

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 15 OF 2020

(Being an appeal arising out of the judgment and ruling of Hon. E. Malesi, Senior Resident Magistrate (SRM), delivered on 4th November 2020 in Kakamega CMCCC No. E20 pf 2020)

CAROLINE MMBAYA IMBAYI.....APPELLANT

VERSUS

GRACE KHATUNYI IMBAYI.....RESPONDENT

RULING

1. Hon. Malesi delivered the impugned judgment on 4th November 2020, wherein the respondent herein was given priority to bury the remains of her deceased husband, with a further order that the body be released to both widows, the appellant and the respondent, for a house to be erected on the Lusui land to facilitate the burial by the respondent, and for the police officer commanding the local police station to ensure compliance and maintenance of law and order during the burial.
2. The appellant was aggrieved and she proffered the instant appeal. Her memorandum of appeal is dated 17th November 2020, and was lodged herein on even date. She lists six grounds: that the land, where the court directed that the respondent inter the remains of the deceased, was not registered in the name of the deceased or that of the respondent; the respondent did not have a matrimonial home on the said land; that the customs and practices of the Abushimuli clan of the Idakho, relating to the siting for construction of a home and a burial site, were not considered; that no customary law marriage rites were conducted between the deceased and the respondent to constitute her a wife of the deceased; erroneous issues were considered; and the fact that the deceased had two parcels of land where he could be buried was not considered.
3. The memorandum of appeal was filed contemporaneously with a Motion, dated 17th November 2020, wherein the appellant seeks stay of execution of the judgment of 4th November 2020. The grounds upon which the application is premised are set out on the face of the application and in the supporting affidavit sworn by the appellant on 17th November 2020. She avers that her appeal is arguable and has overwhelming chances of success. She submits that the body of the deceased is at a morgue, and if the stay orders are not granted, the body may be removed and interred, which would render her appeal nugatory and academic. The only option, should the appeal succeed, after the body has been buried, would be exhumation, which would also be costly. She avers that the respondent would suffer no prejudice if the stay orders were granted. She submits that there were glaring errors of law and fact, which this appellate court ought to consider. She expresses willingness to abide by whatever conditions that the court may impose.
4. The application was placed before the duty Judge on 1st December 2020, and interim stay orders were granted.
5. The application was served. The record reflects that a replying affidavit was filed by the respondent. That affidavit is not in the court file. The appellant filed a supplementary affidavit in response to the said reply. She avers, in that affidavit of 11th December 2020, that the replying affidavit did not address or oppose her application for stay of execution. She states that she had changed the advocate she had at the trial, and that it was her right to do so. She confirms that she had moved the trial court, seeking interpretation of the judgment, and says that that is not the same as appealing. She asserts that she had a right of appeal, and there was no need for her to seek leave to appeal. She further avers that where stay is sought in a non-money decree the only consideration is whether or not there was an arguable appeal. .
6. Directions were given on 14th December 2020, for disposal of the application by way of written submissions. Both sides have complied.
7. In her written submissions, the applicant submits that she had obtained a stay order at the trial court, to allow her seek interpretation of the judgment, as there were aspects of it that were not clear to her, and it was after directions were given that she decided to file an appeal. She states that before the appeal is heard and determined, it was only proper that orders be made to preserve the substratum of the appeal. She submits that she moved the court timeously and without delay. She argues that the trial court had ordered that the body be released to both of them, and, therefore, the respondent would not suffer anything in case stay is ordered. She expresses that there is no need for the court to require a deposit on the mortuary fees be made as the morgue had not demanded any. She submits that it would be in the best interests of justice if stay is granted. She cites the decision in *Lucy Kemboi vs. Cleti Kurgat & 5 others* [2012] eKLR (Mshila J).
8. On her part, the respondent argued three grounds. Firstly, that the application was premature, as the appellant had not first moved the trial court for stay. She accuses the appellant of forum shopping. Secondly, it is argued that the advocate for the appellant was improperly on record. He was not on record at the trial court, and he required leave of court to come on record for the appellant in the place of the previous advocate. Thirdly, it is argued that the appellant should deposit a sum of money at the morgue to cater for the accruing bill. Fourthly, and finally, it is submitted that the appellant had not demonstrated that her appeal had good chances of success.

9. The starting point is that the appellant has lodged her memorandum of appeal in court within the twenty-eight days allowed in law. Her application for stay pending appeal has also been lodged timeously. The appeal turns on burial rights. The trial court has made its decision on the matter, but the appellant was aggrieved, and she is within her rights, to challenge that decision on appeal, and to get a second opinion from a higher court. In disputes of this nature, the matter is only fully laid to rest after the parties have exhausted all the appeal options. It is the only way of getting full closure to the same, if all the other options to resolve the matter have failed. I believe that the justice of the situation favours grant of stay of execution pending appeal.

10. The respondent has raised several issues. The first one is about stay orders being sought first at the trial court. That is a technicality of procedure that Article 159 of the Constitution would frown upon. The appeal is before the High Court, and I believe the High Court is the proper forum to consider whether or not to grant stay pending appeal. It embarrasses a trial court, which has disposed of a matter, to be asked to stay its own orders. On the issue of change of advocates, the short answer to that is that leave for the new advocate to come on record only applies where change is sought in the same cause. Mr. Atulo acted for the appellant at the primary suit before the trial court, the appeal herein is a different and separate cause. There is, therefore, no legal requirement that a different advocate seeks leave to file appeal for an aggrieved party. On deposit of a sum of money as security for costs, with respect to the mortuary fees, it makes sense. The trial court gave the respondent prior right to bury, she will be entitled to security that, in the event the appellant loses the appeal, and she will not be saddled with hefty mortuary charges that were incurred at the behest of the appellant. On the last issue, on an arguable appeal, let the appellant have her day at the appellate court, so that she can be heard on her grievances.

11. In the end, I am persuaded, in the interests of justice, that the application dated 17th November 2020, should be granted, for preservation of the *status quo* pending hearing and determination of the appeal. The appellant seeks to stay an order made in favour of the respondent, she should bear the burden of the stay, by depositing in court a sum of Kshs. 80, 000.00, in the next fourteen days, to secure the mortuary charges. The matter should be listed, as a matter of priority, for directions on the disposal of the appeal. Costs shall be in the cause.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 7TH DAY OF MAY, 2021

W MUSYOKA

JUDGE