



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CIVIL APPLICATION NO. 50 OF 2016

F M..... APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF KILIFI..... 1ST RESPONDENT
MEDICAL OFFICER OF HEALTH KILIFI2ND RESPONDENT
MEDICAL OFFICER OF HEALTH MOMBASA.....3RD RESPONDENT
OFFICE OF THE ATTORNEY GENERAL..... 4TH RESPONDENT

RULING

The application dated 19.9.2016 seeks the following main prayer:-

That the bodies of the applicant's deceased children:

(a) G M (2 weeks old)

(b) P G M (3 years old)

Be exhumed from their place of burial in Malindi and thereafter be re-buried in Mombasa where the applicant intends to relocate to.

The application is supported by the affidavit of the applicant sworn on 19.8.2016 and a further affidavit sworn on 5.1.2017. The 4th respondent filed grounds of opposition to the application. Mr. Gicharu, counsel for the applicant submitted that the application was made because the bodies of the deceased cannot be exhumed without a court order. The children died in 2014 while they were minors. Their mother passed on on 3.3.2016 and is buried in Mombasa. The applicant would like to exhume the bodies of the children so that they can both be buried in Mombasa next to their mother. It is submitted that the issues being raised by the Attorney General are extraneous. The applicant is ready to undergo an inquiry to find out how the children and their mother died. The children died when the applicant was out of the country. The second child died after two weeks of birth. There is no personal gain in the application. Counsel relies on the cases of **PIUS WEYUSIA WAMALABE V THE ATTORNEY GENERAL; Mombasa Misc. Civil application No. 527 of 2004** (In the matter of: Exhumation of the body of Anna Nafula Uwe) and the case of **MACHUA MBUGUA V THE HON. KATTORNEY GENERAL & ANOTHER Nairobi Misc. Civil Application No. 356 of 2010.**

Miss Munyuny, State counsel, opposed the application. It is submitted that the initial application did not attach any death certificate. One death certificate was later annexed which indicates that the death was sudden. There is no report that the police were informed. The reason for the exhumation is not well grounded. Counsel would like the court to order for an inquest. No death certificate was annexed for the two months' old child. There is no proof that the applicant is the father of the children. No notifications of birth have been annexed. If the bodies are exhumed, then it should be for purposes of an inquest and not reburial. Counsel relies on the case of **REPUBLIC V FRANCIS MURIUKI WANDETO Nyeri Criminal Revision No. 4 of 2016**.

The applicant states in his application that he got married to the late M M M in a civil marriage on 29.9.2012. They were blessed with two children who are the subject of the application. Both children died. The first child died when three years old while the second child died when two months old. The applicant's wife died at Pandya Memorial hospital on 3.3.2016. The wife was buried in Mombasa while the children were buried in Malindi. The applicant would like to have the bodies of the children exhumed so that they can be buried in Mombasa where he would like to relocate. If that is done it will be easy for the applicant to visit the graves of his wife and children in Mombasa. A passport for the first child who died when three years was annexed. The death certificate of that child indicates that the child died suddenly on 13.1.2014. It is averred that when the child died the body was taken to the Star Hospital in Malindi by the applicant's wife. A letter from the hospital confirming that fact was annexed to the further affidavit. The letter dated 28.11.2016 from Star hospital indicates that the body of the child was taken to the hospital mortuary on 13.1.2014 at 6.00 pm and was collected by the mother M M M for burial on 17.1.2014.

The applicant also annexed an affidavit of L M M who is his sister in law. It is stated in that affidavit that the late M M M handled the burial of the children. His second child died when she was only two weeks old and the applicant was in Italy. The applicant annexed his passport which indicates that he left Kenya on 8.1.2014 and returned on 1.2.2014. This confirms that when the first child died the applicant was out of the country.

Section 146 of the Public Health Act states as follows: -

Permit to exhume

(1) Subject to the provisions of section 147, it shall not be lawful to exhume anybody or the remains of anybody which may have been interred in any authorized cemetery or in any other cemetery, burial ground or other place without a permit granted in manner hereinafter provided.

(2) Such permit shall be granted only to the legal personal representative or next of kin of the person buried, or to his or their duly authorized agent.

(3) Such permit may be granted by the Minister in respect of anybody or the remains of anybody interred in any cemetery or burial ground or any other place.

(4) The permitting authority may prescribe such precautions as he may deem fit as the condition of the grant of such permit, and any person who exhumes anybody or the remains of anybody contrary to this Act, or who neglects to observe the precautions prescribed as the condition of the permit, shall be guilty of an offence and liable to a fine not exceeding one thousand five hundred shillings:

Provided that nothing herein contained shall be deemed to affect the right of a magistrate to order the exhumation of a body or the remains of anybody for the purpose of holding an inquiry into the cause of death of any person.

From the above section, it is clear that if a body is buried it cannot be exhumed and reburied elsewhere without the permission or authority as provided in that section. The Attorney General is of the view that

the manner in which the children died is doubtful. There is no burial permit or notification of death annexed to the application. It is submitted an inquest would be the best order for this court to grant so as to find out the cause of death. The pleadings show that the children died and were buried. It is not clear when the second child died. The information in the application is that the child died when two weeks old. The first child was buried on 17.1.2014. Since then there has been no issue in relation to that death. The body was taken to a hospital and preserved. There is no evidence that the children were buried secretly after their death. The applicant's wife died at Pandya Memorial hospital. The death certificate was annexed and indicates the cause of death as cardiopulmonary arrest due to respiratory failure 2 degrees due to bilateral pneumonia severe sepsis chronic kidney disease. By that time the children had already died and buried. When the children died, the applicant was out of the country and it is his wife who dealt with the burial.

Given the pleadings herein it is clear to me that the applicant simply wants to comply with the law. The issues being raised by the Attorney General can be dealt with after the bodies have been reburied. The Attorney General cannot request for an inquest simply because the children's father has asked for the exhumation of the bodies. The body of the applicant's wife was buried in Mombasa and she died in the hospital. The body of the three year child was taken to hospital and hospital records have been annexed indicating that indeed the applicant's wife took the body of the first child to Star hospital mortuary. The court cannot speculate about the cause of the death. The police can carry out investigations and record statements from those who were present when the children died and also visit the hospitals where the bodies were taken. That process cannot stop the court from granting the orders being sought. The place where the bodies will be reburied is known and the police can seek the exhumation of the bodies for purposes of an inquest.

In the end, I do find that the application is merited and is hereby allowed as prayed. The applicant to be issued with the relevant permit to exhume and permit to bury the bodies by the respondents. There shall be no orders as to cost.

Dated, signed and delivered in Malindi this 15th day of March, 2017.

S.J. CHITEMBWE

JUDGE