SMG v ENM; LW (Proposed Interested Party) (Civil Appeal 81 of 2021) [2024] KEHC 9840 (KLR) (6 August 2024) (Ruling)

Neutral citation: [2024] KEHC 9840 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL 81 OF 2021

S MBUNGI, J

AUGUST 6, 2024

BETWEEN

SMG ..... APPELLANT

AND

ENM ..... RESPONDENT

AND

LW ..... PROPOSED INTERESTED PARTY

RULING

1. The amended application dated 4th January 2023 seeks for orders;

    a. that pending hearing and determination of this application an order do issue restraining the appellant's family including the intended interested party, his wife, children, siblings and clan members acting under their instructions from burying or disposing off in any way the remains and/or the ashes of SMG the deceased appellant herein.

    b. That this court do allow the enjoinment of the intended interested party for the purpose of executing this court's orders.

    c. That an order do issue directing the remains and or ashes of the deceased appellant be immediately deposited with the government pathologist at the Nyeri County Referral Hospital or any other institution as shall be directed by the other court for preservation and subsequent DNA sampling with a view to ascertain the paternity of the respondent/applicant.

    d. That temporary injunction do issue restraining the interested party either by herself, her agents, family members, relatives and/or any other person acting under her instructions from preventing the applicant from participating in the funeral preparations of the deceased.

e. The officers commanding Karatina Police station or the nearest police station in the circumstances ensure compliance of these orders.

2. The applicant contended that the appellant herein died on 18/12/2022 and it was important that the intended interested party who was the current wife to the deceased appellant be enjoined in these proceedings as any orders issued herein are likely to affect her and her children as beneficiaries and/or dependents to the deceased. He further contended that the appellants appeal was against the decision of Hon V.S Kosgei (RM) issued on 14/12/2021 which dismissed the appellant's application to set aside an order entered by the trial court ordering the deceased appellant to submit to a DNA test to confirm paternity.

3. The appeal was canvassed by a memorandum of appeal dated 18th December 2021.

4. The appellant vide an application dated 15/01/2022 sought interim orders for stay of execution of ex parte orders issued by the Principal Magistrate Court in Karatina in Miscellaneous Application E010 of 2021 pending the determination of the appeal, which orders were granted by Hon. F.N Muchemi on 10/02/2022 issued on 14/02/2022.

5. Before the applicant amended the present application, orders were granted on 29/12/2022 by Hon F.N Muchemi for the application dated 28/12/2022, where the interested party LW was joined in the appeal for the hearing of this application, blood sample of the body of the deceased be removed before the interment of the body for purposes of conducting the DNA et al.

6. The appellant filed a grounds of opposition dated 26/01/2023 in response to the amended application dated 4/01/2023 filed on 6/01/2023 that; i) the application was misplaced, incompetent and improperly before court, ii) that the orders sought therein were illegal and contrary to the court's order dated 14/2/2022 and iii) that the application lacked merit.

7. The interested party through her replying affidavit dated 20/01/2023 averred that the appellant had been cremated as per his wishes on 29/12/2022 upon his demise on 18/12/2022. The two applications before this court primarily sought to extract DNA samples from the deceased and include the applicant in the burial of the deceased appellant.

Appellant's Submissions

8. The appellant submitted that the application lacked merit since if the respondent had disclosed to court that there was an order to stay execution in place the court would not have issued the orders inter alia. Based on the foregoing it is trite that everybody obeys court orders. Reliance was placed on: *Koinange Investments and Development ltd v Nairobi City Council & 3 others* (2009)eKLR and *Omega Enterprises Ltd v KTDA* 1993 LLR 2525 (CAK).

9. The appellant contended that the application dated 28/12/2022 and 4/01/2023 ought to have been made in a new suit and not in the present appeal. Citing Order 42 Rule 27 of the *Civil Procedure Rules* which prohibit the production of additional evidence in the appellate court save for the instances enumerated in the said rule. In the appeal before this court the respondent obtained ex parte orders seeking to execute other ex parte orders given by the trial court which orders were prejudicial to the appellant which formed the basis of the appeal.

