REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLENOUS CIVIL CASE NO. 105 OF 2018

BEATRICE KHAJEHA.....1ST APPLICANT

EVANS LIKONDO LUSULA.....2ND APPLICANT

ALICE KHAGOZI LUSULI.....3RD APPLICANT

VERSUS

WICLIFFE SORE MADEGWA..... RESPONDENT

RULING

The Respondent in this application filed a suit and a notice of motion against the Applicants in the Senior Principal Magistrate's court, Kapsabet. The court granted the orders sought in the Notice of Motion as follows:-

(1) That this application be and is hereby certified urgent.

(2) That pending the hearing and determination of this application inter-parties, Jumia Funeral Home should not release the body of the late Rosah Madegwa until further court orders are granted.

(3) That pending the hearing and determination of this suit, this court be and is hereby pleased to grant temporary injunction order restraining the Defendant/Respondent by themselves, it's agents, servants, employees and or otherwise from burying the remains of the deceased Rosah Madegwa slated for burial on 22nd September, 2018 until further court orders are granted.

(4) That there be interpartes hearing on the 12th day of November, 2018, service be effected.

Served with the said order, the Respondents on 27th September, 2018 filed a Notice of Motion in this court seeking for orders that:-

(1) The Honorable court be pleased to discharge, vary or set aside the exparte order of interim injunction issued by the Senior Principal Magistrate – Kapsabet on the 19th day of September, 2018.

(2) Without prejudice to the prayers sought above and in the interest of justice, the Honorable court be pleased to discharge the orders of Senior Principal Magistrate Kapsabet Hon. D.A Alego issued on the 19th day of September, 2018 and allow the applicants the right to bury their deceased mother, one Rosah Madegwa as per her wishes in her will on land parcel No. Kakamega/Cheptulu/1497.

(3) In the alternative the Honourable court be pleased to withdraw and order the transfer of Kapsabet Senior Principal Magistrate's Court Civil Case No. 196 of 2018 to Hamisi Principal Magistrate's court for hearing and determination.

(4) The court be at liberty to issue further or other orders it deems just and fair in the circumstances.

The applicants during the hearing of the application argued that the respondents extracted and served prayer (d) of which the court had not granted. The interlocutory order granted exceeded the 14 days allowed under *Order 40 Rule 4.* It was granted on 19th September, 2018 and was to run upto 12th November, 2018 the date given for interparties hearing. However 14 days were to lapse on 3rd October, 2018. The date of 12th November 2018 was 2 months away from the date the orders were given and issue of costs was not weighed. They further allege that the deceased's body is at Vihiga County, within the Jurisdiction of Hamisi court and the matter should have been filed there. They therefore

urge the court to transfer the matter to Hamisi Law courts.

Lastly they urge this court to make an order that the body be buried in accordance to the deceased's will and that the Respondents be ordered to pay the mortuary expenses.

The Respondents opposed the application on the grounds that there are orders that the body should not be released by the hospital pending hearing and determination of the application on 12th November 2018. The applicants have replied to the said application and have also raised a defence to the suit. Witness statements are also filed. The orders are only subject to appeal and not review by way of a miscellaneous application.

The orders sought are conclusive in nature of which if granted will deny parties an opportunity to be heard on issues raised in the suit.

I have considered the application. The lower court application is coming for hearing on 12th November, 2018. That is coming Monday. That is a court of law before which the applicants herein will be accorded an opportunity to raise all the concerns they have raised in this application. The lower court has jurisdiction to address all those issues. If they wished to come to the High Court, the applicants should have filed an appeal and not an application on the very same issues raised in the application in the lower court. That makes it appear like the applicants were forum shopping of which should be discouraged. Their

application lacks merit. The lower court will address the issues they have raised this coming Monday. Application is therefore dismissed with costs to the Respondents.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 8th day of November, 2018

In the absence of:-

The applicants

The Respondent

And in the presence of Ann – Court assistant