



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ramadhan v Werimo & 2 others (Civil Appeal E004 of 2023)
[2023] KEHC 875 (KLR) (10 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 875 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E004 OF 2023
PJO OTIENO, J
FEBRUARY 10, 2023**

BETWEEN

BAKARI OWUORI RAMADHAN APPELLANT

AND

CLESNCIA MALOBA WERIMO 1ST RESPONDENT

MICHAEL WERIMO 2ND RESPONDENT

KAKAMEGA REFERRAL HOSPITAL 3RD RESPONDENT

*(Being an appeal from the judgment of Hon. Gabriel Peter Omondi (PM) in
Mumias CMCC No. E141 of 2022 delivered on the 9th day of January 2023)*

RULING

1. On the January 9, 2023 the trial court delivered a Judgment on a burial dispute and directed that the deceased's remains be interred at by those held to be closest to her being a child, brother and a parent. The decision aggrieved the Appellant who had asserted having married the deceased.
2. He preferred this appeal and simultaneously filed an application for stay pending appeal which application foresaw possibilities of a burial before orders could be given and sought an order for exhumation in the event that burial would have occurred before orders could be granted.
3. Indeed the Court did on January 10, 2023 issue interim orders which when served were said to have been overtaken by event as interment had taken place.



4. With such development when the matter came up for inter partes hearing, Counsel for the Appellant only urged prayer 9. That prayer was crafted that:-

' That in the event that the body of the deceased, Phasutine Auma Werimo has already been interred, the same be exhumed and returned back to the 3rd Respondent's mortuary pending the hearing and determination of this Application and the intended Appeal.'
5. The Appellant sought to stop burial on the basis that he has an arguable appeal that would be rendered nugatory and the outcome, if successful, merely academic. That he was married to the deceased was underscored and that the trial Court's Judgment exhibited a misapprehension of the law and therefore unless stay is granted burial would take place and prejudice would visit the Appellant in his capacity as the spouse to the deceased in that his right to access justice by an appeal would have been defeated.
6. That application was resisted by the Respondent by the Affidavit sworn by the 1st Respondent which asserts that after the delivery of an interlocutory injunction the Magistrate asked parties if any of them had any application to make and Mr Ashioya Counsel affirmatively said he had no such application as a consequence of which no stay was anticipated nor granted and therefore the Respondent proceeded to extract the order and arrange a burial for the November 12, 2022 only to be stopped at the last minute by an order of stay pending appeal.
7. To fast track that interlocutory appeal, the Respondent conceded to the appeal being compromised on terms that the status quo be maintained pending hearing of the suit in full and further on terms that the Appellant deposits Kshs 300,000/= as security for the expenses incurred and to be incurred for the postponed burial but the Appellant wholly failed to meet such condition.
8. After the final Judgment and in the absence of court order to the contrary, the deceased's body was interred under the charge of her son aged 25 years at a home, where the Appellant had never set foot, bought and developed by the deceased without participation of the Appellant.
9. Marriage between the Appellant and the deceased was denied it being underscored that the deceased had only one home where her remains were interred.
10. To the Respondents, no loss had been demonstrated and indeed none could be envisaged as there is no property in a cadaver but the litigation was a veiled laying of claim to the deceased property. It was stressed that the Appellant is a man of the straw unable to meet any expenses the Respondents who have been forced to incur in exhuming the body and having to bury it a second time all approximated at Kshs 2,500,000/=. The Appellant was lastly faulted for failure to offer any security for the costs that will be incurred if exhumation is ordered and a second burial necessitated.
11. The rival positions taken in the Affidavit were regurgitated by Counsel in oral submissions with the Appellant's Counsel stressing that unless he gets a chance to bury the deceased's remains, grave repercussions await to visit him including a cultural curse and emotional trauma with long term effects thus irreparable. On security it was the position of the Appellant that the same remains at the discretion of the Court and he would have no difficulty availing same.
12. For the Respondent, the submissions offered were that there had not been demonstrated any compelling reason to merit the traumatizing exercise of exhumation. On the alleged strength of the appeal, Counsel asked the Court not to be preemptive for that would be the mandate in the appeal and not at this interlocutory stage and in any event it was reiterated that the deceased was buried in the only home acquired and own where the Appellant had never set foot, hence there was no basis to disturb her remains.



13. Counsel urged the Court to appreciate that exhumation would postpone the process of healing to the family and children of the deceased. And on security it was highlighted that the Appellant had been urged to deposit security without success. The Respondents' Counsel then cited to Court the decision in *Concilia Ondieki -vs- Grace Achieng [2019] eKLR* for the proposition that an applicant seeking to stop burial needs to act with promptitude and on the factors to consider before the Court orders exhumation.
14. In his rejoinder to the Respondents' submissions, Counsel for the Appellant conceded that his client had indeed been ordered to bear the costs of delayed burial but did not get the chance to meet the same owing to the swift and hurried conduct of the Respondents while denying that the Appellant is a man of the straw. On the need for closure for healing to commence, Counsel submitted that a closure which is not wholesome to accommodate the interests of the Appellant cannot be just. On priority between the parties, Counsel cited to Court the decision in *Ruth Njoroge -vs- Jemima Njoroge [2004] eKLR* for the proposition that the fat of marriage is the yardstick in a burial dispute.
15. In every application for stay pending appeal, the cornerstone is the consideration of the test of substantial loss. Here while being so guided, it is appreciated that what could be stayed is the burial which has been undertaken. The order for exhumation would take the form of a mandatory injunction pending appeal under Order 42 Rule 6 (6). As in all interim mandatory orders the threshold is indeed higher and the Appellant must prove exceptional, unique and compelling circumstances to merit being given such orders. The Court must be satisfied that in granting a mandatory injunction it would at the conclusion of the matter remain satisfied that it was the most appropriate and just order to make. That is the flip side of saying that the Court should be satisfied that the appeal is not only arguable but presents more probability of success than failure.
16. It however must be noted that beyond the emotional trauma and cultural disgust expected upon the immediate family members, the exercise of exhumation, if ordered, also present public health questions. Of course the flip side is to ask what prejudice is likely to be suffered by the Appellant if the decision to exhume is delayed to await the outcome of the appeal. In the Court's assessment, more prejudice would be visited by interlocutory exhumation order compared to leaving that exercise to be conducted at the end of litigation and once in the event the appeal succeeds.
17. I have considered the rival submission by the parties and the relationship between the Appellant and the Respondent especially the mother and the son to the deceased and I do hold that on the basis of the Judgment yet to be upset, the rights of the Respondents outweigh those of the Appellant. In those circumstances, it is not demonstrated to the satisfaction of the Court that the appeal is such strong that it has more probability of success than failure. It is determined that an order for exhumation in the intervening period is not merited nor desirable.
18. The application is thus dismissed with costs being in the appeal but with directions that appeal be fast tracked with a record of appeal being filed within thirty (30) days from today together with submissions.
19. Upon service, let the Respondent also file and serve submissions within fifteen (15) days thereafter. Time is of essence.
20. Mention on March 20, 2023 to confirm compliance.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 10TH DAY OF FEBRUARY, 2023.

PATRICK J. O. OTIENO

JUDGE



In the presence of:

Mr. Shikanda for Ashioya for Appellant

Ms. Omar for the Respondents

Court Assistant: Polycap