Respondent's Submissions

10. The respondent touching on the grounds of opposition submitted that the orders for stay of execution had been overtaken by events particularly by the demise of the appellant which necessitated the

amended application before this court and that counsel for the appellant had no instructing client as there had been no substitution. In any event the appeal in the absence of the appellant would not be sustainable unless there was substitution and even then the subject question would be whether the cause of action survives the deceased. Reliance was placed on the case of *Re Estate of Agan Ondiek (Deceased)* (2019)eKLR.

11. The respondent further contended that it was well within his mandate to move court for appropriate orders and that at the time of filing the application dated 28/12/2022 the appeal had already been scheduled for notice to show cause why it ought not to be dismissed on 19/01/2023. Orders of stay cannot remain perpetually in force to put the applicant in abeyance especially taking into account that at the time of the appellant's death no action had been taken to prosecute the appeal and the grounds of opposition have been raised to further frustrate the applicant's efforts to finalize the issues between the parties and should not be allowed to stand.

12. On the amended application the respondent submitted that the applicant moved this court through the application of 28/12/2022 with a view of securing a DNA sample for purposes of establishing and confirming paternity where favorable orders were granted on 29/12/2022, which became in-executable with the cremation of the appellant's death by the interested party and her agents which necessitated the amended application.

13. The orders issued on 29/12/2022 should be varied so that the appellants ashes could be used as a DNA sample instead of the blood sample.

Interested Party Submissions

14. The interested party identified 3 issues arising for determination as;-

    a. Whether her participation was properly invoked before the court?

    b. What was the status of the appeal and this application?

    c. Whether the interim orders should be set aside?

15. The interested party submitted that the applicant's prayer seeking the enjoinment of the proposed interested party, meant essentially to have them barred from joining the suit yet they had made no application to join the suit nor were they already parties to the suit. The court then proceeded to issue a prayer which was not sought by causing joinder of the proposed interested party.Parties are bound by their pleadings and it was clear from the onset the proposed interested party has been wrongly admitted into the suit contrary to the prayer by the respondent/applicant.

16. On the status of the appeal and application she submitted that Order 24 of the Civil Procedure Rules outlined what ought to happen if a party or parties to a suit dies. Reliance was placed on the case of: *Joseph Ng'ang'a Njoroge v Kabiri Mbiti* (1986) eKLR as cited in *Fidelity Commercial Bank ltd v Greenwoods Limited & 3 others* (2015)eKLR, *Athman Omar Zuberi v Mamson Asol Apinde* (2012) eKLR.

17. On whether to set aside the interim orders she further contended that the orders for 29/12/2023 should not have been issued as they were since the court was not being asked to determine paternity of the respondent, which issue was alive before lower court. This court's jurisdiction had been invoked to set aside the orders of the Principal Magistrate compelling the appellant to submit himself to a DNA test.

18. She further invoked the doctrine of *res sub-judice.*

19. That the application dated 28/12/2022 which was amended to the present application seeking for orders to draw blood samples from a deceased person, rendered the appeal a nullity by dealing with a matter that was solely within the purview of the trial court, and defeated the appellant's appeal by issuing the same orders the appellant sought to stay and for which had been granted by this very court.

20. The proper way to deal with the appellant as a deceased person was to file a fresh suit before a proper court and seek those orders since the appellant was deceased and any decisions touching on his remains were no longer subject to the exercise of the jurisdiction and discretion of this court.

Analysis and Determination

21. I have considered the pleadings and the submissions by both parties and I do find that the issue for determination is whether the amended application is merited?

22. It is not in dispute that the amended application was filed upon learning of the demise of the appellant on 18/12/2022 seeking new orders. I take notice that the applicant failed to comply with the favorable orders he was granted and he did not provide any reasons as to why until the deceased died making it a period of 1 year 5 months when he brought the amended application.

