



REPUBLIC OF KENYA

Cases in Magistrate Courts

Miscellaneous Civil Application 8 of 2012

OMBIJAH OMOLO.....1ST APPLICANT

JOHN OKELO RACHUONYO.....2ND APPLICANT

CHRISTOPHER OMOLO CHOKA.....3RD APPLICANT

AND

FLORENCE CHOKA.....1ST RESPONDENT

MARTIN ELIJAH CHOKA.....2ND RESPONDENT

ANDREA ASETO CHOKA.....3RD RESPONDENT

ELIDA ANYANGO CHOKA.....4TH RESPONDENT

LORNA AUMA ODHIAMBO.....5TH RESPONDENT

JOYCE ACHIENG OMOLO.....6TH RESPONDENT

RULING.

By a chamber summons Application dated 10.2.2012 brought under certificate of urgency the 3 applicants sought the following orders against the 6 Respondents:-

1.

2. The Honourable court be pleased to order a summons to issue directed at the six respondents above in whose custody the person of Ezra Omolo Choka improperly detained is, summoning them to appear in person to show cause why Ezra Omolo Choka an old man aged 107 years should not be forthwith released or set free.

1. The costs of this application be provided for in favour of the Applicants.

In other words they seek directions in the nature of Habeas Corpus.

The grounds for the application were as follows:-

a. The applicants are acting for and on behalf of the family of Ezra Choka Omolo, a male senile aged 107 or thereabout.

b. The Respondents who are some of the 22 children of Ezra Choka Omolo have kidnapped and concealed the whereabouts of the old man who is sickly and is constantly under medical care at Tenwek Hospital.

c. The financial requirements for the necessary upkeep subsistence, medication and sanitary care of the said Ezra Choka Omolo is far beyond the capability of the Respondents.

d. Most of the Respondents do not have fixed abode or steady and reliable sources of income.

e. The act of kidnapping and removing the person of Ezra Choka Omollo from the home of his son at Athi River is cruel, inhuman and a gross violation of the constitutional rights of the said Ezra Choka Omolo.

f. The conduct of the Respondents in all respects unlawful, misguided, misconceived and primitive.

The application is supported by an affidavit sworn by Christopher Omolo

Choka the 3rd Applicant to which he has annexed some documents.

The respondents filed a replying affidavit sworn by Judith Awuor Choka the 7th Respondent. The same has several annexure.

Before the application could be heard Ezra Choka Omolo, the subject of the same, passed on.

On the day of the hearing the applicants were represented by Mr. G.S. Okoth whereas the Respondents were represented by Mr. Ogejo. Mr. G.S. Okoth informed the court that the 1st applicant was a brother of the deceased, the 2nd applicant a grandson and the 3rd applicant one of his children whereas the Respondents are some of the children. He urged the court to order the matter referred to a magistrate to hold an inquest as provided under S 386 of the Criminal Procedure Code. He submitted that this is because there may be circumstances that could give rise to suspicion as to the cause of death and only an inquest could determine the cause of death.

Mr. Ogejo for the Respondents while confirming that Mr. Ezra Choka Omolo had passed on submitted that a post mortem request was made so as to ascertain the cause of death and that there is already a complaint at the central Police Station in Kisumu. The same is pending investigations. He submitted that what I am being asked to do would be a nanton abuse of the court process. That if the police should find the death suspicious there is a procedure to follow. He contended that the applicants ought to await the conclusion of investigations. He submitted further that no leave was sought to make the prayer for an inquest and such leave could only be obtained from the Attorney General. He urged the court to find the application unmerited and to dismiss it with costs.

In his reply Mr. Okoth submitted that had the subject been alive an order for habeas corpus would issue. That the court has power to issue any other orders and Section 386 is clear. He contended that they are not asking for a private prosecution which would require leave to be obtained first. He contended that the provisions of S 386(1) © have been satisfied and no leave is required. That the order is only sought so as to establish the cause of death.

I have considered the application, the grounds thereof, the affidavits in support and in reply and the annexures thereto.

I have also considered the rival submissions put forth at the oral hearing. The subject of the application having passed on the directions in the nature of Habeas Corpus cannot issue. Being alive to that Mr.

G.S.Okoth seeks that this court orders that an inquest be held to establish the cause of death.

I do however agree with Mr. Ogoje, Advocate for the Respondent that it would not be appropriate to grant that order at this stage. As stated by Mr. G.S. Okoth the provisions of S. 386 of the Criminal procedure Code regarding inquests are clear.

Indeed it all starts at S. 385, S. 386(1) gives the police powers to inquire and report on suicide and other deaths to a magistrate who shall then order an inquest. S. 387(1) gives power to magistrates to hold inquests where a person dies while in the custody of the police or prison officer. S. 388(1) then gives powers to the Attorney General as to inquiries into cause of death. The respondent's Advocate has demonstrated that the applicants have instituted a complaint with the police regarding the death of the subject. Investigations seem to be underway as a post mortem was carried out and results are awaited. It would be best therefore that they await the outcome of that investigation. The application is accordingly rejected but considering the nature and circumstances of these proceedings. I order that parties shall bear their own costs. It is so ordered.

E. N. MAINA

JUDGE. 19.3.2013.

The ruling is signed, dated and pronounced in open court in presence of:

Mr. Ongoso Holding brief for Mr. G.S. Okoth for the Applicants.

No attendance for the respondents but applicants.

CC Eudice

Interpretation English/dholuo.

E.N. MAINA

JUDGE 19.3.2013.