



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT MACHAKOS**

**Civil Appeal 201 OF 2006**

**1. AGNES NDINDA MUSYOKA**

**2. TERESIA KALONDU MUSYOKA:.....APPELLANTS/APPLICANTS**

**VERSUS**

**ROSE KAMENE:.....RESPONDENT**

**RULING OF THE COURT**

1. The application coming up is the Notice of Motion dated 8/05/2007 and filed in court on 9/05/2007 seeking an order staying the taxation of the Respondent's Bill of Costs dated 26/01/2007 and seeks a further order setting aside the lower courts order dated 27/01/2007( the actual date of the order was 25/01/2007) and to reinstate the applicant's application dated 27/11/2006 and the main appeal for hearing and determination on their merits and on priority basis.

2. The application is premised on 4 grounds on the face thereof namely that the consent order of 25/01/2007 was recorded by counsel without the consent and/or authority of the applicants who had given express instruction to their former advocates to prosecute the application; and finally that the consent was recorded in a fraudulent manner.

3. The affidavits in support of the application are sworn by Agnes Ndinda Musyoka and Teresia Kalondu Musyoka on 8/05/2007. In her affidavit, Agnes Ndinda Musyoka says that there are many unexplained lapses on the part of her former advocates in prosecuting CMCC No.636 'A' of 2005, which culminated in an adverse order being made against her and her co-applicant to pay mortuary charges for a body which had been stolen from them and preserved in an expensive mortuary without the applicant's consent or authority. She also says that the application dated 27/11/2006 was set down for hearing on 25/01/2007, but that before they knew what was happening, the consent orders of 25/01/2007 had been entered into withdrawing the application with costs to the respondent. She says further that the circumstances under which the said consent was recorded were suspect, hence this present application. She says that unless this application is allowed, she will suffer irreparable damage.

4. The 2nd applicant, Teresia Kalondu Musyoka reiterated the averments made by the 1<sup>st</sup> applicant and added that soon after her former advocate recorded the consent orders of 25/01/2007, he kept on giving her story after story as to why the application dated 27/11/2006 could not proceed to hearing on 25/01/2007 or on other dates thereafter on which the said application would be heard. She also says that she never gave any instructions to her former advocate to enter into the consent of 25/01/2007 and also said that they have been uncomfortable with the close relationship between their former counsel, the respondent and the respondent's counsel. She alleges that her former advocate was compromised.

5. The application is opposed. The Replying Affidavit is sworn by Rose Kamene in which she outlines the history of this matter. She says that her husband died on 5/10/2005 and that as the family awaited to

bury her husband whose remains were preserved at the Machakos Funeral Home, she was served with an order of injunction stopping the burial. She also says that mortuary charges of over Kshs. 200,000/= accumulated as a result of the long storage period and that the applicants undertook to pay the amount in installments of Kshs. 50,000/= - on 24/11/2006, 8/12/2006, 22/12/2006 and the balance on 29/12/2006. That despite the undertaking, the applicants either failed and/or refused to settle the mortuary charges; and filed HCA No. 201 of 2001 which was the subject of the consent orders of 25/01/2007.

6. The respondent also says that the consent order of 25/01/2007 was made deliberately by all the parties, so as to pave way for an application in the lower court to amend the plaint in CMCC No. 636 'A' of 2005. Annexure marked "RK2" to Kamene's affidavit is the handwritten record of the lower court on 16/04/2007 during which Mr. Mbaluka informed the lower court in part thus-

**"There is no order barring this court to proceed with this matter. High Court matter was withdrawn to pave way for this application. The matter regards a body lying in the mortuary. Its accruing charges. The application before court is merely for amending the plaint....."**

7. The respondent avers that there is lack of good faith on the part of the applicants and that their prayers should not be granted.

8. At the hearing of the application, Mr. Mbaluka reiterated the contents of the two affidavits sworn by the two applicants and urged the court to find that the application has merit. Mr. Makundi for the respondent thought otherwise and urged the court to find that an advocate who appears in a matter is deemed to have full instructions from his client and that if an advocate acts outside those instructions, the aggrieved client must follow the laid down procedure in seeking redress. He submitted that the applicants herein had not followed such procedure. Mr. Makundi described the applicants as mere busy bodies who were using the court process to smear counsels' names for their own sake; and particularly to protect themselves against their failure to pay mortuary charges.

9. The application dated 27/11/2006 sought an order staying the ruling of the lower court dated 8/11/2006. The ruling of 8/11/2006 deferred the proceedings in CMCC No.636 'A' of 2005 and required the applicants herein to pay mortuary charges to the Machakos Funeral Home until the appeal was heard and determined. The applicants had contested the payment of the mortuary charges on the ground that the respondent herein had fraudulently retrieved and preserved the body of Daniel Wambua Musyoka at the Machakos Funeral Home Ltd.

10. When the parties appeared before me on 25/01/2007, Mr. R.M. Matata, advocate then appearing for the applicants told the court that he had instructions to withdraw both that application and the appeal to enable the applicants file an amended plaint in the lower court. That was the same reason that was given by Mr. Mbaluka when he appeared for the applicants before the lower court on 16/04/2007.

11. Should I grant the applicants' prayer? The application is brought under the general inherent power of this court to make such orders as would meet the ends of justice. After carefully considering the pleadings as filed and the submissions made to me at the hearing hereof, I do not think that the applicants have demonstrated to me that they are entitled to the order sought. In the first place, a consent order/judgment is like a contract entered into by two consenting parties so that revocation of such consent can only be done with the consent of the two parties. Apart from the fact that the respondent herein does not consent to the revocation of the consent, it is also clear to me that the applicants are mere busy bodies who want to take advantage of every situation whenever it suits them.

12. The orders of 25/01/2007 were made for the reason that the applicants desired to get an opportunity to amend the plaint in the lower court, which they could not do if both the appeal and the application were still pending before this court. It does appear to me that when the applicants did not get their way with the proposed amendment of plaint, they decided to return to this court with the allegations they have made against their former counsel, the respondent and the respondent's counsel. The court will not allow itself to be used by the applicants to vex the respondent herein.

13. In the result, I find that the applicant's application lacks merit. Accordingly the application is dismissed with costs to the respondent.

14. It is so ordered.

Dated and delivered at Machakos this 29<sup>th</sup> day of January, 2008

**R.N. SITATI**

**JUDGE**