



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CIVIL SUIT 7 OF 2012

LUCY KEMBOI.....PLAINTIFF

VERSUS

1. CLETI KURGAT.....1ST DEFENDANT

2. BENJAMIN KURGAT.....2ND DEFENDANT

3. VERONICAH KURGAT.....3RD DEFENDANT

4. AGNES KURGAT.....4TH DEFENDANT

5. BENADETTE KURGAT.....5TH DEFENDANT

6. CONSOLATA KURGAT.....6TH DEFENDANT

RULING

The application before this court is a Notice of Motion dated the 14th March, 2012 brought under Section 3, 3A and 63 (e) of the Civil Procedure Act and Order 42 Rule 6(1) 2(a) (4), (5) and (6) of the Civil Procedure Rules.

This matter relates to a burial dispute in respect to the place of interment of the Applicant's late husband. The Applicant being aggrieved with the court's decision has lodged an appeal to the Court of Appeal and seeks a Stay of Execution pending the hearing and determination of the appeal.

The Applicant relies on the grounds set out in the body of application and her affidavit sworn on the 14th March, 2012.

It was submitted by the Applicant's Counsel that the application was timeous as it was made within twenty-four (24) hours and without any undue delay.

That the appeal was not frivolous and had overwhelming chances of success and the appeal would be rendered nugatory were the orders for stay of execution not granted.

The Applicant further submitted that she would suffer substantial loss if the orders sought were not granted and that she was willing to indemnify the Respondents for loss and damage.

The body has not been interred and that the Applicant is equally suffering due to the long wait but is seeking for a just decision and therefore prayed that the application be allowed.

The application as opposed and the Respondents relied on the affidavit sworn by **Cleti Kurgat** on the 11th April, 2012.

The Respondent argued that the Applicant had not demonstrated sufficient cause to warrant or merit the orders sought of stay for execution.

That the applicant had not demonstrated the substantial loss she would be subjected to if the body were buried. The Public Health Act Chapter 242 Laws of Kenya provided for exhumation which the Applicant would rightfully do were she to succeed in the appeal.

The Respondent also argued that the Applicant had furnished no security to indemnify the Respondents for loss.

The Respondents therefore prayed that the application be dismissed and the Respondents be allowed to enforce the Judgment.

I have heard the respective arguments of both Counsel for the Applicant and Respondents and I have perused the affidavits filed herein for and against the application.

I find that the Applicant has satisfied the conditions for granting of an order for stay of execution. Firstly the application was filed timeously. Secondly if the body is interred even if the Applicant has a right to exhume the same, she will suffer substantial loss in the form of emotional stress. The application therefore is meritorious. There shall be a stay of execution pending the hearing and eventual determination of the appeal to the Court of Appeal provided the Applicant pays the sum of Kshs 80,000/= forthwith to the Moi Teaching and Referral Hospital being the current outstanding charges for storage and preservation of the body of the late **AMBROSE KIPKOECH KURGAT**.

Further the Applicant to continue paying for storage charges to the said hospital in the sum of Kshs 21,700/= with effect from the 30th April, 2012 and on the last day of each and every succeeding month until determination of the appeal. In default of any one payment the orders for stay of execution shall lapse and the Respondents will be at liberty to execute the decree.

The Applicant is condemned to pay the costs of this application.

Dated and delivered at Eldoret this 20th day of April 2012.

**A.MSHILA
JUDGE**

Coram: Before: Hon. A Mshila J

CC: Collins

Counsel for the Applicant.....

Counsel for the Respondents.....

**A.MSHILA
JUDGE**