



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

HIGH Court CIVIL APPEAL NO. E100 OF 2021

REUBEN MBAISI.....1ST APPELLANT

BENSON DASI.....2ND APPELLANT

FREDRICK KAGONI.....3RD APPELLANT

RHODA INDWASI4TH APPELLANT

VERSUS

ELCA ADISA ONZELE.....RESPONDENT

RULING

1. Before this Court for determination are two applications – the first is the Notice of Motion dated **13th September 2021** whilst the second application for determination is the Notice of Motion dated **15th September 2021**. Vide the application dated **13th September 2021** the Applicant sought the following orders :-

“1. Spent.

2. THAT this honourable court do order a stay of execution of the judgment issued by the lower court (Hon. A N. Ogonda (SRM) on 10th September 2021 pending hearing and determination of this application and appeal.

3. THAT the honourable court do recall file number E1137/2021 from the Milimani Chief Magistrate Court.

4. THAT the appellants be allowed to bury the deceased (A B C) according to Luhya customs and his last wishes at Igunga Village in Vihiga County.

5. THAT the honourable court do order that the mortuary bills accruing at Mama Lucy Hospital from the date of death of the deceased be paid by the Respondent.

6. Any other relief that this honourable court may deem just and fit to grant”.

2. The application was premised upon **Section 1A, 1B, 3A and 65 of the Civil Procedure Act, Cap 21, Laws of Kenya Order 42 Rule 6 of the Civil 2010, the Constitution of Kenya 2010** and all other enabling provisions of the law, and was supported by the Affidavit of even date sworn by **BENSON DASI** the 2nd Applicant herein. In the Notice of Motion dated **15th September 2021** the same Applicants (Appellants) sought the following orders: -

“1. SPENT

2. THAT pending hearing and determination of this application the honourable court do order a stay of execution of the judgment issued by the lower court (Hon. A.N. Ogonda (SRM) on 10th September 2021 in Milimani Commercial Suit Number E1137/2021.

3. THAT in the alternative, this Honourable court do issue an injunction against the respondent barring her from picking the body of the deceased (A B C) from the mortuary at Mama Lucy Hospital Mortuary, organizing his burial or buying him until hearing and determination of this application and appeal.”

3. The application was similarly premised upon **section 1A, 1B, 3A and 65** of the **Civil Procedure Act Cap 21, Order 42 Rule 6** of the **Civil Procedure Rules 2010**, the **Constitution of Kenya 2010** and all other enabling provision of the law and was supported by the Affidavit of even date sworn by the 2nd Appellant **BENSON DASI**.

4. The Respondent **ELCAH ADISA ONZELE** filed Replying Affidavit dated **20th September 2021** in which she strenuously opposed the prayers being sought by the Applicant/Appellants. Pursuant to directions made by the court the two applications were canvassed together by way of written submission. The Applicants filed the written submissions dated **28th September 2021**, whilst the Respondent relied upon her written submissions dated **22nd September 2021**.

BACKGROUND

5. The Deceased herein **ADAMBA BENARD CHAHILU** died in **Nairobi** on the **14th August 2021**. Following his demise the body of the Deceased was moved to the **Mama Lucy Kibaki Hospital Mortuary** where it remains to date.

6. The 2nd Applicant **BENSON DASI** avers that he is the only biological brother to the Deceased whilst the Respondent **ELCA ADISA ONZELE** claims to be wife of the Deceased having married the Deceased on or around **December 2006** under **Luhya customary law**.

7. The Respondent on **20th August 2021** filed a suit **E1137 of 2021** before the **Chief Magistrate Court** at **Milimani** seeking order to authorize her to inter the body of the Deceased at their matrimonial home in **Soy Village, Kakamega County**. The suit was heard *inter partes* and on **10th September 2021**, the learned trial magistrate delivered her judgment in favour of the Respondent allowing her to collect the body for burial in **Soy Village**.

8. Immediately after delivery of said judgment, the Applicants sought and obtained a stay of execution for **seven (7) days**. Thereafter, the Applicants who were aggrieved by the decision of the magistrates court filed in the High Court the **Memorandum of Appeal** dated **13th September 2021** which memorandum listed **eighteen (18)** grounds of appeal. Contemporaneously with the appeal the Applicants filed applications seeking of stay the judgment of the magistrate court pending full hearing and determination of their appeal as well as orders restraining the Respondent from collecting the body for burial.

9. On **17th September 2021** the court made orders of *status quo* pending the hearing and determination of the two applications.

