



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 65 OF 2020

NORAH BOSIBORI MANG'ERERE.....1ST PLAINTIFF/APPLICANT

JAMES MANG'ERERE.....2ND PLAINTIFF/APPLICANT

JOSEPH MANG'ERERE.....3RD PLAINTIFF/APPLICANT

LUCAS AYORA MANG'ERERE.....4TH PLAINTIFF/APPLICANT

CATHERINE MANG'ERERE.....5TH PLAINTIFF/APPLICANT

-VERSUS-

HENRY NYABUTO MANG'ERERE.....DEFENDANT/RESPONDENT

RULING

1. The 1st to 5th plaintiffs/applicants herein took out the Notice of Motion dated 19th May, 2020 and sought for the orders hereunder:

i. Spent.

ii. Spent.

iii. Spent.

iv. THAT a temporary injunction do issue restraining the defendant/respondent by himself, his agents, servants and/or other person authorized or purporting to be authorized by himself and/or other person whomsoever from interfering and/or in any way disposing of the remains of MARCO MANG'ERERE pending the hearing and determination of the suit.

v. THAT a mandatory injunction do issue compelling the defendant/respondent to repatriate the remains of MARCO MANG'ERERE to Kenya pending the hearing and determination of the suit.

vi. THAT directions do issue that the matter be heard electronically on priority basis until final determination and service of court process be effected to the defendant/respondent via his email address: mangerere1@yahoo.com and/or through WhatsApp through his telephone no. +19734520792.

vii. THAT the costs of the application be awarded to the plaintiffs/applicants.

2. The Motion stands supported by the grounds laid out on its face and the facts deponed in the affidavits of the 1st and 2nd applicants.

3. The defendant/respondent put in a replying affidavit to oppose the Motion, with the 2nd applicant rejoining with a further affidavit.

4. This court directed the parties to file written submissions. At the time of writing this ruling, only the applicants' submissions were in the court file. Going by the record, when the applicants' advocate attended court on 30th July, 2020 for purposes of obtaining a hearing date, he indicated to this court that he had not been served with any submissions by the respondent's advocate, whom this court also notes was absent on the said date.

5. In their submissions dated 17th July, 2020 the applicants have argued that this court has jurisdiction to entertain the instant application and the suit for the reasons that Marco Mang'erere ("the deceased") who was the husband to the 1st applicant and father to the 2nd to 5th applicants as well as the respondent, was a Kenyan citizen domiciled in Kenya and only went to the USA for purposes of seeking medical treatment. The applicants have further argued that all the parties herein are of Kisii ethnicity and hence the applicable law is the Kisii Customary Law.

6. Further to the foregoing, the applicants submit that by filing an unconditional memorandum of appearance and statement of defence, the respondent acquiesced to the jurisdiction of this court. For purposes of reference, the applicants cited the case of **Gremmo Danielle & Another v Kilily Spa [2009] eKLR** where this court held thus:

"In Raytheon Aircraft & Another v al-Faraj Ltd C.A. NO. 29 OF 1999 [Unreported] the court of appeal seem to suggest that a party who seeks to challenge jurisdiction can only do so, if entered conditional appearance or filed a protest to entry of an unconditional appearance or defence. The court of Appeal was very explicit Kanti & Co. Ltd v South Briton Insurance Co. Ltd [1985] KLR page 1 at page 2 it was by court of appeal held interalia:-

"a defendant by entering an unconditional appearance to a summons to enter appearance, submits to the jurisdiction of the court and as long as the unconditional appearance stands, the court is seized of jurisdiction to try the suit, and the defendant cannot after filing such a memorandum of appearance abrogate or annul it unilaterally by entering an amended appearance under protest, without an order of the court releasing him from his admission and acceptance of the jurisdiction."

7. It is the submission of the applicants that in any event, the respondent does not stand to suffer any prejudice if the suit is heard in Kenya while the reverse is true in respect to the applicants, should the suit be heard in the State of Phoenix in the USA.

8. On the merits of the Motion, the applicants argue that the circumstances of the present case are clear cut enough to warrant the granting of a mandatory injunction at this interlocutory stage.

