



REPUBLIC OF KENYA



**KENYA LAW**  
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**Yeko & another v Krumoja (Civil Appeal E080 of 2023)  
[2023] KEHC 22912 (KLR) (25 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22912 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E080 OF 2023**

**DK KEMEL, J**

**SEPTEMBER 25, 2023**

**BETWEEN**

**PHANCIE YEKO ..... 1<sup>ST</sup> APPELLANT**

**WYCLIFFE CHEBONYA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**LEONARD CHESARMIT KRUMOJA ..... RESPONDENT**

**RULING**

1. The Appellants filed a notice of motion application dated 17<sup>th</sup> July, 2023 seeking principally an order of stay of execution of the Judgement and decree in Sirisia SPMCC E076 OF 2023 Leonard Chesarmit Krumoja -vs Phanice Yeko & Another pending the determination of the appeal. The applicants also pray for costs of the application.
2. The application is supported by the grounds set out on the face thereof and by the affidavit of Phanice Yeko, the 1<sup>st</sup> Appellant sworn on even date on her own behalf and on behalf of the 2<sup>nd</sup> Appellant wherein she deposed inter alia; that she is aggrieved by the judgement of the lower court and has since activated the appellate process against the said judgement; that vide the impugned judgement, the lower court allowed the Respondent's case and ordered that the body of the deceased – Millicent Cherop Chebonya be released to him immediately for burial, among other orders; that during the pendency of this appeal, the Respondent will thus be at liberty to take the body of the deceased and inter it, thereby dissipating the substratum of the appeal hence rendering these proceedings superfluous; that she is the mother to the deceased stands to suffer substantial loss, emotionally, mentally and psychologically if the Respondent removes the body of the deceased from the mortuary and inter the same in the absence of an order of stay, should the appeal eventually succeed; that she had not consented to the purported marriage between the deceased and the Respondent and that she stands to suffer substantial loss both mentally and psychologically to have her daughter interred by a stranger; that the application has been filed timeously being on the same day upon being supplied with a certified copy of the judgement of



the lower court; that she is ready and willing to furnish any form of security which this Honourable court may impose in allowing an order of stay; that the Respondent will not suffer any prejudice as he will have an opportunity to defend the judgement of the lower court during the hearing of the appeal herein..

3. The Respondent opposes the application. Vide a replying affidavit sworn on 21<sup>st</sup> day of July 2023 wherein he deponed inter alia; that he and the deceased got married in 2004 under the Sabaot customs and were blessed with four children; that the Appellants failed to prove their case in the lower court regarding the existence of the marriage, or that there would be any prejudice if the Respondent buried his wife of 25 years or that no dowry was paid; that the Appellants had not prayed for a counterclaim to bury the deceased in the lower court and thus cannot do so in this appeal; that the 2<sup>nd</sup> Appellant is an uncle to the deceased and has no locus standi to agitate this suit; that he has incurred about Kshs 300, 000/ in mortuary bills and burial preparations; that the Appellants will not suffer any prejudice if the order for stay is not granted since they haven't given any security in the event the appeal does not succeed; that the children are traumatized by the turn of events; that the clan has intervened in the matter in which he has since cleared any outstanding dowry; that the matter herein is being instigated by other forces who are not the Appellants herein; that the Appellants should deposit a sum of Kshs 50, 000/ to cushion the Respondent's expenses, bills and education of the children who are now suffering.
4. The application was canvassed by way of written submissions. Both parties duly filed and exchanged submissions.
5. Mr Bryan Khaemba, learned counsel for the Appellants vide submissions dated 26<sup>th</sup> July, 2023, raised one issue for determination namely whether the Appellants have met the threshold for the grant of an order of stay of execution pending the appeal. It was submitted that the Appellants have met the conditions imposed under Order 42 Rule 6 of the Civil Procedure Rules. On the issue of substantial loss, it was submitted that if an order of stay is not granted, they stand to suffer great loss in that should they succeed in the appeal, the body of the deceased would have been interred by the Respondent and that exhuming the same will cause a lot of emotional distress to the Applicants. Reliance was placed in the case of *Lucy Kemboi V Cleti & 5 Others* [2012] Eklr, *Francis Muthusi Malombe & 7 Others V Daniel Kaloki Malombe & 9 Others* [2022] Eklr.
6. As to whether the application has been filed without unreasonable delay, counsel for the Applicant submitted that the judgement of the trial court was delivered on the 13/7/2023 while the present application was lodged on 17/7/2023 and hence there was no delay whatsoever.
7. As regards the issue of security for the due performance of the decree, it was submitted that the Applicant is ready and willing to abide by any conditions to imposed by the court. It was further submitted that the matter does not involve a money decree so as to warrant an order for security but nonetheless the applicant is willing to pay a sum of Kshs 50, 000/ towards the mortuary fees even though it was the Respondent who had earlier sought to have the body preserved pending determination of the matter.
8. Mr Sichangi for the Respondent vide submissions dated 27/7/23, submitted that the Respondent had earlier proposed that the Applicants do deposit a sum of Kshs 500, 000/ towards the mortuary fees which are still escalating and which are now well over Kshs 150, 000/ even before the appeal is heard thereby implying that the costs might surpass the proposed figures. It was further submitted that even if the appeal is successful, the body could easily be exhumed and re-buried as the court may direct and thus no substantial loss will be suffered. It was also submitted that the applicants might vanish into thin air in the event the appeal does not succeed and hence the need that they should deposit the proposed sums. In any case, it was opined that the Respondent are not persons of deep pockets and might pose



