



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISCELLANEOUS APPLICATION E069 OF 2021

B E T W E E N:

MECHTILDA IMBOGO.....APPELLANT

VERSUS

CHRISTINE MAKOKHA IMBOGO.....RESPONDENT

R U L I N G

1. The Court has before it two applications which were filed side by side, the second was filed before the first had been disposed of. They seek, in part, almost identical relief. By way of introduction and context, it is important to note that, there are several matters and numerous applications between the two parties to this dispute. The subject matter resolves around a burial dispute. The Deceased passed away and was buried in Trans Nzoia County by Applicant without involving the Respondent. The two Parties both claim to be the widows of the Deceased. The Plaintiff to the first suit states that she was excluded from the burial and attendant ceremonies. The Matters that have been brought by the Parties are:

- (i) Butali SPMCC No. 210 of 2020 (filed by Christine Imbogo)
- (ii) Kakamega High Court Civil Appeal No E020 of 2020 (by Metchilda Imbogo)
- (iii) Kitale High Court Case (by Metchilda Imbogo)
- (iv) Kitale High Court Civil Appeal No (Filed by Metchilda)
- (v) Kakamega High Court Misc Application No E069 of 2021 (Filed by Metchilda).

2. The Respondent Christine Makokha Imbogo was the original Applicant/Plaintiff in the first suit in the Butali Magistrate's Court. That matter was decided on 27th November 2020 by a Ruling of the same date. The Applicant here (Metchilda Imbogo) filed and Appeal against the decision of Hon Z.J. Nyakundi SPM delivered on 27th November 2020. In addition, she used the Appeal to ask for further relief.

3. The relief prayed for in the earlier appeal filed by Metchilda Imbogo. That Appeal was filed against the Butali's court disallowing the PO and relied on the following grounds:

- a) That the ruling in Butali SPM's Court Civil Suit No. 210 of 2020 delivered on 27/11/2020 disallowing the preliminary objection dated 20/11/2020 be set aside and in its place the said Butali SPM's Civil Suit No. 210 of 2020 be struck out.*
- b) The Respondent be condemned to pay the appellant Costs of this appeal and costs of in the Butali SPM's Court Civil Suit No. 210 of 2020."*

4. The Judgment in the Appeal was delivered on 25th May 2021. The Applicant was not successful. Although this file is related to an ongoing dispute before the Court, it was filed under a certificate of urgency dated 8th June 2021 and given a new file number and that file was opened to register this Application.

5. The Application is by a notice of motion brought under **Sections 1A, 1B, 3A** and **Sections 17 and 18 and 63(e)** of the **Civil Procedure Act, Order 51** of the **Civil Procedure Rules** and **Article 165 of the Constitution**. The Application is seeking orders that:

"1. This Honourable Court be pleased to certify the application urgent and service of the application herein be dispensed with

2. This Honourable court be pleased to call for the file number Bitalli No. SPMCC No. 210 of 2020 between Christing Makokha Imbogo -Vs- Methcilda Imbogo for the purposes of making appropriate orders/directions.

3. This Honourable court be pleased to transfer Butali SPMCC No. 210 of 2020 to Kitale Chief Magistrates Court or a court of similar jurisdiction within the jurisdiction of the place of burial of the Deceased for hearing and determination.

4. In the meantime there be a temporary order of stay barring Hon. Z.J. Nyakundi from proceeding with the hearing and determination of Butali SPMCC No.210 of 2020 pending the hearing interparties and thereafter pending the hearing and determination of the application herein.

5. Any other order the court shall deem fit.

6. Costs be provide for.”

6. The Application is based on the grounds that appear on its face and is supported by the Affidavit of the Applicant Metchilda Imbogo sworn on 8th June 2012. The grounds are that:

“i. The Applicant has challenged the Jurisdiction and manner in which the suit has been handled.

ii. The suit relates to exhumation of a body buried in Trans-Nzioa County.

iii. The orders that the court shall make are likely to impact on a pending probate matter number 24 of 2021 regarding the will of the deceased.

iv. The Court has bested itself with Jurisdiction and has refused to recuse itself from hearing the matter.

v. It is in the interest of justice that the matter be transferred to this court.”.