Analysis and determination

10 I have carefully considered the two applications before the court, the Affidavit in reply as well as the written submissions filed by both parties.

11. The Applicants assert that the Respondent is **not** the legal wife of the Deceased. They claim that the Deceased had relationships with several women all of whom bore children with the Deceased. However, it is averred that the Deceased was **not** legally and /or customarily married to any of the women with whom he sired children. More specifically, it is averred that no dowry was ever paid for the Respondent by the Deceased in accordance with **Luhya Customary Marriage** rites.

12. The 2nd Applicant avers that the Deceased stopped cohabiting with the Respondent in **2018**. That at the time of his illness and demise the Deceased was cohabiting in Nairobi with the 4th Applicant **RHODA INDWASI**, who together with the 2nd Applicant took care of the Deceased during his illness and catered for all his medical bills.

13. The 2nd Applicant denied that the home in **Soy village** was the matrimonial home of the Deceased and asserts that none of the Deceased relatives have ever visited that home. He asserts that prior to his demise the Deceased expressed his wish to be buried at his ancestral home in **Igunga village in Vihiga County** next to the grave of his parents. That the entire family including the eldest son of the Deceased are in agreement that the Deceased should be buried at his ancestral home in **Vihiga County** as he wished. That if the stay sought is not issued, there is the real possibility that the Respondent will move to remove the body of the Deceased from the mortuary and inter the remains in **Soy village** to the exclusion of the family and elders.

14. As stated earlier, applications were opposed by the Respondent who asserts that she is the legal wife of the Deceased having been married customarily in the year **2006**. The Respondent avers that she has been cohabiting with the Deceased at their matrimonial home in **Soy village, Kakamega County**. She avers that their union was blessed with **three (3)** children but concedes that the Deceased had **two (2)** other children from a previous marriage.

15. The Respondent stated that she was in **Soy village** when the Deceased passed away. That upon being informed of his demise she travelled to Nairobi and went to **Mama Lucy Kibaki Hospital** intending to view the body. However, she was turned away at the mortuary upon instructions issued to management by the Applicants. The Respondent then filed **Milimani CMCC NO. E1137 of 2021**, seeking orders to bury the Deceased at their **Soy village home**, which suit was decided in her favour.

16. The Respondent opposes the application for stay arguing that the matter in the lower court was heard *inter partes* and both sides were given an opportunity to call and cross-examine witnesses. That as the wife of the Deceased she has the right to bury her husband. That the

continued detention of the body of the Deceased in the mortuary poses a health hazard to patients, staff and the public in light of the ongoing **Covid – 19** pandemic.

17. The Respondent stated that the Applicants have not offered any security which is required before a stay of execution can be granted. She urges the court to dismiss the two applications with costs.

18. The only issue for determination in this matter is whether the Applicants have made out a persuasive case for grant of an order of stay pending appeal.

19. **Order 42 Rule 6** which sets out the principles for stay of execution provides as follows: -

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appeal from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision to appeal is preferred may apply to the appellate court to have such order set aside.

2. No order for stay of execution shall be made under subrule (1) unless-

a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

c.”

20. Therefore in order to merit the orders being sought the applicants must satisfy the court.

(i) That the application for stay was whole without unreasonable delay.

(ii) That they stand to suffer substantial loss unless the stay order is granted.

(iii) That security for the performance of the decree or order has been given by the Applicants.

21. On the question of delay I note that the judgment which is being challenged was delivered by the trial court on **10th September 2021**. The two applications were filed on **13th** and **15th September 2021** respectively just **three (3)** and **five (5)** days after the judgment was delivered. I am satisfied that the applications were both filed in a timeous manner without any delay whatever.

22. The Respondent submit that the application is fatally defective and is therefore for dismissal as the Applicants have failed to annex a copy of the judgment sought to be stayed. On their part, the Applicants have explained that their efforts to secure a copy of the judgment from the trial court did not bear fruit. **Article 159 (2) of the Constitution of Kenya 2010** exhorts courts to administer justice ‘**without undue regard to technicalities**’. Both parties agree that the lower court delivered a judgment on **10th September 2021** which judgement directed that the remains of the Deceased be released to the Respondent for burial at **Soy Village**. It is said judgement that forms the basis of the present application. In my view, failure to annex that judgment is not fatal at all.

