February, 2015. The same was later amended and filed on 20th February, 2015.
4. The Defendant too has filed a defence. There are interlocutory applications which have been filed by the Plaintiff and the same were heard *ex-parte* with drastic orders being made by the Subordinate Court namely;
5. (i) On 25th February, 2015 Hon. J. Nyagol, Resident Magistrate issued an order for exhumation of the deceased's body when the Defendant had not been served. She only heard the Plaintiff *ex-parte* and issued

the said orders. The body was to be preserved at a mortuary in Embu town.

6. (ii) On 10th March, 2015 Hon. B. Limo, Resident Magistrate again upon hearing the Plaintiff *ex parte* and without service on the Defendant issued an order for removal of the deceased's body from a mortuary in Embu to Kericho for Postmortem.

7. It is nowhere explained that the postmortem was to be conducted in the presence of both parties and/or their representatives.

8. It is also not shown that there were no pathologists and/or doctors in Embu who could have carried out a postmortem on the deceased's body, to require such a drastic order by the learned Trial Magistrate.

9. The Defendant orally applied for recusal of Hon. B. Limo, Resident Magistrate but the said officer disallowed the application.

10. It has come to the notice of this court that in fact the Plaintiff has removed the body of the deceased from the mortuary and buried it. This in itself amounts to disrespect of the Court.

11. The Plaintiff filed a suit in Court where one of the issues for determination is the burial place for the deceased. This has not been determined and the Plaintiff has determined it herself!

12. She used the Court to have the body removed from Embu to Kericho under the pretext of conducting a postmortem just for her to take the body for burial.

13. An analysis of all these happenings clearly shows an abuse of the Court process. Judicial Officers must at all costs resist the issuance of *ex parte* interlocutory orders which would be interpreted to portray bias.

14. There was no urgency shown which could have made the Court lock out the Defendant in this whole process, yet he is laying claim on the deceased's body.

15. He has a right to be heard and thereafter a decision made on merit. How can he ever say he received justice before the two subordinate courts that have handled this matter?

16. The other issue is jurisdiction. The deceased died in Meru where she worked. The Defendant buried her in his home in Embu County as he claims to be her husband. The body was preserved at a mortuary in Embu following a Court Order.

17. There is a 2nd Defendant **JUSTIN NYAKI NGURE** representing the **GEKARA CLAN** which hails from Mbeere South Sub-district of Embu County which is the 1st Defendant's home. This may have informed Hon.J.Nyagol's decision to have the body preserved at a mortuary within Embu town.

18. It is therefore clear that the Court with jurisdiction to hear this matter is the Chief Magistrate's Court, Embu.

19. It is in the interest of justice that this matter be heard expeditiously with all parties involved being given an opportunity to state their case.

20. And for the above reasons I hereby make the following Orders/Directions:

(i) The Orders in Kericho C.M.C.C No.58 of 2015 issued on 11th February 2015, 25th February 2015, 10th March, 2015, Ruling of 22nd April, 2015 are hereby set aside.

(ii) The Plaintiff is directed to file in Court the postmortem (if any) in respect of the deceased within five (5) days.

(iii) The body of the deceased Lilian Chepkorir Tonui which was removed from the mortuary and buried by the Plaintiff within Kericho County without leave of the Court and before determination of the suit shall be forthwith exhumed by the Kericho County Public Health Officer, and be kept and preserved at Kericho District Hospital Mortuary awaiting collection by the Defendants who will keep the body preserved at Embu Provincial General Hospital Mortuary pending the hearing and determination of this suit.

(iv) The OCPD Kericho, of Kericho County in whose jurisdiction the body is buried will provide security while the orders herein are being executed.

(v) This suit is hereby transferred to Embu Law Courts for hearing by the Chief Magistrate Embu.

(vi) All parties to appear before the said Court on 8th June, 2015 for purposes of taking directions for hearing of the matter.

(vii) The suit to be heard on a day to day basis to avoid unnecessary expenses.

(viii) Let the Plaintiff explain to the court during the hearing why she acted in contempt of Court by removing the body from the mortuary and burying it when the Order issued to her was clear that the body remains there until the application is heard and determined.

(ix) The Deputy Registrar to ensure that all the parties plus the Kericho County Public Health Officer and the Kericho OCPD are served.

(x) The file Kericho C.M.C.C No.58 of 2015 to be transferred to Embu forthwith. A copy of these Orders/Directions to be availed to Hon. B. Limo, Resident Magistrate and Hon. J. Nyagol, Resident Magistrate.

Dated and signed this 28th day of May, 2015.

H.I.ONG'UDI

JUDGE