



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL SUIT NO. 58 OF 2015

MATHEWS MABUSI PLAINTIFF

VERSUS

WILLIAM SITUMA

EDNA SITUMA..... DEFENDANTS

RULING

1. The Notice of Motion dated 21st April, 2015, is brought under Order 40 Rules 1, 2, 3, & 4 of the Civil Procedure Rules and S.34 of the Civil Procedure Act and is for orders that pending the hearing and determination of this suit a temporary order of injunction be issued restraining the defendants / respondents jointly and severally, their family members and / or any other person or person acting through them from removing the body of Christine Nanjala Situma from the mortuary at the Cherenganyi Nursing Home or elsewhere or burying the body at any other place apart from the deceased's matrimonial home at No.376 Kapkoi- West Scheme Kwanza Sub-County of Trans-Nzoia County.

2. The grounds for the application are contained in the body of the Notice of Motion and fortified by the averments in the supporting affidavit dated 21st April, 2015 and the supplementary affidavit dated 21st May 2015 both deponed by the applicant/ plaintiff .

The respondents oppose the application on the basis of the grounds contained in their replying affidavit dated 24th April, 2015 deponed by the second respondent and further replying affidavits dated 29th May 2015, deponed by one Michael Munyekenye Situma and one John Khaoya.

3. The learned counsel, **Mr. M. Wafula**, argued the application on behalf of the applicant while the learned counsel, **Mr. Okile**, opposed the same on behalf of the respondents.

Having considered the arguments put forth by both sides, it is apparent to this court that the real dispute between the parties is the disputed marriage between the applicant and the deceased and in particular under the Bukusu Customary Law. Indeed, the main prayer in the suit is for a declaration that under the Bukusu Customary Law the applicant is entitled to bury the body of his deceased wife, Christine Nanjala Situma.

4. The arguments presented by both parties were largely on matters which cannot be determined at an interlocutory stage without in effect determining the entire suit. In other words, the arguments were suitable for purposes of the full hearing of this suit. However, what this court was made to understand is that whereas the applicant contends that he has a “**prima facie**” case with high probability of success, the respondents contend otherwise. The respondents also contend that the balance of convenience in the present circumstances would tilt in their favour.

5. The principals for grant of a temporary injunction were clearly set out in the famous case of ***Giella vs Cassman Brown & Co. Ltd.***(1973) E.A.358. Thus, **Firstly**, applicant must show a prima facie case with a probability of success, **Secondly**, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. **Thirdly**, if the court is in doubt, it will decide an application on the balance of convenience.

These principles have applied for a long period of time and continue to apply to this day. They are settled principles and represent the law on grant of temporary on interlocutory injunction provided for under Order 40 of the Civil Procedure Rules 2010.

6. Basically, the courts primary task is to give a full scale, impartial hearing, before determining winners and losers, in its final decree and orders. It is such process conducted through evidence and submissions that leads the court towards an ascertainment of the justice of a case. The justice of a case ultimately emerges from the main suit rather than in interlocutory applications.

Nevertheless, an injunction is primarily preventive or protective in character, generally operating upon unperformed and unexpected future, rather than past acts. Thus, a temporary injunction is a provisional order to restrain the doing of a particular act or to require a certain state of affairs to be altered for the time being, either until the trial of the suit or until further order. It lasts only for the special time or occasion specified in the order (*see, “Principles of injunctions” by Richard Kuloba.*

7. In this case, the applicant alleges that the deceased was his wife having undergone a ceremony of marriage under Bukusu Customary Law in the year 2002, and that the marriage had since resulted in five issues aged between nine (9) and two (2) years. That, he began burial arrangements for deceased after she passed away on 17th April, 2015 but later learnt that the respondents were arranging to bury the deceased at their home without involving him and contrary to customs. The applicant contends he is entitled to bury the deceased in accordance with the Bukusu customary law and in particular the beliefs, traditions and practices of the “**Bakhaweka**” clan rather than those of the “**Balunda**” clan to which the deceased belonged.

8. The respondents on their part allege that the deceased was never married to the applicant as he never paid any dowry to them as her parents. That, for their relationship to have been solemnized under Bukusu Customary Law, dowry ought to have been paid. That, they (respondents) being the biological parents of the deceased are entitled to bury the deceased as she was not married to the applicant or anybody else at the time of her death. That, the applicant never took care of the deceased while she was ailing such that they (respondents) took her to hospital and paid all the hospital bills amounting Kwshs.20,705/= . That, the applicant never bothered about the deceased while ailing and only bothered about her after her death.

9. On the issue of dowry, the applicant contended that the same was paid in the form of school fees for the siblings of the deceased and in the form of cash money Kshs.25,100/= through M-pesa transactions in favour of the respondent's son called Michael Munyekenye who could receive his sister's dowry in accordance with Bukusu Custom.

The said Michael Munyekenye, denied the allegations and indicated that the amount of money aforementioned was a refund of money owed to him by the applicant. He contended that under Bukusu Customary Law, he was not allowed to receive dowry while the parent of the deceased are alive.

A Bukusu elder, **John Khaoya**, said that he was 95 years old and affirmed that under Bukusu Customary Law no marriage arises between a man and woman staying together if dowry is not paid. That, such a relationship is merely a friendly one and cannot amount to a marriage.

10. From all the foregoing facts, it is apparent that the actual relationship which existed between the deceased and the applicant cannot be ascertained at this juncture and without further cogent evidence to prove or disprove the applicant's claim.

Suffice to hold that this court is at a loss in determining whether or not a *prima facie* case with probability of success has been established by the applicant and more so on the basis of scanty affidavit evidence availed here. There has also been no demonstration by the applicant that he stands to suffer irreparable harm if an injunction is not granted. If anything, what he may suffer is loss of money which would not amount to irreparable damage or injury.

11. This court is thus left with the third option (i.e. balance of convenience) in determining whether or not an injunction should be granted against the respondents.

Now that this case cannot be determine on the basis of the affidavit evidence availed here and without further evidence which ideally would come from the trial of the case and given that the crucial prayer in the main suit is a declaration that the applicant is entitled to bury the deceased as his wife and in accordance with the Bukusu Customary Law, the balance of convenience dictates that the burial of the deceased be halted until such time that the case shall be heard and determined or until further orders.

In that regard, the present application is granted in terms of prayer (c) of the appropriate Notice of Motion. Each party to bear own costs of application.

[Read and Signed this 17th day of June, 2015]

J. R. KARANJA

JUDGE