



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 980 OF 2014

IN THE MATTER OF THE ESTATE OF JOHN KATHUMBA MAKU – (DECEASED)

LITHA KATUMBI KATHUMBA1ST PETITIONERS

AMINA MBULA KATHUMBA2ND PETITIONERS

VERSUS

NZIOKA WATHOME

NDUVA NDAMBUKI

REGINA MWIKALI NZOMOOBJECTORS

RULING

1. The Application coming for consideration is the one dated 22.11.2018 seeking the following orders:

i. The remains of BEATRICE SYOKAU KATHUMBA to be exhumed from strange site where male children of JOHN KATHUMBA MAKUTHI got buried and transferred to the 3 parent's burial site as set by the Patriarch to comply with the Patriarch's wish.

ii. The Court to summons all holders of burial permits, power of Attorney and other parents government official documents to deposit the same in Court for cancellation purpose where applicable as they were used to defeat justice against Courts direction as set for hearing of the Application on 1/4/2019.

iii. Machakos funeral Home to release all particulars as request for particulars dated in the request on 9.4.2019.

iv. The holders of burial permits namely SYLVESTER PETER NGUTA NDETI and SAMUEL SAIVA MUTEI to demonstrate their relationship to the family of JOHN KATHUMBA as in the family transgenicity.

v. A permanent injunction to restrain all the holders of the illegal power of Attorney and illegal burial permits by themselves, their agents, privies or whoever from dealing in any manner touching on the estate of JOHN KATHUMBA MAKUTHI.

vi. The firm of KIVUVA OMUGE AND CO, ADVOCATES do account for the property of our late parents which they used the proceeds to hijack the burial of BEATRICE SYOKAU KATHUMBA on 30.3.2019.

vii. REGINA MWIKALI NZOMO to deposit the cash collected as rent from the houses belonging to JOHN KATHUMBA MAKUTHI as from 30.1.2010 to 31.5.2019 at a rate of Ksh.7, 000/- per room for 113 months for the 100 rooms in this Honourable Court for Distribution purposes to the beneficiaries.

viii. The Cost of transferring the remains of BEATRICE SYOKAU KATHUMBA (Deceased) from Children's burial site to the Patriarch's burial site and the cost of this Application be borne by the respondents.

2. The Application is supported by the Affidavit of LITHA KATUMBI KATHUMBA of even date.

3. The Respondents have filed a Replying Affidavit dated 11th February 2019.
4. The parties gave viva voce evidence. The applicants are asking for orders to exhume the remains of their mother BEATRICE SYOKAU KATHUMBA from where she was buried to a site where the Patriarch had set for burial.
5. The Respondents said the inquest on the death of BEATRICE SYOKAU was concluded in Makadara and another case was done before Hon. Justice Musyoka which was dismissed.
6. I have considered the evidence adduced by the parties in this case. I find that this Succession cause is for the Estate of JOHN KATHUMBA MAKUTHI.
7. The Applications are seeking orders to exhume the body of Beatrice syokau kathumba who was a step mother of the applicants and a wife to the deceased herein JOHN KATHUMBA MAKUTHI.
8. I find that there is evidence that the parties have had several cases on the issue of the burial of the deceased BEATRICE SYOKAU KATHUMBA including an inquest where the issue of burial was dealt with.
9. It is not clear why the Applicants are raising the issue of the body of BEATRICE SYOKAU In this Succession Cause and yet this suit only deals with the Estate of JOHN KATHUMBA MAKUTHI.
10. Furthermore the body of BEATRICE SYOKAU (Deceased) is not property for purposes of this Succession Cause. Dead bodies are not part of estate and neither are they properties to the estate. See the case of **Norah Masitza Mamadi& Another –vs= Mombasa hospital Association T/A Mombaa Hospital (Unreported), Mombasa H.C.C.C. no. 153 of 2008** in which Justice Azangalala (as he then was) expressed himself as follows, interalia

“The dispute between the plaintiffs and the respondent involves a dead body which must be disposed of at once. In that regard, I am of the view that this matter ought to be decided at once as special circumstances exist. The plaintiffs have demonstrated that they alone are interested in the release and burial of the remains of the deceased. I have also found that they have a right to receive those remains and bury them. The respondent does not claim such a right over those remains. Its primary interest is in its charges which it insists should be settled or a guarantee for payment of the same be made before the remains may be released. The respondent’s concern in my view should not delay the disposal of the remains of the deceased. The defendant’s claim is a charge on estate of the deceased. **The deceased’s remains are not an asset that the respondent may hold as alien.** The defendant cannot sell the same to recover its charges. It cannot pledge or otherwise use the remains as security. Indeed the defendant acknowledges that there is no property in the remains of the deceased. So the respondent has no basis for refusing to release the remains of the deceased at all. The estate of the deceased will in due course be advertised before its administration is undertaken. There is no impediment to the lodging of the respondent’s claim then. Alternatively, the respondent can take out a citation in the event that no one is ready to take out letters of Administration. As the respondent has not and will not at any time claim the remains of the deceased I find that in the circumstances that the injunction sought is directed at a simple and summary act, namely the release of the remains of the deceased for burial. The respondent’s interest in its charges does not lapse with the release and burial of the remains of the deceased. I therefore feel that at the trial it will appear that the injunction has been rightly granted.”

11. I dismiss the Application dated 22.11.2018 for want of merit and I further direct that each party bears its own costs of the said application.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 14TH DAY OF FEBRUARY, 2020

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.