9. To support their argument above, the applicants submit that the right to decide the place of burial of the deceased lay squarely with the 1st applicant, being his legal wife. The applicants then quoted the case of **Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge & another [2004] eKLR** in which the court determined the following:

"...in social context prevailing in this country, who is in the first line of duty in relation to the burial of any deceased person, is the one who is closest to the deceased in legal terms. Generally the marital union will be found to be the focus of the closest chain of relationships touching on the deceased. And therefore, it is only natural that the one who can prove this fundamental proximity in law to the deceased, has the colour of right of burial, ahead of any other claimant."

10. The applicants expounded on their submissions by arguing that the 1st applicant and the deceased had contracted a Christian union and that it matters not that the deceased adhered to the Christian way of life; the customs and practices of his community would still apply to him even to the point of death.

11. In that regard, it is the contention of the applicants that they are deserving of a mandatory injunctive order at this interlocutory stage.

12. As concerns the granting of an interlocutory injunction, the applicants are of the view that the special circumstances of the instant case warrant such an order since the remains of the deceased continue to decompose and that unless an interlocutory injunctive order is granted and the case drags on, the remains will have decomposed substantially, thereby rendering the proceedings nugatory.

13. The applicants further called upon this court to take judicial notice that the transportation of corpses is still ongoing amidst the Covid-19 pandemic and that the respondent has not produced any evidence to show that the burial of the deceased was ordered by the Arizona State in the USA, and has instead taken advantage of the situation to hinder the 1st applicant and the remaining children of the deceased from partaking in the burial of the deceased in the proper manner.

14. I have considered the grounds set out on the face of the Motion, the facts deponed in the respective affidavits supporting and opposing the Motion and the written submissions by the applicant together with the authorities cited.

15. Before I delve into the merits of the Motion, I deem it necessary to first address the issue of jurisdiction which was essentially raised by the respondent in his replying affidavit.

16. According to the respondent, this court does not have jurisdiction to entertain the Motion and the suit for the reason that the deceased was a permanent resident of Arizona State in the USA and that neither he nor the 1st applicant had glued themselves to the customary way of life or rites.

17. In response, the 2nd applicant through his further affidavit stated that the deceased obtained a permanent residency permit solely to enable him access medical treatment in the USA and not for the purpose of staying there permanently.

18. The 2nd applicant further stated that the deceased was a Kenyan domiciled in the Republic of Kenya and that at no time did he renounce his citizenship or abandon his family and hence, the private laws of Arizona would not be the applicable law in the instant case. According to the 2nd applicant, Kisii Customary Laws would instead be the applicable law to the circumstances surrounding the burial of the deceased.

19. Upon considering the arguments presented by the respective parties, I note that it is not in dispute that the deceased sought permanent residency in Arizona State in the USA. It is also not in dispute that the reason for the deceased's relocation to the USA was for purposes of seeking advanced medical treatment for various conditions/illnesses that he suffered from, before his unfortunate demise.

20. In the absence of any credible evidence or documentation to demonstrate that the deceased who was at all material times a Kenyan citizen, did not wish to be governed by the Kenyan and/or Kisii Customary Laws upon his relocation and during his stay in the USA or that he renounced his Kenya citizenship. I am therefore convinced that the Kenyan courts are seised with jurisdiction to handle the present matter.

21. More importantly, upon my perusal of the record, it is apparent that the respondent recently filed both an unconditional memorandum of appearance and a statement of defence. In so doing, he submitted himself to the jurisdiction of this court. Had the respondent wished to challenge the jurisdiction of this court from the onset, he ought to have entered a conditional appearance or filed a protest to the entry of an unconditional appearance or defence, but he did not.

22. In such instances, the legal position is that a party cannot be heard to subsequently challenge the jurisdiction of a court. This position was succinctly stated by the Court of Appeal in the case of **Raytheon Aircraft & Another v air al-Faraj Ltd C.A. NO. 29 OF 1999 [Unreported]** and referenced by this court in the case of **Gremmo Danielle & Another v Kilily Spa [2009] eKLR** as cited earlier on in this ruling.

