



Odhiambo v Owuor; Ongola & 5 others (Interested Parties) (Civil Case E011 of 2024) [2025] KEHC 5413 (KLR) (Family) (2 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5413 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL CASE E011 OF 2024
H NAMISI, J
MAY 2, 2025**

BETWEEN

MARTHA ODHIAMBO PLAINTIFF

AND

MARGARET ATIENO OWUOR DEFENDANT

AND

BISHOP SAMUEL ADEDE ONGOLA INTERESTED PARTY

RICHARD JAGERO OGWENO INTERESTED PARTY

RAPHAEL OORO OMUSI INTERESTED PARTY

JASHON OGWENO MISASA INTERESTED PARTY

MUSA WAKIAGA INTERESTED PARTY

GERISHOM OKINDA INTERESTED PARTY

RULING

1. The matter herein relates to a burial dispute between the Plaintiff and Defendant with respect to the burial of their husband, Japheth Odhiambo Owuor (Deceased) that has dragged on since July 2024.

Brief Background

2. The Plaintiff moved the Court by way of Plaint dated 15th July 2024, which was accompanied by a Notice of Motion filed under certificate of urgency. The Plaintiff got married to the Deceased in 1958 as his first wife, while the Defendant was the second wife. The Deceased passed away on 11th July 2024.



3. At the hearing of the Notice of Motion dated 15 July 2024, parties compromised the application and the entire suit by recording consent as follows:
- i. That burial date is set for 2nd August 2024 at the Deceased's homestead situate on Title Number Rusinga/Kaswanga Wanyama/429 in Rusinga Central, Kaswanga sub location, Gunda village;
 - ii. That the memorial service to be held on 31 July 2024 at Maxwell SDA Church, Nairobi where the Deceased fellowshipped;
 - iii. That the Deceased's body to be preserved in the current status at Umash Funeral Home, Nairobi and will be moved on 31 July 2024 in the presence of the Plaintiff and the Defendant for:
 - a. Church memorial service at Maxwell SDA Church, Nairobi;
 - b. Transportation to the Deceased's home at Outer Ring, Nairobi;
 - c. Return of the Deceased's body to Umash Funeral Home, Nairobi by or not later than 1900 hours on 31 July 2024;
 - iv. That the Deceased's body to be airlifted on Kenya Airways (KQ) on 1 August 2024 in the company of the Plaintiff and the Defendant to Kisumu International Airport in the morning of 1st August 2023. Then transported in the company of the Plaintiff and Defendant and other family members by road to his home in Rusinga Central, Kaswanga sub location, Gunda Village for interment;
 - v. That the Plaintiff and Defendant being the Deceased's wives, shall participate in the funeral preparations and burial of the Deceased except for the specific roles assigned under no. 10 below. The Plaintiff and the Defendant and their respective families shall jointly come up with the program and eulogy for the Deceased;
 - vi. That the Plaintiff, the Defendant and their children shall have unrestricted access to the Deceased's body at Umash Funeral Home or any other morgue that the Deceased's body may be preserved;
 - vii. That the Deceased's body should not be disposed of in any way including by burial or cremation unless with the consent of both Plaintiff and Defendant;
 - viii. That the Deceased's body be interred on a portion of the land to be hived off from both sides of the boundary demarcating the two households on all that parcel of land known as Title Number Rusinga/Kaswanga Wanyama/429, being the Deceased's homestead in Rusinga Central, Kaswanga sub location, Gunda village with the consent of the Plaintiff and the Defendant. The hiving off of this area and its fencing be done before the body be moved from Nairobi.
 - ix. That the Plaintiff, the Defendant and their children shall have and retain unrestricted access to the Deceased burial site with the right to erect gates and create pathways for such access as would be most convenient;
 - x. That all bills and funeral expenses be settled in apportionment in the meeting held on the 22 July 2024 as follows:



- a. The Defendant shall take care of the deceased's coffin, dress, funeral home's expenses, church fees, transport to church service, outer ring, back to the funeral home, the airlifting of the body to Kisumu and transport from Kisumu to Rusinga Central Kaswanga sub location, Gunda village. The Defendant shall also take care of the grave digging, construction and tiling.
 - b. The Plaintiff secure one bus to transport people from Rusinga to Kisumu and back home to Rusinga. The Plaintiff will also provide one bus from the outer ring home to Rusinga Central, Kaswanga sub location, Gunda Village.
 - c. The Defendant shall secure one bus to transport people from the Outer Ring home, Nairobi to Rusinga Central, Kaswanga sub location, Gunda village;
 - d. The Plaintiff shall meet and foot catering, tents, seats and any necessary decoration expenses. She will also take care of the tombstone on the grave and general beautification of the grave.
- xi. The OCS Kaswanga Police Station be ordered to provide security from the arrival of the body at the Kisumu International Airport and the transport of the entourage to Rusinga Central, Kaswanga sub location, Gunda village to ensure a peaceful interment ceremony in the agreed location
4. Thereafter, burial plans continued. Burial was scheduled for 2 August 2024, but this was never to be. What appeared to be an amicable settlement was quickly brought to an end by wrangles between the parties, resulting in two applications dated 5 August 2024 and 11 August 2024, with each party accusing the other of disobeying the orders of the Court.
 5. The two Applications were canvassed together and subsequently dismissed vide Ruling of this Court on 31 October 2024. In its Ruling, the Court observed that consent orders are binding on the parties and can only be varied on grounds that justify the setting aside or variation of a consent order or by another consent by the parties involved. Reference was made to the case of Wasike vs. Wamboko (1988) KLR 429, where it was held:

