



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL CASE NO. 10 OF 2019

(Coram: Odunga, J)

(CONSOLIDATED WITH MACHAKOS CRIMINAL CASE NO. 15 OF 2019)

REPUBLIC.....PROSECUTOR /RESPONDENT

-VERSUS-

- 1. PAULINE MAISY CHESANG.....1ST ACCUSED**
- 2. RICHARD LORUNYEI MORU.....2ND ACCUSED**
- 3. LAWRENCE METAYO LEMPESI.....3RD ACCUSED**
- 4. PETER MAUNDU MBITHI.....4TH ACCUSED**
- 5. NUNO HASSAN JILLO.....5TH ACCUSED**

RULING

1. On 14th June, 2019, I delivered a ruling in this matter in which I ordered that the accused persons may be released upon deposit into court of a cash bail in the sum of Kshs 500,000.00. In addition, they were to provide two sureties of Kshs 1 Million each to be approved by the Deputy Registrar of this court and were to deposit all their travel documents including their passports which they hold – if they have any.

2. Subsequently, the court reviewed the said order and set aside the requirement for the cash bail with the other terms remaining as they were.

3. By an application dated 9th October, 2019, the 1st accused/applicant herein, **Pauline Maisy Chesang**, now seeks the following orders:

1. THAT this Honourable Court be pleased to review/revise the terms of bond granted to the applicant so that the Director of Immigration or any other such officer in charge of the issuance of passports be ordered to supply the applicant with a new passport/or replace the lost passport.

2. THAT the Investigating Officer, no 86449 CPL Kapario Lekakeny do remove the entry he made with the department of immigration with regards to not having the applicant issued with a new passport.

3. THAT the investigating officer, no 86449 CPL Kapario Lekakeny do return all the items to the applicant taken from the applicant's house at Moke Gardens as per the inventory taken and signed for by the investigating officer herein.

4. THAT the 2nd interested party be and is hereby restrained from threatening, abusing and intimidating the applicant, her children, and wider family including mother, sisters, and brother in any way including directly communicating to them by way of phone calls, sending of sms messages and proxies/agents.

5. THAT the 1st interested party do forthwith supply the applicant the remainder of the title documents currently being held by herself which are in the joint names of the applicant and the deceased as well as those in the deceased's name which certificates are in the 1st interested party's possession.

6. THAT the 2nd interested party do supply the deceased's death certificate to the applicant to enable the applicant process the deceased's benefits for the benefit of her school going children.

4. According to the applicant, this Court suspended the requirement that she deposits her lost passport in court as condition for granting her bail/bond, provided that she complied with the rest of the other conditions as to bail/bond and that she either look for the same or apply for a new one. She subsequently extracted the said order to facilitate her in getting another passport after she confirmed from her house at Moke Gardens, Athi River, where she had always kept it that indeed, the passport was not in the house and was lost. She then applied for the replacement of the passport, paid Kshs 12,000.00 for the same and submitted her application to the department of immigration to enable her comply with the said conditions.

5. Upon her submission of the application form online and attending the office of immigration at Nyayo House, 8th floor, she was informed that it is impossible for her application to go through because there was an entry regarding her at the department of immigration made by the police; and that she needed the number of the lost passport which she did not recall as she had not used the passport for some time. It was her deposition that the said entry at the department of immigration was made without the knowledge or orders of this Court and was an illegally added condition by the investigating officer to the conditions set by the court as regards bail/bond terms. It was averred that the investigating officer has admitted to making this entry in his affidavit deposed to on 17th June 2019 at paragraph 6 thereof, making her flight from this jurisdiction impossible in any event.

6. The applicant therefore averred that since she has demonstrated efforts made to comply with the conditions set by the court in vain, she is unable to deposit that which she doesn't have. It was her case that she has also obeyed and not violated the other conditions of bail/bond set by this Court, and it is on that basis that she implored this court to review/revise the condition as to her depositing the passport so as to dispense with the same and/or order the Director of Immigration to supply her with a passport upon which she will re submit her application willingly.

7. It was stated that as indicated on record, all parties have indicated on record during pre-trial that they are ready for trial, marking an end of police investigations and therefore the items on the inventory are no longer useful to the investigations herein. It is desirable that all the items and documents that were removed from the applicant's house at Moke Gardens as per the inventory signed be returned to the applicant for her further use and dealing. In her view, since the items and documents in the inventory were taken from her house at Moke Gardens, the irrebutable presumption is that the said documents and items belong to her to the exclusion of anybody else, unless strictly proved by a party who wishes to claim her belongings.

