



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT CHUKA**

**HCCA NO. 1 OF 2020**

**RUCHA MARETE.....APPELLANT**

**VERSUS**

**PITYNESS WANGU KINOTI.....RESPONDENT**

**R U L I N G**

1. Before this court is an application dated 18<sup>th</sup> February 2020 by way of Notice of Motion brought by **RUCHA MARETE**, the Appellant/Applicant and seeks the following orders namely;

***i) Spent***

***ii) That pending the hearing of instant application and/or until further orders from this court, this honourable court be pleased to issue stay of execution orders/or implementation orders against the execution and/or implementation of the orders dated 14<sup>th</sup> February 2020 in Chuka Chief Magistrate's Court Succession Cause No.232 of 2016 and which orders restrained the interment of the remains of Mawira Rucha on L.R Mwimbi/S. Mugumango/736.***

***iii) That pending the hearing and final determination of the instant application and the appeal and/or until further orders from this court, this honourable court be pleased to issue orders directing the interment of the remains of one Mawira Rucha on L.R. Mwimbi/S.Mugumango/736 and where he was residing on prior to his demise and where his entire family resides.***

***iv) That this honourable court do grant such further orders as appropriate to meet the ends of justice.***

***v) Costs***

2. The grounds upon which this application has been lodged are listed as follows namely;

***a) That the Applicant/Appellant felt aggrieved by the ruling of subordinate court delivered on 12<sup>th</sup> February 2020 which restrained the burial of one Mawira Rucha on L.R. No. Mwimbi/S. Mugumango/736 and from which ruling the Appellant has lodged an appeal herein.***

***b) That the appeal filed has overwhelming chances of success and that it is in the interest of justice that stay orders be issued and burial be allowed to proceed pending the hearing and final determination of the appeal as in his view no property lies on a dead person.***

***c) That unless the orders sought are granted, the Applicant stands to suffer irreparable loss and damage.***

***d) That the Respondent would not suffer any prejudice as she does not reside on the land.***

3. The Applicant has filed a Supporting Affidavit sworn on 18<sup>th</sup> February 2020 to support the reliefs as sought above. He has reiterated the above grounds complaining that he was barred from burying his son to the parcel of land he calls home which according to him was left for him by his late father, the late Marete Ibutu.

4. He asserts that the restraining orders were obtained by his sister who is married to one Kinoti Muthara whom she stays with in a separate parcel of land.

5. The Applicant contends that he has no other place to bury his son other than Mwimbi/S. Mugumango/736 where his deceased son was staying with his family. He claims that the Respondent would suffer no prejudice as there is no property in a dead person and that because the Respondent does not reside on the contested parcel there would be prejudice suffered.

6. The Respondent has opposed this Application through grounds of opposition dated 24<sup>th</sup> February 2020 where she has contended that orders issued in the lower court is incapable of being stayed.

7. The Respondent contends that the relief sought are akin to setting aside

The lower court's orders before the appeal is heard and determined and that the orders sought would essentially determine the appeal.

8. The Respondent through counsel submitted that the Applicant has alternative land to bury his son. She further contends that the provisions of **Order 42** are inapplicable in probate and administration matters because they are not the exemptions under **Rule 63 P & A Rules**.

9. This court has considered this application and the response made. The applicant has invoked **Order 42 Rule 6** and **Articles 48,50, 159 (1) and 2 (a) (b) (c) (d) and (e) and 165 of Constitution of Kenya 2010**.

10. The appeal herein arises from a succession cause that is pending in the lower court vide **Chuka Chief Magistrate's Court Succession Cause No.232 of 2016**. The appeal relates to injunctive orders issued by the subordinate court stopping the applicant from burying or interring the body of Mawira Rucha (deceased) on L.R. No. Mwimbi/S. Mugumango/736. That order was made on 12<sup>th</sup> February 2020 and issued on 14<sup>th</sup> February 2020.