23. On the merits, it is clear that the application concerns itself with the granting of an interlocutory injunction. The germane principles on interlocutory injunctions were stated by the Court of Appeal in East Africa in the case of **Giella v Cassman Brown & Co. Ltd (1973) EA** as follows:

a. The applicant must first establish a prima facie case with a probability of success.

b. The applicant must then demonstrate that he, she or it stands to suffer irreparable loss that cannot be adequately compensated through damages.

c. Where there is doubt on the above, then the balance of convenience should tilt in favour of the applicant.

24. On the first principle, the 1st applicant indicated that she was the wife to the deceased, having married and thereafter formalized the union by way of a Christian marriage ceremony in 1980 and that he had traveled to the USA to seek and obtain advanced medical treatment for his diabetes, high blood pressure and prostate cancer.

25. The 1st applicant stated that following the demise of the deceased on 2nd March, 2020 she informed all her children, that is the 2nd to 5th applicants and the respondent, to make arrangements for the repatriation of the remains of the deceased for burial in his rural home at Kenyoro Masanga in Kisii County and that a burial site had been set up and burial arrangements were underway, including the raising of funeral related funds.

26. According to the 1st applicant, despite the original arrangement and legitimate expectation that the respondent would arrange for the remains of the deceased to be returned to the country from the USA, she came to learn that the respondent had secretly buried his remains in a cemetery in Arizona without her consent or consultation of herself or her children, despite the fact that some airlines have been permitting and undertaking the transportation of cargo including human remains from the USA to Kenya.

27. The 1st applicant stated in her affidavit that to date, she has not been issued with the Certificate of Death for the deceased.

28. In support of the aforementioned averments, the 2nd applicant in his affidavit stated that the respondent had previously indicated to them that the Kenyan community and friends in the USA were raising funds to enable the transportation of the remains of the deceased to Kenya for burial, only to later learn that the respondent had proceeded to bury the deceased in Phoenix, Arizona.

29. The 2nd applicant added that at the time of the deceased's passing, the Kenyan Government had yet to impose any travel restrictions and hence the respondent has no excuse for failing to organize for the transportation of the deceased's remains to Kenya.

30. The 2nd applicant also stated that the respondent chose to ignore their requests that he preserve the remains of the deceased until such time as the pandemic would subside to enable the transportation of the remains for proper burial in Kenya.

31. In his response, the respondent asserted that following the Covid-19 pandemic, global governments including but not limited to the Kenyan Government set stringent measures to curb the spread of the virus, such as travel bans and restrictions on socialization.

32. The respondent stated that as a result, efforts to have the remains of the deceased repatriated to Kenya were defeated by the overriding circumstances of the global pandemic and he was therefore not to blame for any omissions in delivering the body. The respondent added that

in the premises, the only pragmatic step to take was to have the deceased buried in Arizona and that in any case, all the applicants were made aware of this fact.

33. It was stated by the respondent that throughout the illness of the deceased, who lived with him in Arizona, none of the applicants made arrangements to visit him and they are only intent on obtaining the Certificate of Death for the purpose of pursuing succession proceedings.

34. The respondent restated that the Kisii Customary Laws do not apply in respect to the deceased, who was a permanent resident of Arizona and hence it is unnecessary for the applicants to insist on burying the deceased in line with the Kisii Customary Laws.

35. It is apparent from the foregoing that the respondent already undertook the burial of the deceased in the USA.

36. Upon considering the rival positions taken, I established that few issues arise therefrom, the key issues touching on whether decision by the respondent to bury the deceased was done lawfully or reasonably or with the consent of the applicants; particularly the approval of the 1st applicant whom it is undisputed was the legal wife to the deceased; and whether the decision of the respondent to bury the deceased in a different jurisdiction is contrary to the parties' customs/traditions and therefore contrary to public policy.

37. It is not controverted that the deceased had been residing in the USA for close to 10 years before his death, during which time there is no indication that he ever visited his country of origin, Kenya.