23. In the Indian Case of *Pratap Chand Mehta vs Chrisna Devi Meuta* AIR 1988 Delhi 267 the court citing another decision observed as follows,

> "If a suit is filed against a dead person then it is a nullity and we cannot join any legal representative; you cannot even join any other party, because, it is just as if no suit had been filed. On the other hand, if a suit has been filed against a number of persons one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void but the court has to strike out the name of the party who has been wrongly joined. If the case has been instituted against a dead person and that person happened to be the only person then the proceedings are a nullity and even Order 1 Rule 10 or Order 6 Rule 17 cannot be availed of to bring about amendment."
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> It is common ground that the 7th defendant was not alive when the suit was filed against him. It is also inconceivable how a party who is deceased can instruct counsel and that counsel takes over instructions from a non-existent person. It follows therefore any action including the filing of the plaint, the extraction of the summons; the entering of appearance and filing of the defence were a nullity. The cases cited by counsel for the plaintiffs include, *Benjamin Leonard Mc foy v United Africa Company Limited* [1961] All ER 1169. In that case the court stated as follows,
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> > "If an Act is void, then it is in Law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."
>
> This is exactly what the instructing party to the counsel now on record for the deceased person and or his estate is attempting to do. In the words of the cited case above this is an attempt to place something on nothing and expect it to retain ground. This cannot happen."

24. Further, in *Geeta Bharant Shah & 4 Others –v- Omar Said Mwatayari & Another* (2009) eKLR, the Court of Appeal while considering an Appeal over a matter in which the suit was filed against a Defendant who was dead at the time of filing suit stated as follows:

> " We have anxiously considered the appeal. This is a first appeal. We have no doubt whatsoever that the learned judge, in refusing to allow the application in favour of the deceased against whom a suit was filed after his demise, was plainly wrong. Indeed, in our view, there was no need for the administrators of the deceased's estate to urge the court to do so for once the respondent also admitted he sued a dead person, the court was duly bound to down its tools as it had no jurisdiction to proceed to hear a suit filed against a person who was already dead by the time the suit was filed. In any event, because the person cited in the plaint as the first defendant was already dead by the time the suit was filed meant that the plaintiff (now first respondent) did not tell the truth when he said in his verifying affidavit that he had read the plaint and verified the facts therein for how could he say that against undisputed fact later discovered that by the time he was saying so, the first defendant was long dead. Therefore, the suit was fatally instituted against a non-existent person and remained so. Ipso facto, the suit was nullity ab initio. It could not be resuscitated by amendment. It could not survive to be substituted. It was dead on filing because something could be placed on nothing and be expected to remain there."

25. As was re-stated by the Supreme Court in Petition No. 5 of 2015 - *Republic vrs Karisa Chengo and 2 Others*, where the court quoted Lord Denning M.R in *Benjamin Leonard Mcfoy United African Company Limited (UK)* [1962] AC 152 in the Privy Council as opining:

> " If an act is void, then it is in law a nullity. It is not only bad ...and every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse"

26. Therefore, the submission by the appellant to the effect that he got instructions to act for the deceased in the first place was misplaced, for the reason that there was no proper application in existence.

27. The next aspect was whether this application was properly filed. The Deceased was deceased by the time the application was filed. The deceased was already deceased when he was sued. He cannot be alive to issue instructions or orders enforced against him. The proceedings in this court are a nullity.

28. In the case of *Viktar Maina Ngunjiri & 4 others v Attorney General & 6 others* [2018] eKLR, the court stated as doth: -

> " The estate of a deceased person may take over proceedings against him if that person were alive at the time the suit was filed. That notwithstanding, the estate must be made a party and authorized by the court through an executor or a personal representative. A formal application has to be filed to facilitate this. No grant of representation has been presented to court. In the instant case this cannot happen because the deceased died before the suit was filed and the representative of the estate has not been identified. Even if the representative were identified it is not possible to take over a nullity."

29. So far no legal representative was made party to the proceedings before court, we don't know who filed the appellant submissions and who instructed counsel for the appellant. Given the foregoing I have nothing useful to say other than to strike out the application. I cannot understand how the deceased issued instructions, while dead and filed submissions. I will not say more.

30. The application is hereby struck out with no orders as to costs for the matter involves a dead appellant.

SIGNED, DELIVERED & DATED AT KAKAMEGA VIRTUALLY THIS 6TH DAY OF AUGUST 2024.

HON. JUSTICE. S. MBUNGI

JUDGE

Court:

Ruling delivered in the absence of the parties and in presence of Advocate Njeri for the Respondent.

Right of appeal 30 days.