23. The Applicant being the only brother, the eldest son and ‘wife’ of the Deceased submit that they are likely to suffer irreparable harm if the orders of stay being sought are not granted. They argue that the family does not recognize the Respondent as the widow of Deceased and have never visited the **Soy village** home. That the Deceased expressed a wish to be buried in his ancestral home at **Igunda village in Vihiga County** which wish should be honoured by the court. Finally, the Applicants submit that their intended appeal has high chances of success and the same may be rendered nugatory if the orders being sought are not granted.

24. On her part the respondent asserts that they Applicants will not be prejudiced if the stay orders are denied as she fully intends to consult and include the family regarding the burial. The Respondent argues that it is she and the children who stand to be prejudiced as they continue to suffer trauma grief, and lack of closure for as long as the burial remains in limbo. The Respondent submits that the intended appeal will not be rendered nugatory as in the event the appeal succeeds the court may order that the body be exhumed and re-interred at the ancestral home in **Vihiga County**. She urges the court to declare to grant the orders of stay.

25. It is important to note that it is not the duty of the court at this point to assess the merits or otherwise of the intended appeal. All that is being asked is that the court determine whether sufficient grounds have been adduced for stay of execution pending the determination of the appeal. Suffice to say I have perused the memorandum of appeal dated **13th September 2021** and note that the same raises grounds which are in my view arguable.

26. In the case of **MUKOMA – VS – ABUOGA [1988] KLR** the Court of Appeal in referring to the exercise by the Superior court of their discretion in granting stay of execution under **Order 42 Civil Procedure Rules 52 (b)** of the **Court of Appeal Rules** respectively, emphasized the centrality of substantial loss as follows –

“..... the issue of substantial loss is the corner stone of both jurisdictions. Substantial loss is what has to be prevented by preserving the *status quo* because such loss would render the appeal nugatory”

27. Therefore the courts should aim at preventing substantial loss to either party and should also guard against rendering the appeal nugatory. In **KENYA COMMERCIAL BANK – VS – BENJOH AMALGAMATED LTD & Another Nairobi and Application No 50 of 2001 (KLR)** the Court of Appeal held that -

“..... the onus of satisfying us on the second condition that unless stay is granted the intended appeal would be rendered nugatory is also upon the applicant..... We remind ourselves that each case depends on its own facts.....”

28. In the case of **JAMES WANGALWA & ANOTHER – VS – AGNES NALIAKA CHESETTO [2012] eKLR** it was held that –

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparable affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail.....”.

29. The subject matter of this dispute are the remains of the Deceased and the place of interment of said remains. If the stay orders are not granted then I have no doubt that the Respondent will move to have the body buried at **Soy village**. In the event the appeal succeeds then the Applicants will be faced with a body that has already been buried and may have to seek orders for exhumation of said body. This in my view would be prejudicial not only to the Applicants but to the Respondent herself as well as her children. The disturbance of the remains of a person who has already been laid to rest is not a matter to be taken lightly. Such exhumation is likely to cause greater trauma to all parties than a delay on the burial would cause. I find that this ground of substantial loss has been proven.

30. The Respondent has raised the issue that no security has been offered for performance of the Decree and charge the court to require the Applicants to deposit in court Kshs 300,000/-. However, courts have severally held that the question of security is discretionary and each court will decide based on the facts of the specific case. This is a case involving family members. In my view, it is not necessary to demand that security be deposited and condition for stay. In the case of **RWW vs EKW [2019 Eklr]** the court held as follows –

“The other condition for granting stay orders is on the security to be offered. The law is that a party seeking stay must offer such security for the due performance of the orders as may ultimately be binding on the appellant. I am however of the considered view that in the circumstances of this cause and it being a matrimonial cause, the court can grant stay of execution of its orders without demanding that the Applicant furnish the Court with security for the due performance of the orders.” (emphasis added)

31. It is my considered opinion that the *status quo* ought to be preserved pending the hearing and determination of the appeal, which can be expedited. In the circumstances, I allow the application dated **13th September 2021** and **15th September 2021** and make the following orders:-

- (i) That there shall be a stay of execution of the judgment delivered by the lower court on **10th September 2021** pending the hearing and determination of this Appeal.
- (ii) The Hon Deputy Registrar is hereby directed to obtain **CMCC NO. E1137 of 2021** in order to expedite the hearing of the appeal.
- (iii) The mortuary bills that shall accrue at the **Mama Lucy Kibaki Hospital** from the date of this ruling shall be settled by the Respondents.
- (iv) This being a family matter I make no orders on costs.

DATED IN NAIROBI THIS 15TH DAY OF OCTOBER, 2021

.....

MAUREEN A. ODERO

JUDGE