38. It is also not controverted that at the time of the deceased's death, a global Covid 19 pandemic had already hit some countries including the USA, thereby resulting in restrictions in both local and international travels with the introduction of travel bans in most countries. This made it difficult if not impossible for persons to travel in and out of the country. Subsequently, the pandemic spread to Kenya and other African countries which followed suit in issuing travel restrictions.

39. Taking the above factors into consideration, I am not satisfied that the elements of a prima facie case have been established by the applicants.

40. As relates to the second principle on irreparable loss, the 1st applicant stated that as a result of the unlawful burial of the deceased, she has suffered and continues to suffer emotional and psychological distress since the deceased who was her husband was buried in a foreign country without her consent or attendance and since the right to determine the burial of the deceased is vested in her, the action of the respondent overruled her wishes.

41. The 2nd applicant reiterated the above sentiments and stated that as a result of the actions of the respondent, the family has been traumatized and brought to public ridicule, adding that the health of the 1st applicant has deteriorated.

42. The 2nd applicant further stated that the respondent had earlier on received some funds to necessitate the repatriation of the deceased's body thereby making it obvious that the respondent's actions are mischievous and improper at the least.

43. In reply, the respondent asserted that the applicants have not demonstrated the irreparable loss they stand to suffer if the orders sought are denied.

44. Having considered the rival positions, it is apparent that arrangements were made to have the deceased buried in Kenya and that the applicants who are close family members of the deceased did not attend the burial of the deceased in Arizona in the USA which caused them to suffer emotional and psychological distress. It is also apparent that the applicants are of the view that the burial procedure undertaken by the respondent went contrary to public policy and the customs/traditions of the parties herein, which traditions are known to be held in high regard in many communities in Kenya.

45. However, this court reiterates that the global pandemic, namely Covid-19, created very unique circumstances. Moreover, it is clear that the deceased passed on in the USA in the midst of this pandemic and upon residing there for quite a number of years as a permanent resident. It is apparent from the evidence of the 1st plaintiff and respondent that the deceased was buried in Arizona State in the USA. Suffice it to say that, I am of the view that the applicants did not bring any credible evidence to show the irreparable loss they will suffer if the injunctive order sought is denied at this interlocutory stage.

46. Having determined that the applicants have not satisfied the first two (2) principles above, I find that the balance of convenience automatically tilts against their favour.

47. When it comes to mandatory injunctions, the courts have been hesitant to grant the same particularly at the interlocutory stage, save in clear-cut cases. Such was the reasoning taken by the court in **Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR** in the following manner:

“...the court will not grant a mandatory injunction if the damage feared by the plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing.

Persuasive judicial pronouncements by Indian courts have also affirmed that great circumspection is called for before awarding a mandatory injunction at interlocutory stage. In **BHARAT PETROLEUM CORP LTD V. HARO CHAND SACHDEVA**, AIR 2003, Gupta, J. of the Delhi High Court observed as follows:

“While Courts power to grant temporary mandatory injunction on interlocutory application cannot be disputed, but such temporary mandatory injunctions have to be issued only in rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and is likely to cause extreme hardship. If a mandatory injunction has to be granted at all on interlocutory application, it is granted only to restore status quo and not to establish a new state of things.”

48. The 1st applicant stated in her affidavit that owing from the conduct of the respondent, a mandatory injunction would be appropriate. She further stated that the 2nd to 5th applicants are willing to cater for the repatriation costs and preservation costs of the deceased’s body.

49. The respondent replied by stating that seeking orders for exhumation of the deceased’s body is a draconian act.

50. In the present circumstances, I have not come across any compelling reasons to persuade me on the practicability of issuing a mandatory injunction for the exhumation and repatriation of the body of the deceased at this interlocutory stage. I think the circumstances of this case militate against a grant of a mandatory injunction at this time. There is need to have the case heard substantively.

51. In the end, I find no merit in the plaintiffs’ motion. the same is dismissed with no order as to costs. The suit should be listed for hearing on priority basis.

Dated, signed and delivered online via Microsoft Teams at Nairobi this 9th day of October, 2020.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiffs/Applicants

..... for the Defendant/Respondent