8. The applicant further averred that taking advantage of the fact that the condition not to threaten anybody including the family of the deceased applies to her and not to the interested parties (who are witnesses herein) and the family of the deceased and more particularly the 2nd interested party has been sending threatening short message service (sms) to her mother and sister from his registered mobile no.0723xxxxxx and in the said sms, he has threatened the applicant, her children, mother and other family members so much so that her family now lives in fear for their lives and they are unable to move back into their house at Moke Gardens for fear that the 2nd applicant and the family of the deceased will attack them while living or visiting therein.

9. It was disclosed that indeed, on 9th September 2019, the 2nd applicant (sic) quarrelled the applicant's mother through sms service and later told her that the applicant and her children should not move back into their house because he and his family have a stake in it and that his family have many people who are police officers who will shoot the applicant if she did so. The applicant urged the court to take the said threat seriously and protect them from the complainants' aggression and threats since the applicant, her children and family too have a constitutional right to life and to be treated with dignity. It was emphasised that the threats ought to be taken seriously in light of the fact that the 1st interested party works for the National Police Service and is currently stationed at Vigilance House, and therefore has access to police officers who may do the shooting as threatened by the 2nd interested party. Some of the alleged messages are as hereinunder:

On 26th August 2019

"I AM SHOCKED THAT YOU MAISY GO CLEAN THE HOUSE, DESPITE THE COURT ORDER, AT LEAST CULTURAL RITE ARE PARAMOUNT, IF I SHOW YOU THE PICTURE OF ROBERT BOOKS THAT MAISY DREW LAST TIME AND PUT AT VERANDA, ITS VERY PAINFUL. THE HOUSE IS OWNED JOINTLY EVEN IF MAISY WAS SERVING THE LOAN AS A JUDICIAL I HAVE ALL THE ORIGINAL DOCUMENTS. DECEASED CLOTHES SHOES, 2 COURT GOWNS, FILES, THOUSAND AND THOUSAND OF BOOK SHOULD NOT BE INTERFERRED. I HAVE ALL THE PHOTOS. I DON'T THINK ITS CULTURALLY RIGHT FOR ROBERT CHILDREN TO GO TO THAT HOUSE WITHOUT CLEANSING"

ON 7TH October 2019

"KINDLY CONFIRM AND IF YOU ARE AWARE OF A MEETING THAT LATE ROBERT CHESANG, MAJORIE AND A CATHOLIC PASTOR HELD AT CREAM INN KITENGELA ON NOVEMBER, CONFIRM URGENTLY, WHAT DID THEY DISCUSSED ACCORDING TO THEM, THE DECEASED SENT THEM TO NYERI BUT DIDN'T WHY? CONFIRM THOSE DETAILS URGENTLY."

"ARE YOU AWARE OF SUCH A MEETING???? KINDLY CONFIRM FROM MARJORIE"

10. The applicant lamented that the 1st interested party is still holding on to title documents for some of the joint property she held with her deceased husband for which she has no legal interest and in violation of the *Land Title Act* which prohibits a person who is not an owner of titles from holding or being in possession of the same. The said documents and titles were stolen from her house at Moke Gardens, Athi

River where they were normally kept, and taken away from the house before the applicant could reach or get access to the house. In fact, it was averred, on gaining access to her house after the court granted her access, she found out that other items, documents, common household items and personal belongings owned by her husband, herself and her children are also missing despite the fact that the house does not seem to have been broken into as the doors and windows had not been interfered with. She averred that she has not accessed the house from the time of the death of her husband until the court gave her possession of the same after conclusion of investigations and upon the application of her advocate in this court. This is because the house had been declared a crime scene by the police for the purposes of investigations. She particularised the said title documents are:

- a. Title no. Kajiado/Meto/5911
- b. Title no. Kajiado/Mailua/3155
- c. Sale agreement, Land Registration fee receipt and letter of allocation with respect to Title no Mgange/Nyika/402
- d. Sale agreement and title to Mavoko town Block 3/4795 in the names of Sophia Isutsa Angote
- e. Sale agreement and title to Mavoko Town Block 3/4796 in the names of Sophia Isutsa Angote
- f. Four (4) Ownership certificates with respect to title no Kajiado/Kaptei North/25108 held at Kico housing Co operative Society

11. The applicant insisted that she needs the titles and documents to file a succession cause as she has priority in law as the widow of the deceased, and it is impossible to file a succession cause without the titles and documents in the possession of the 1st interested party. In any event, the interested party and the family of the deceased have a right to contest the succession cause that she may file and if they have any claim to their joint property and that of their brother, so that the succession court determines the matter substantively.

12. The applicant believed that it is important that this Court deals conclusively with the matter of the 1st interested party holding the titles and documents herein in a conclusive manner since they were made issues by the 1st interested party in her witness statement and admitted by her counsel on record.