“A consent Judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract, or if certain conditions remain to be fulfilled which are not carried out”
 6. The Court also made reference to the case of Jonathan Namulala Nyongesa v. Multi Business Shooters Investors Ltd & 2 Others (2015) e KLR, where it was stated:

“A consent entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an agreement contrary to the policy of the court. Or where the consent was given without sufficient material facts or misapprehension or ignorance of such facts in general for reason which would enable the court to set aside an agreement.”
 7. In the case of Brooke Bond Leibig (T) Ltd. versus Maliya 1975 [EA] 266 it was also held that a consent order made in the presence and with the consent of counsel is binding on all the parties to the proceedings. It cannot be varied or discharged unless it is obtained by fraud or collusion or is contrary to the public policy of the court.



8. The Court of Appeal in *Samuel Wambugu Mwangi Vs. Othaya Boys High School, Nyeri Civil Appeal no. 7 of 2014* held that a consent order has a contractual effect upon the parties. That it cannot be set aside unless there is fraud, collusion or any of the reasons that can justify the setting aside of the consent as in a contract.
9. In dismissing the Plaintiff's Application seeking to set the consent orders aside, the Court observed that the reasons advanced by the Plaintiff were not sufficient and/or justifiable to warrant the orders sought.
10. Regarding the Defendant's Application, this Court observed that the same was a backdoor attempt at getting the Court to review the consent orders in place.
11. Even with the dismissal, it would appear that this dispute is far from over. The Interested parties filed an application dated 31 October 2024, while the Defendant filed an application dated 7 November 2024.

Notice of Motion dated 31 October 2024

12. The Application seeks the following orders:
 - i. Spent;
 - ii. Spent;
 - iii. That this Honourable Court be pleased to grant an interim, Conservatory or temporary Order of stay of execution of the Orders of this Honourable Court pursuant to the Ruling or Judgment delivered by the HON. LADY JUSTICE NAMISI herein on 31 October 2024, pending the hearing and determination of this Application or until further Orders of the Court;
 - iv. That this Honourable Court be pleased to stay the Execution of the Orders made herein on 31 October 2024 pending the hearing and determination of the Appeal against the same in the Court of Appeal;
 - v. That the proceedings herein be stayed pending Appeal or further orders of this Honourable Court;
 - vi. That such further or other Orders be made as the interests of Justice may demand;
 - vii. THAT the costs of and incidental to this Application be provided for and be in the cause, or the same be awarded to the proposed Appellants being the Applicants / Interested parties herein.
13. The Plaintiff filed an Affidavit in support of the Application.
14. In response thereto, the Defendant filed a Replying Affidavit containing various averments, but one in particular stands out. The Defendant avers that the orders arising from the impugned Ruling are negative in nature, and, therefore, cannot be stayed.
15. I have keenly read the Application, the Affidavits and the submissions filed herein. I note that in its Ruling of 31 October 2024 this Court did not direct any of the parties to do anything, to refrain from doing anything or to pay any sum.



16. In the case of *Western College Farts and Applied Sciences vs. Oranga & Others* [1976] KLR 63, the Court of Appeal whilst considering whether an order of stay can be granted in respect of a negative order stated inter alia as follows:

“But what is there to be executed under the judgment, the subject of the intended appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs.....”

17. This position was reiterated by the same court in *Kanwal Sarjit Singh Dhiman v Keshavji Juvraj Shah* [2008] eKLR, where it held as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see *Western College of Arts & Applied Sciences v Oranga & Others* [1976] KLR 63 at page 66 paragraph C).”

18. Adopting the same reasoning, I find that Applicants seek to stay a negative order which is one that is incapable of execution, and thus, incapable of being stayed. I, therefore, dismiss the Application.

Notice of Motion dated 7 November 2024

19. The Application seeks orders of review and partially setting aside of the Ruling delivered on 31 October 2024 dismissing the Application dated 5 August 2024 seeking the setting of a new burial date for the interment of Japheth Odhiambo Owuor to facilitate compliance with the orders issued on 26 July 2024.

20. One of the grounds upon which the Application is premised is that although the Court upheld the orders of 26 July 2024, the Court failed to set a burial date as prayed in the Defendant’s application.

21. The Plaintiff and Interested Parties filed Replying Affidavits opposing the Application.

22. I have considered the Application, the Affidavits and submissions filed in respect of this application. First and foremost, it is important to remind the parties that this suit was determined by the consent adopted on 26 July 2024. From that moment on, this Court became functus officio.

23. In an attempt to vary and/or review the terms of the consent, the Defendant filed her application dated 5 August 2024 seeking, inter alia, that this Court set a new burial date for the Deceased on 9 August 2024 and that the burial be conducted in full compliance with the orders issued on 26 July 2024. The Application was heard on merit and dismissed. Reasons were provided in the Ruling of 31 October 2024 and repeated hereinabove. Similarly, I dismiss the current application.

24. To summarise, the two applications are dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 2 DAY OF MAY 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:



Mr. Simiyufor the Plaintiff

Ms Kayugira & Ms. Kioge.....for the Defendant

Mr. Adalafor the Interested Parties

Libertine AchiengCourt Assistant