7. The salient facts garnered from the Supporting Affidavit are the Deceased passed away on 12th November 2020. It is said that prior to his death he made a will which stated that he be buried at Lukesi Machewa Location Saboti Division Trans-Nzoia county. Also that in the Butali suit the Applicant was represented by a different law firm. R. E. Nyamu, who filed a defence and a preliminary objection. Also that the Court (in Butali) did dismiss the P.O. which prompted an appeal to the High Court.

8. It is then alleged that “the High Court Judge while dismissing the appeal remarked that I still had a leeway of filing an Application to transfer the suit to the relevant court.”. The deponent then goes on to justify the need for urgency by saying the Plaintiff’s Advocates had issued short notice for a hearing on 7th June 2021 (in other words the day before). She says a new date was taken for 5th July which was then changed to 14th June 2021.

9. When the matter first came before the Court as currently comprised, an ex parte order for a stay was not granted but direction were given for a quick hearing. It should be stated that there is no independent verification of the hearing date for 7th June 2021.

10. The Respondent (Christine Imbogo) appointed the same Advocates (Boniface Masende & Co Advocates. The Respondent filed grounds of opposition on 30th June 2021 and written submissions on the same day. It is clear she is saying this application is a duplication and therefore an abuse of process and forum shopping. The Grounds relied upon on:

“1. **THAT** the application lacks merit, is frivolous vexation and amounts to an appeal against the judgment of this court delivered on 25th May, 2021 in Kakamega High Court Civil Appeal No. E020 of 2020 between **Metchilda Imbogo vs Christine Makokha Imbogo** who are the same parties to this litigation.

2. That the application is an abuse of the process of court intended to scuttle the just, efficient and expeditious determination of Butal Civil Case No. 210 of 2020 between **Christine Makokha Imbogo vs Metchilda Imbogo** which is a burial dispute concerning the deceased husband of the Respondent.

3. **THAT** the Applicant is engaging in forum shopping which should not be entertained by this court.

4. **THAT** on 14th June, 2021 the parties in this litigation appeared before the Honourable trial court at Butali Law Courts and by consent they fixed Butali CMCC NO. 210 of 2020 for hearing on **15th and 19th July 2021** both dates inclusive and the said hearing dates were proposeod by counsel for the Applicant herein. The trial court and the Respondent were never informed of these proceedings at the time of fixing the hearing dates.

5. **THAT** the Applicant has not demonstrated that she stands to suffer any substantial loss or prejudice if the proceedings before the trial court are allowed to proceed to their logical conclusion.

6. **THAT** the Honourable Court sitting at the Butali law Courts has the requisite territorial jurisdiction to hear and determine the dispute as the first instance court.

7. ***THAT*** the is absolutely no justification in law in having the trial transferred to Kitale Law Courts.

8. ***THAT*** the question of jurisdiction of the trial court is Res Judicate.

Based on the above grounds the Respondent prays that the Notice of Motion dated 3rd June, 2021 be dismissed with costs to be borne by the Applicant and her Advocates on record jointly and severally."

11. It is interesting to note that the Grounds of Opposition directly contradict what is said by Metchilda Imbogo in her affidavit (on oath) in regard to the hearing dates being taken unilaterally and then being changed by the Advocates.

12. Having not succeeded in obtaining a stay from the High Court in June, on 6th July 2021 Mr Wanyonyi "*on behalf of Metchilda*" filed on Application in the Butali SPM's Court, also for a stay. From the Certificate of Urgency it is clear that the Hearing date was fixed for 15th July 2021. Making what was said by Metchilda in her affidavit untrue. In Butali it was said there should be a stay pending the High Court decision. That is an interesting approach given that the High Court itself had not granted the stay of the Butali proceedings. There was no ex parte stay forthcoming in Butali either.

