



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. 52 OF 2018

SYLVESTER WABUSYA.....APPELLANT

VERSUS

JAMES MUTELE WEINDABA.....RESPONDENT

Being an Appeal from the Judgment of the Honourable Senior Resident Magistrate A.N. Makau delivered on the 2ND May 2018 in the Chief Magistrate's Court Civil Suit No. 1960 of 2018

RULING

1. Before the Chief Magistrate's Court at Milimani the respondent James Mutele Weindaba sued the applicant Sylvester Wabusya for an order to be allowed to bury the remains of the deceased Beatrice Wabusya Nyongesa which were lying at Chiromo Funeral Home of the University of Nairobi. His case was that the deceased was his wife whom he had married under Luhya customary law and with whom he had children, but that, upon her death the applicant (the deceased's brother) had denied him access to her body for burial. The applicant's case was that the respondent and the deceased were never married, but that had only cohabited for a short period between 1993 and 1996. The deceased had died on 15th March 2018. The suit was filed on 20th March 2018. The suit was heard by the learned Senior Resident Magistrate who delivered a judgment on 2nd May 2018. He found that the deceased was the respondent's wife under Luhya customary law; that the respondent was entitled to bury her remains; and that the body be released to him for burial. The applicant sought the stay of the judgment in an oral application but the application was declined by the learned magistrate.

2. On 4th May 2018 the applicant filed a "Draft Memorandum of Appeal" before this court. With it was an urgent motion seeking stay of the judgment of the lower court. On the same day an *ex parte* order was issued preserving the remains of the deceased until further orders. The respondent was restrained from burying the remains, and the order was to be enforced by the OCS Matete Police Station in Kakamega County.

3. The order was extracted and handed to a process server who went to serve the respondent at his rural home. The process server arrived to find that the body had been buried 30 minutes earlier.

4. On 7th May 2018 the applicant filed the present application seeking the exhumation of the body pending the hearing and determination of the appeal. The application was opposed by the respondent whose case was that the court lacked the jurisdiction to deal with the application. This was because the issue of exhumation was a fresh cause of action that was not before the trial court, and on which there was no appeal. Secondly, that the applicant's appeal had been overtaken by events, and, in any case, the order could not be granted before the hearing and determination of the appeal. Thirdly, the applicant had failed to invoke the provisions of **section 146** of the **Public Health Act** and **sections 387(2)** and **388(3)** of the **Criminal Procedure Code** which provided for the circumstances under which exhumation can be ordered. Fourth, the conditions under **order 42 rules 1** and **2** of the **Civil Procedure Rules** had not been complied with. Lastly, the applicant had not provided for security, especially, now that the matter had been overtaken by events.

5. The applicant was represented by Mr Mugu and the respondent by Mr Mandala. Each filed written submissions which I have considered.

6. The Draft Appeal that was filed challenged the ruling made by the trial court which declined to order the stay of the judgment following an oral application under **order 42 rule 6(5)** of the **Civil Procedure Rules**. The trial court had asked that a formal application be made. Along with the Draft Appeal was the motion that led to the orders that were granted *ex parte* on the same day. The orders were sought "**pending the filing of the appeal against the judgment.**" In paragraph 12 of the affidavit sworn to support the motion, it was deponed as follows:-

"12. THAT I pray the Honourable Court to set aside the order disallowing my application for stay, and order temporary

stay of seven days pending filing of an appeal against the judgment of the learned magistrate, the Respondent will not be prejudiced by waiting for a few days before the deceased is buried, as the body has been in the mortuary since 15th March 2018.”

The motion was brought under **Order 42 rule 6(2)** and (5) of the **Civil Procedure Rules**. Under the provision, the applicant has to file an appeal against the orders of the lower court, before seeking the stay of the execution of the orders pending the hearing and determination of the appeal. There is no appeal filed to challenge the findings of the lower court that the respondent was the lawful husband of the deceased who was entitled to bury her remains. If that is true then the present application seeking the exhumation of the deceased has no foundation.

7. Even assuming that there is an appeal, the orders of stay of execution that were sought and obtained were overtaken by events. This was because when the process server went to serve he found the body had already been buried.

8. What would be open to the appellant would be to process the appeal and await the outcome of the same. The court is ready and willing to have the appeal heard and determined at the earliest possible date.

9. The issue as to whether the applicant will suffer substantial loss if the body remains buried has taxed my mind. This is because of the question what would happen if at the end of the day it turns out that the respondent was entitled to the body. What if the court were to confirm the respondent as the husband of the deceased who was entitled to bury her remains, and the body has been exhumed? In my view, the lesser evil would be to await the resolution of the appeal.

10. In short, I do not find that the application has basis. I dismiss it with costs.

DATED and SIGNED at NAIROBI this 12TH day of JULY 2018

A.O. MUCHELULE

JUDGE

DATED and DELIVERED at NAIROBI this 16TH day of JULY 2018

J. N. ONYIEGO

JUDGE