13. The applicant also complained about the manner in which the deceased was buried and averred that the complaints' family who include the 1st and 2nd interested parties herein, obtained a burial permit and subsequently a death certificate secretly and hurriedly, which they are still holding but which is of no probable value to them, yet required by the deceased's children. In particular, the deceased youngest child will be joining grade one (1) in January 2020 and a reputable school has admitted her and the school requires proof of her of her father's death so as to register her and send her particulars to the Ministry of Education. The deceased's oldest child who is in grade 3 requires his father's death certificate to register to an application called NEMIS as required by the Ministry of Education, so that his results and data for the recently conducted national examination can be accommodated. The children will be requiring their father's death certificate from time to time according to their state of life, hence the application.

14. It was averred that the 2nd interested party is indeed in possession of the deceased's death certificate as he presented the same to the Law Society of Kenya after the burial of the applicant's husband in a bid to claim benevolent funds due to the deceased's children. The applicant asserted that it is trite law in the Constitution and *Children's Act* that where the interests of children are concerned, such interest is paramount all other interests ought to be put aside in favour of the interests of children, and this is the situation herein.

15. The application was opposed by the Respondent by way of a replying affidavit sworn by **CPL Kapario Lekakeny**. According to the deponent, he is one of the investigating officers in this case hence competent to swear the said affidavit. It was his averment that the Bond/bail terms granted by this court did not include any orders to the Director of Immigration and /or his officers to issue or replace the Applicant's passport. He deposed that as no entry was made to the Department of Immigration to stop issuance of a new passport to the Applicant, the allegation is therefore unfounded and baseless.

16. According to him, an inventory of all the items recovered from Applicant's House Block 3/10057 Moke Gardens Athi River on 20th February 2019 was duly signed by the Applicant, 1st and 2nd interested parties and 3 others in the presences of one of the Investigating Officers Inspector **Hussein Mahat** and the items that were not related to the case were returned to the applicant and remaining items are exhibits in this case.

17. It was his case that the documents mentioned in the applicant's affidavit to be in possession of the 1st and 2nd interested parties do not form part of their exhibits in this case hence not in the Respondent's custody.

18. As regards the allegation of threats to the life of the Applicant and her family, it was contended that the same has not been proved by the applicant since no report has been made to the authority or the police.

19. The application was similarly opposed by the interested parties based on a replying affidavit sworn by **Nehemiah Cheptumo Chesang**, the 2nd interested party. According to him, it is for this court to make a determination whether the said documents should be given to the Applicant herein bearing in mind that the trial against her is set to begin and the said documents may be presented as evidence before the trial court. According to the interested parties, the Applicant has failed to demonstrate the alleged threats to her and/or her family as she has not provided any documentation of having made any complaints to the police in regard to the said alleged threats to her and/or her family. The extracts of the text messages do not demonstrate any such threat and should be put in context and not just extracting bits and pieces.

20. As regards the release of the properties to the applicant, it was deposed that this Court pronounced itself on this issue and the court was

categorical that such issues are to be dealt with in a succession court which has jurisdiction to determine such matters. It was averred that the Applicant through her advocates had previously made an application to have all documents in her name supplied to her, which documents were subsequently given to her on the orders of this court. Further asking this court to be supplied with documents in the joint names is asking this court to aid in benefitting from a wrongdoing.

21. It was averred that immediately prior to his death, the deceased was afraid for his life which led him to take steps to safeguard the documents by handing them to his sister, the 1st Interested party herein for safekeeping, a position which still prevails to date and unless the court directs otherwise, the said documents are preserved for the benefit of the deceased's children.

22. According to the interested parties, the Applicant is hiding under the guise of her children to obtain the death certificate for her own benefit and not that of the children. In any case, the family of the deceased has no interest in keeping the children from accessing the necessary educational benefits and is willing to do what is required for the benefit of the deceased's children.

23. It was contended that the Applicant has conveniently failed to acknowledge the involvement of her mother in claiming the benevolent funds due to the deceased's children. The 2nd Interested party does not dispute having in his possession the death certificate; however, while claiming the benevolent funds on behalf of the deceased's children, the 2nd Interested Party was assisted by the Applicant's mother to fill the necessary forms. The funds were subsequently approved and released directly to the school in which the children attend. The Applicant should desist from utterances tending to imply that the interested parties herein were claiming the funds for their private benefit.

24. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions made herein. First and foremost, the matter before me is a criminal case. It is neither a Constitutional Petition nor a Succession Cause. Nor is it a Children's Cause. While any court, including a criminal court is obliged to uphold the provisions of the Constitution in the course of the trial, that course is only geared towards the attainment of the constitutional dictates under Article 50 of the Constitution and ought not to be invoked in a manner that suggests that the criminal court has transformed itself into a purely constitutional court. Similarly, this court is not a succession court and ought not to trespass onto the jurisdiction of the court that may ultimately be called upon to decide matters related to the succession. Again while the Constitution in Article 53(2) provides that a child's best interests are of paramount importance in every matter concerning the child, the question then is whether the substance of the matter before me is one that can be said to concern a child. Whereas disputes may occasionally touch on the interest of children, it does not necessarily follow that all such disputes fall within Article 53(2). In my view only those disputes that call upon the court to make a determination regarding the interests of a child either directly or necessarily in determining the dispute can be said to fall within the ambit of the said Article. To say that a murder trial pitting one of the parents is a matter concerning a child is to stretch the provisions of the said Article too far. I accept that when it comes to sentencing the interests of a child may be taken into account. However, to make an order in the course of a trial which can properly be made before the Children's Court amounts to usurpation of jurisdiction by the criminal court.

25. Regarding the prayer that this court directs the Director of Immigration or any other officer in charge of issuance of passports to issue the applicant with a new passport or replace the lost one, it is my view that that prayer cannot be granted in the manner sought in these proceedings. A determination as to whether to renew a passport or replace a lost one requires the fulfilments of certain conditions and the decision whether or not such conditions have been satisfied in the first instance must be made by the authorities concerned. This court may only come in whether the decision is illegal, unprocedural or unreasonable and in properly instituted proceedings and not in proceedings such as these ones. However, the court has the power to review its bail/bond terms where it turns out that due to circumstances beyond the control of an accused person the conditions imposed are incapable of being complied with. In the absence of a passport it would be unreasonable to insist that the applicant deposits what she does not have. Accordingly, I set aside the requirement that she deposits the passport until further orders of this court.

26. Similarly, the prayer that the investigating officer removes the impugned entry ought to be dealt with in appropriate proceedings. Regarding the return of the items taken from the applicant's house, this court directed that the applicant's personal items be returned to her. However, those which are jointly owned between her and the deceased ought to be dealt with in a Succession Cause. As I held earlier on cannot be directed to be released to her in these proceedings since the decision as to who should properly administer the estate of the deceased is yet to be made and is not within the powers of this court. However, such items as those which the applicant had in her possession by virtue of being a judicial officer ought to be returned to her. To demand that she furnishes proof of ownership of such items when it can be seen that the same bear the marks of the applicant's employer amounts to splitting the hairs. Accordingly, the Respondent is hereby directed to strictly adhere to the directions of this court and to release to the applicant those items that belong to her in her own right and which the Respondent has not declared that it intends to use as exhibits in this case.

27. When I admitted the accused persons to bond I made it clear that they should not interfere with witnesses. This court is under an obligation to protect not only the complainant and the witnesses but the accused as well since an accused person also has rights which must be protected. Accordingly, any action that is meant to instil fear in either the complainant, the witnesses or even the accused will not be tolerated by this court since such actions will be deemed to amount to interference with the due administration of justice. Accordingly, all the parties to these proceedings, be they the accused persons, the complainants, witnesses and interested parties are hereby put on notice that actions will be taken against them if found to be interfering with the free and fair trial of this case.

28. As regards the benefits of the children, while that is a matter which falls within the jurisdiction of the Children Court, counsel for the parties herein ought to advise their clients to desist from taking actions that are likely to jeopardise the interests of the children. Where the parties' actions are shown to be inimical to the interests of the children this Court will not hesitate to take appropriate steps to protect their interests when the court's attention is drawn to the fact that the parties are not mindful of their interests including directing the parties to deposit the documents in court pending orders from either the Succession Court or the Children Court. As was appreciated by **Madan, J** (as he then was) in **Yasmin vs. Mohamed [1973] EA 370**:

“The High Court is especially endowed with the jurisdiction to safeguard the interests of infants, as the court is the parent of all infants. The welfare of the infants is paramount and it is dear to the heart of the court. There would be no better tribunal to perform the task more wisely as well as affectionately. All infants in Kenya of whatever community, tribe, sect fall within

the ambit of the Guardianship of Infants Act and the court is charged with the sacred duty of ensuring that their interests remain paramount and are duly preserved.”

See also **Omari vs. Ali [1987] KLR 616.**

29. In this case I am not satisfied that I need to take such a drastic step yet considering the conflicting depositions made by the parties before me. I must however stress that whenever it is necessary that documents be availed to facilitate the children’s welfare, the parties herein are both under constitutional and statutory obligation to ensure that appropriate steps are taken towards that end.

30. Those shall be the orders of this court.

31. **Read, signed and delivered in open Court at Machakos this 11th day of December, 2019.**

G. V. ODUNGA

JUDGE

Delivered in the presence of:

Miss Onunga for the State.

Mr Nyakundi with Mr Osiemo for the 1st accused

Mr Muumbi for Mr Nthiwa for the 4th accused and Miss Watta for the 2nd accused

Miss Wandugi for the family

CA Geoffrey