



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. 62 OF 2013
(FORMERLY NAIROBIN CMCC NO 6966 of 2012)

GRACE THOGORI KOMO.....PLAINTIFF

V E R S U S

DAN NJAGI NDWIGADEFENDANT

R U L I N G

1. The suit herein is a burial dispute. It commenced in the *Chief Magistrate's Court* before it was transferred to this court. On 11th December 2012 the lower court ordered by consent, *inter alia*, in exchange for a temporary injunction, that the Plaintiff will pay mortuary fees for preservation of the Deceased's body until hearing and determination of the suit. That order is still in place.

2. Hearing of the suit commenced on 16th April 2013 but for various reasons that are on record, including the trial judge being on leave at some point for about 2 months, the trial has not yet been completed. On 15th January 2014 the case was fixed for further hearing on 4th February 2014. But on 24th January 2014 the Defendant filed a **notice of motion dated the previous day** for the main order that the Plaintiff be ordered to deposit security in the form of money to cater for mortuary fees that will be owed at the conclusion of the suit, such deposit to be in a joint account to be opened in a reputable financial institution in the names of the advocates on record for the parties.

3. The application is apparently brought under the inherent power of the court. The grounds thereof appearing on the face of the application include –

- (i) That the Plaintiff has demonstrated lack of diligence in prosecuting the case, thus occasioning delay in concluding the case.
- (ii) That mortuary fees are escalating daily and there is likelihood that the Plaintiff “will not be in a position to raise” the necessary amount at the end of the suit.

There is a supporting affidavit sworn by the Defendant to which a document is annexed showing that **daily** mortuary charges at *Kenyatta University Funeral Home* where the Deceased's body is preserved are KShs 600/00.

4. The Plaintiff has opposed the application by grounds of objection dated 29th January 2014 (there is no replying affidavit). Those grounds include –

(i) That the Plaintiff “has never sworn any undertaking affidavit ... and there is no order for her to pay mortuary fees...”.

(ii) That the application is “non-meritorious, incompetent, pre-mature, *malafide* and otherwise vexatious, frivolous and an abuse of court process”.

(iii) That the Defendant should be ordered to deposit “security for costs to cater for mortuary as he has come out with this idea himself”.

5. By consent of the advocates for the parties this application for security for mortuary costs was heard on 4th February 2014. I have considered the submissions of learned counsels appearing.

6. Upon the court drawing the attention of the Plaintiff’s learned counsel, Mr Kinuthia, to the consent order of 11th December 2012, against which the Plaintiff’s then learned counsel (as well as the Defendant’s counsel) appended his signature, he appeared surprised by it, as if he was unaware of the order. But that did not deter in any way his vigorous opposition to the application.

7. The Plaintiff already has an obligation under the aforesaid order of 11th December 2012 to pay mortuary costs up to the time the court gives its judgment. She appears not to have disclosed the said order to her new advocates. She has vehemently opposed the application for security for those mortuary costs. Her conduct in this application is therefore indicative of likelihood that she may not willingly pay the mortuary costs, as she is obliged to, whatever the judgment might be. The Defendant’s apprehension in this regard is thus not unreasonable.

8. Another drawn-out wrangle, this time over payment of mortuary fees at the conclusion of the case, should not be allowed to crop up. This will not be in the interests of justice.

9. I will in the event allow the application and direct that the Plaintiff shall deposit in court within twenty-one (21) days of delivery of this ruling the sum of KShs 200,000/00. This sum shall go towards payment of mortuary costs at the conclusion of the case. In default there will be liberty to apply. It is so ordered.

10. Costs of the application shall be in the cause.

DATED AND SIGNED AT NAIROBI THIS 12th DAY OF FEBRUARY 2014

H.P.G. WAWERU

JUDGE

DELIVERED THIS 14TH DAY OF FEBRUARY 2014.