hardship to the Respondent who has to shoulder the burden of meeting the morgue fees and burial expenses in addition to taking care of the children. Finally, it was submitted that the appeal has no chances of success as the Applicants did not even seek to counterclaim to bury the deceased in the trial court case and hence they are just litigating for fun and further to advance their claim that they stand to lose their dignity and pride in the society if the Respondent buries his deceased wife. Learned counsel sought for the dismissal of the application with costs.

9. I have given due consideration to the application as well as the submissions of both learned counsels. It is not in dispute that the application is predicated under the provisions of order 42 rule 6 (2) of the *Civil Procedure Rules*. Indeed, both counsels have substantially submitted on the three conditions imposed by the said provision namely; whether the Applicants stand to suffer substantial loss if the stay is not granted; whether the application has been lodged without unreasonable delay and whether the Applicants have offered security for the due performance of the decree herein. The only issue for determination is whether the application is merited.
10. It is noted that the trial court's order now appealed against was delivered on 13/7/23 while the present application was lodged three days later. Hence, there was no delay at all on the part of the Applicants. Turning to the second condition namely whether substantial loss will be suffered by the Applicants if an order of stay is not granted, it is noted that the trial court had given the Respondent the green light to proceed and bury the remains of the deceased. The applicants have maintained that they stand to suffer substantial loss since in the event of success of the appeal, the body would have to be exhumed with great mental and psychological anguish visited upon the children of the deceased. Indeed, the exhumation of a body already buried is not something pleasant to watch and participate in and hence the Applicants' apprehension which is that the children of the deceased and family members are likely to suffer social and emotional loss. It is trite law that substantial loss is what has to be prevented by preserving the status quo because such loss would render an appeal nugatory. In the case of *Butt V. Rent Restriction Tribunal* [1979] Eklr, the Court of Appeal held that in an application for stay pending appeal, the court should not exercise its discretion in such a way that it will in any manner prevent an appeal or create circumstances that would render it nugatory. To that extent, I find that the Applicants have established that they stand to suffer substantial loss if the stay is not granted and that the pending appeal will be rendered nugatory.
11. As regards the condition of furnishing security, the Applicants contend that the matter does not involve a money decree and as such this court should reject the Respondent's demand that a sum of Kshs 50, 000/ should be deposited with the mortuary to cater for the charges before an order of stay is granted. The Applicants in their submissions and supporting affidavit indicated that they are willing to share in the burden of the cost of the mortuary fee and in that regard they have proposed to pay the sum of Kshs 50, 000/ as part of any costs due to the mortuary. On the other hand, the Respondent maintains that a sum of Kshs 500, 000/ should be deposited since the mortuary charges have been escalating. Indeed, an applicant seeking for an order of stay pending appeal is under an obligation to furnish security for the due performance of the decree. It is not in doubt that the body of the deceased is still lying at the mortuary pending determination of the appeal. Both parties appear not to have any divergent views regarding the need to pay some monies towards the mortuary fees pending determination of the appeal. It is also not in doubt that the trial court had allowed the Respondent to proceed with the burial and that it is the applicants who moved to this court on appeal against the said orders. If that is the position, then it behoves on the Applicants to offer the requisite security pending determination of the appeal herein. I note the amounts sought by the Respondent is rather on the higher side bearing in mind that the partes herein have some relation with the deceased. It is noted that the mortuary charges keep on rising and hence I have to impose a reasonable figure in the circumstances. Suffice here to add that the parties being family members to the deceased will definitely participate during the burial of



the deceased upon conclusion of the appeal herein. Further, and in any case, were the Applicants to succeed in the appeal, then they would have to sort out the mortuary fees before the body is released for burial. I am of the view that a sum of Kshs 200, 000/ would be reasonable in the circumstances. The said sums must be deposited with the mortuary facility currently handling and or holding the body of the deceased within a certain timeline pending determination of the appeal failing which the order of stay will lapse.

12. In view of the foregoing observations, the Applicants' application dated 17/7/2023 is allowed in the following terms:
- a. An order of stay of execution of the judgement and decree in Sirisia SPMCC No. E076 of 2023 is hereby granted upon the Applicants depositing and or paying directly the sum of Kshs 200, 000/ to the hospital mortuary facility currently handling and or holding the body of the deceased namely University of Nairobi Enterprises & Services Ltd within fourteen (14) days from the date hereof failing which the stay shall lapse.
  - b. The costs hereof shall abide in the appeal.

Orders accordingly.

**DATED AND DELIVERED AT BUNGOMA THIS 25TH DAY OF SEPTEMBER 2023**

**D.KEMEI**

**JUDGE**

**In the presence of:**

Khaemba for Appellants/Applicants

Sichangi for Respondent

Kizito Court Assistant

