



## REPUBLIC OF KENYA

### High Court at Nairobi (Nairobi Law Courts)

#### Civil Appeal 512 of 2012

#### Editorial Summary

1. *Civil application*
2. *Civil Practice & Procedure Court case*
3. *Subject of main Subordinate court case*

#### *BURIAL DISPUTE*

3.1 *Court held in its judgment burial location be as per respondent's husband's wishes.*

3.2 *Children (adult) appealed to High Court.*

3.3 *Appeal filed 3<sup>rd</sup> October 2012.*

3.4 *Application dated 2<sup>nd</sup> October 2012 seeking stay of court judgement.*

4. *Application 2<sup>nd</sup> October 2012*

4.1 *Parties are not objecting to stay of court's judgment.*

4.2 *Issue of costs*

a) *Arguments by applicant plaintiff.*

*They wish the costs be at*

*Ksh. 100,000/-*

4.3 a) *Arguments by respondent defendant*

*That there be costs of Ksh. 200,000/-,*

*some parties are out of the*

*country.*

5. *Held:*

5.1 *Costs to be provided by appellant*

*jointly & severally Ksh. 100,000/-*

5.2 *Mortuary charges be shared at 50%*

5.3 *Ksh. 100,000/- be deposited in interest earning  
account.*

6. *Case Law:*

7. *Advocates :*

i) *J.M. Njenga instructed by M/s J.M. Njenga. & Co Advocates for applicants*

ii) *N.W. Amolo instructed by M/s Amolo & Kibanya & Co Advocates for respondents*

**SARAFINA WANJIKU KINYANJUI**

**PHYLIS WAIRIMU NJENGA**

**WANJIRU NJURU**

**JAMES MBURU KINYANJUI**

**GEORGE NJOROGI KINYANJUI**

**PAUL KAMAU KINYANJUI ..... APPELLANTS**

**VERSUS**

**ELIZAPHASON KINYANJUI MUKORA .....**

**RESPONDENT**

**R U L I N G**

**Issue of Costs**

## **I. BACKGROUND**

1. The magistrate's court at Milimani Commercial Courts heard and determined a burial dispute between the appellants, being the children of the deceased, Kenyatta University which has a funeral home where the deceased remains lay and the respondent Elizaphason Kinyanjui Mukoria, the husband to the deceased and father to the appellants.

2.The magistrate's court held, in its judgment, that burial of the deceased would be, the person entitled to bury the deceased under Kikuyu customary law. He in effect would determine the burial site.

3.The children (adults) appellants herein being aggrieved filed a appeal to this High court on the 3<sup>rd</sup> October 2012. Together with the appeal was an application seeking stay of the magistrate's court's judgment.

4.This court granted the application *ex parte* on the 3<sup>rd</sup> October 2012. It was agreed by parties prior to the *interparte* hearing being heard on 8<sup>th</sup> October 2012 that, in principal, the stay of the court's judgment would be conceded. This is on condition the hearing of this suit is fast tracked.

5.The issue between the parties was the issue of costs. Should this be provided for pending the appeal.

## II COSTS

6.The respondent original plaintiff argued that there indeed must be security of costs to be provided for by the appellant. This was in two portions. The costs that would cover both the magistrate's court and the High Court, then, the mortuary charges. A reasonable sum of

Ksh. 200,000/- was sought.

7.In reply, the appellant argued that cost is at discretion of the courts. The mortuary charges was ordered to be shared equally by the parties. The reasonable costs should be Ksh. 100,000/- which they were willing to pay.

8.There was an argument by the respondent/original plaintiff that two of the original defendants lived outside the court's jurisdiction and thus the need to have the costs paid in. This was refuted on the grounds that the two had to return to their employment having been in Kenya since August 2012 when the deceased passed away.

## III FINDINGS

9.The issue herein is, that whereas both parties are in agreement that there be stay of execution of the magistrate's judgment, both conceded also that security for costs be provided. I believe the main concern here is, how much should be provided as to this costs.

10. The parties are related to each other as children/father. How much should be provided is at the discretion of the court.

11. I would find that the sum of Ksh. 100,000/- offered by the appellants is reasonable. That this be the costs so provided.

12. As to the mortuary charges, the magistrate has already made orders that this be shared equally between the parties. I would agree that the charges be paid directly to the funeral home by both parties as ordered by the subordinate court.

## IN CONCLUSION

13. There be and is hereby be orders of stay of execution of the magistrate's court judgment delivered on 28<sup>th</sup> September 2012 in CMCC 4915/12 pending the hearing and final determination of the appeal.

14. That the appellants 1 – 6 do provide security of costs at

Ksh. 100,000/- pending the determination of this appeal; jointly and severally.

15. That is the said sum be deposited in a joint interest earning account in the names of their respective advocates.

16. That parties continue paying the mortuary charges at 50% share.

17. That the costs of this application be in the appeal.

DATED THIS 16<sup>TH</sup> DAY OF OCTOBER 2012 AT NAIROBI

**M.A. ANG'AWA**

**JUDGE**

*Advocates* :

i) *J.M. Njenga instructed by M/s J.M. Njenga. & Co Advocates for applicants*

ii) *N.W. Amolo instructed by M/s Amolo & Kibanya & Co Advocates for respondents*