11. The memorandum of appeal herein is couched in the following terms that the appeal is "***an appeal against the ruling delivered on 12<sup>th</sup> February 2020 and restraining orders thereof issued on 14<sup>th</sup> February 2020 by J.M Njoroge - Chief Magistrate Chuka Law Courts vide Chuka CM'S Court Succession Cause No.232 of 2016***"

12. The body of the appeal is the grievances about the decision by the said subordinate to restrain the Appellant from interring his deceased son on L.R. Mwimbi/S. Mugumango/739.

13. It is therefore clear that the Applicant here is seeking orders that are really final in effect which pegs the question as whether a party can seek final orders at an interlocutory stage. This in my view is the primary consideration even before I look at the merits of the orders sought.

14. While there is no bar to granting such orders, such orders can only be granted in very few exceptional circumstances where it is very clear that the Applicant would eventually succeed. In the case of **Olive Mwhiki Mugenda & Another -vs- Okiya Omtata Okoiti and 4 others [2016] eKLR** the Court of Appeal *inter alia* made the following guiding observations citing an Indian decision in **Ashok Kamau Bajpru -vs- Dr.(Smt) Ranjama Baipai, AIR 2004 ALL 107, 2004 (1) AW 88**:

***" It is evident that the court should not grant interim relief which amount to final relief and in exceptional circumstances where the court is satisfied that ultimately the petitioner is bound to succeed and fact - situation warrants granting such a relief, the court may grant the relief but it must record reasons for passing such an order and make it clear as what are the special circumstances for which such a relief is being granted to a party."***

15. The Applicant in this application has not disclosed what special circumstance obtains that can persuade this court grant final orders without interrogating the merits or demerits of the appeal. In the first place, the proceedings from the lower court has not been availed or the record of appeal availed to help this court even determine whether the applicant has established the threshold for granting interim orders.

16. I am also persuaded by the Respondent that there are no orders issued by the subordinate court capable of being stayed. The orders issued are negative in effect that it restrains the Applicant from burying his son in the estate and the only way for this court to interfere with the orders is to lift the orders or set them aside. To lift them or set them aside, is to determine the appeal herein as that is all in this appeal. A positive decision in this application renders the appeal determined which I find premature and improper because the appeal must be determined on the merits and upon hearing both parties.

17. Secondly, the Applicant has not demonstrated that he has high chances in the appeal or that he is likely to suffer irreparable harm. He says that there is no property in a dead body which is true. This begs the question why can't he bury his son in the alternative parcel which he concedes he owns and has no dispute as opposed to the property in issue here which is in dispute. Why can't he bury his son in peace in a parcel of land he knows no one stakes any claim over it?

18. On the application of **Order 42 of Civil Procedure Rules** in the Probate matters, it is true that Law of Succession Act prescribes its own rules and procedures and it specifically ousts the application of Civil Procedure Rules and provides exemptions under **Rule 63** of its rules. **Order 42** by construction is not one of those rules applicable. So a party has to move the court either under **Section 47** or **Rule 73** to invoke inherent powers of court to grant such orders as to met the ends of justice. This court further finds that even if **Order 42** applied, the applicant would still fail because under **Order 42 Rule 2 (1)** the rules provides that no order of stay can be granted unless

***" (a) This court is satisfied that a substantial loss may result to the applicant....."***

The applicant has not demonstrated that he will suffer any substantial loss.

In the end this court finds that this application fails mainly on the following reasons namely;

- (i) He has not demonstrated what substantial he would suffer if he buries his deceased son in his other parcel that is not disputed.
- (ii) There is no order capable of being stayed since the order for which the applicant is aggrieved about is a restraining order.
- (iii) Under Rule 63 P&A Rules, Order 42 does not apply and even if it was to apply, the applicant has not met the threshold.

19. This court has considered this application in all its aspects and I must say that the Applicant appears intent at only circumventing the order issued by the subordinate court without interrogating the merits of the appeal itself. This court finds that application totally lacks in merit and is also incompetent. The same is disallowed but costs shall be in the appeal.

**Dated, signed and delivered at Chuka this 4<sup>th</sup> day of March 2020.**

**R. K. LIMO**

**JUDGE**

**4/3/2020**

Ruling signed, dated and delivered in the open court in presence of Kirimi for Applicant and Murithi for Respondent.

**R. K. LIMO**

**JUDGE**

**4/3/2020**