13. On 9th July 2021 Mr Wanyonyi on behalf of Metchilda filed yet another application under yet another certificate of urgency. In that Application the prayer is for a stay pending the disposal of the Application for a transfer. It is noteworthy that at that time, the Application for transfer had been listed for hearing on a taken taken by Mr Wanyonyi (1st July 2021). In his certificate of urgency, Mr Wanyonyi's reason for urgency is that "the lower cour has refused to stay proceedings in Butali SPMCC NO. 210 of 2020 which is fixed for hearing on 15th July 2021 when hearing of the main suit is due.

14. The Application of 9th July 2021 was brought by notice of motion under Section 1A, 1B, 3, 6, 18 and 63(e) of the Civil Procedure Act and Orer 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of law. The Application seeks for orders that:

"1. THIS Application be certified urgent and the same be heard forthwith ex parte

2. THAT pending hearing interparties and thereafter pending the determination of this application there be a stay of proceedings in Butali SPMCC No 210 of 2021

3. THAT proceedings in Butali SPMCC be stayed pending the hearing and determination of the application for transfer of suit.

4. THAT costs be in the course."

15. The Application is supported by the Affidavit of Mitchilda Imbogo and relies on the following grounds:

"1. That the applicant herein has filed an application to transfer Butalii SPMCC 210 of 2020

2. That the Application is pending for hearing and determination

3. The court did direct that the application be made in the court of first instance.

4. The application was made but the court declined to make the orders other than directing that the application be heard on the same day the suit comes up for hearing.

5. The suit is likely to be concluded on the same day".

That application is supported by yet another affidavit sworn by Metchilda Imbogo. She says at paragraph 5 In her Supporting Affidavit that she is apprehensive that "the matter is likely to be concluded before the matter before this court is heard and determined.". She seeks a stay of the Butali proceedings. What Metchilda fails to disclose is that the issue of transfer has already been ruled upon by the High Court in Kakamega. That was a material fact and it was not disclosed within her ex parte application, which requires full and frank disclosure.

16. On 17th July 2021, the Applicant rather than proceedings with the hearing of the application sought further directions. Immediately thereafter the Applicant, Metchilda filed the Second application seeking (yet again) a stay. The Certificate went before Court 1 and an interim stay was granted until 27th July 2021. On 27th July this Court extended the stay and gave a date for Ruling. Unfortunately, on that date the Judge was required to attend essential training before going on leave.

17. The Issues for determination are:

(a) Whether this Court has jurisdiction to re-hear a dispute which it has already substantively adjudicated upon; namely. Whether

(i) Whether the SPMCC in Butali has jurisdiction

(ii) Whether the Plaintiff be afforded access to justice in the Court where she has issued her suit.

(iii) Whether there are any cogent grounds to stay proceedings

(iv) Whether there are grounds for transfer.

18. The Applicable Law

(1) **Section 5** of the *Civil Procedure Act (Cap 21)* provides:

Any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred.

(2) **Section 6** of the same Act provides:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

(3) Further **Section 7** provides:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

19. The Parties' Advocates have filed very erudite written submissions which expand greatly on the topic. The Court has considered them carefully but in the interests of brevity they are not repeated here.

20. In relation to the Application dated 8th June 2021, prayers 2, 3 and 4 were dealt with in ***High Court Civil Appeal No. E020 of 2020*** and therefore are res judicata.

21. In relation to the Application dated 9th July 2021 the prayer was for stay pending disposal of the earlier application. The interim order was made by Hon Mr Justice Musyoka in Court 1. It is now spent.

22. Given the large number of repetitive applications filed by the Applicant Metchilda it is clear that the way in which she conducts litigation is an abuse of the process. Making the same application before various courts in the hope that somewhere she will succeed. In addition the Court notes with disapproval that there has been failure to disclose material facts during ex parte applications. The result is that she does not come before the Court with clean hands.

23. In the circumstances both Applications are dismissed with costs.

Order accordingly,

FARAH S. AMIN

JUDGE

DELIVERED, DATED AND SIGNED THIS THE 15TH DAY OF DECEMBER 2021 IN KAKAMEGA ON-LINE AFTER NOTICES WERE SERVED

In the Presence of:

Court Assistant: Clement Okoit

Mr Wanyonyi for Applicant

Mr Masinde for the Respondent