



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

Civil Suit 464 of 2012

JACKLINE NJAMBI KINYANJUI..... APPLICANT/PLAINTIFF

VERSUS

MARGARET WAIRIMU. RESPONDENT/DEFENDANT

R U L I N G

The application before the court is the Amended Notice of Motion dated 19th September, 2012. It seeks that: -

a) An order do issue restraining the Defendant/Respondent and/or her agents and or her servants from removing the mortal remains of the late Arthur Kinyanjui Magugu from the mortuary or burying the same pending the hearing and determination of this suit.

And in the alternative that: -

b)The Respondent and her agents and servants be restrained and be prohibited from barring the Applicant from attending and fully participating in the funeral and burial arrangements of the late Arthur Kinyanjui Magugu.

c) In the event the defendant disputes Applicant's paternity, the Applicant be allowed to extract a DNA sample out of the remains of the late Arthur Kinyanjui Magugu before burial and the same be remitted for testing to the Government Chemist, Nairobi and thereafter a report indicating the results be filed in court.

The Applicant bases this application on the grounds that she is a daughter of the Late Arthur Kinyanjui Magugu by a second wife of the deceased called Maria Wambui Njuguna. She also depones that the Respondent/Defendant has maliciously sidelined her in the burial arrangements and failed to publish the information that the Applicant is the daughter of the deceased by a second wife. Finally, the Applicant also stated that she relied upon the contents of the affidavit she had sworn on 19th September, 2012.

At the hearing, the Respondent who had filed a replying affidavit, orally raised Points of Objection based on the law and Civil Procedure. Mr. Chege on behalf of the Respondent, argued that the application of the Applicant should be struck out for being incurably incompetent on the following grounds: -

a) That the Amended application before the court was not supported by any affidavit as required by law. He asserted that once the original Notice of Motion was amended, it was effectively replaced by

the amended one and therefore required a fresh affidavit of support. She argued that the supporting affidavit filed in support cannot be considered to be supporting the Amended Notice of Motion.

b) That the Amended Notice of Motion was incompetent also for having introduced totally new matters and prayers which did not flow from the original prayers and which changed wholly the nature of the application.

In response Mr. Kangata for the Applicant expressed a different opinion. He said that while the Amended application in a way took over the place of the original Notice of Motion, it really did not stand unrelated to the original one. He said that there was no rule of Civil Procedure which demanded that an Amended Notice of Motion called for a fresh supporting affidavit and that accordingly, the original supporting affidavit remained in support of the Amended Notice of Motion. He referred the court to the provisions of Section 1A and 1B of the Civil Procedure Act and Article 159(2) of the Constitution.

I have carefully considered the arguments from both parties. I have also perused the provisions of law to which the court was referred. I observe that the amendment introduced into the Amended Notice of Motion was the addition of two alternative reliefs to the original prayers. It is also clear that the Applicant specifically supported the Amended Notice of Motion with the affidavit sworn by the Applicant Jacqueline Njambi Kinyanjui on 19th September, 2012. The fact that the same affidavit had supported the first Notice of Motion did not in my view, make much difference.

In the above circumstances, the Applicant clearly and intended the court to rely on the original affidavit of support to support the Amended Notice of Motion. He expressly based the Amended Notice of Motion upon the said supporting affidavit and stated so. This court has no reason to contradict the Applicant's express intention. That to me means that the Respondent clearly misunderstood the point. Had the Applicant failed to expressly rely on the affidavit in respect of the Amended Notice of Motion, it might then have been interpreted differently.

On the other hand, even if the Applicant could have failed to expressly link the said affidavit with the Amended Notice of Motion, the view of the court would still be that the amendment alone, did not nullify or displace the affidavit. This is because an amendment does not nullify the amended original document. It alters parts of the origin

nal pleading so as to bring it in line to the relevant issues in dispute. If such amendment alters part of the pleadings and require support of additional sworn facts, a further affidavit in support might be called for or be necessary. In this case the additional reliefs sought did not probably seek such additional or fresh affidavit.

It is the view of the court accordingly that the Preliminary Objections before the court, do not carry much merit. It is unfortunate that the raising of the same have wasted the court's time in a matter where time is of the essence and where the main application should by now have been disposed off. May be that was the Respondent's undisclosed purpose in raising the points.

Be that what it may, the Preliminary Points of law raised are hereby dismissed and costs arising therefrom which is for half day, will be met by the Respondent for raising frivolous Points of Objection.

Dated and delivered at Nairobi this 20th Day of September, 2012.

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D A ONYANCHA
JUDGE