



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**

**CIVIL CASE NO. 17 OF 2013**

**ALBERT FRED EKIRAPA ..... PLAINTIFF/RESPONDENT**

**VERSUS**

**NYONGESA SIRARI ..... 1<sup>ST</sup> DEFENDANT/APPLICANT**

**PATRICK OCHI ..... 2<sup>ND</sup> DEFENDANT/APPLICANT**

**JOSEPH OCHI ..... 3<sup>RD</sup> DEFENDANT/APPLICANT**

**GODFREY OPILI ..... 4<sup>TH</sup> DEFENDANT/APPLICANT**

**JOEL ONGIRO ..... 5<sup>TH</sup> DEFENDANT/APPLICANT**

**DENNIS SIRARI ..... 6<sup>TH</sup> DEFENDANT/APPLICANT**

**RULING**

1. By an amended notice of motion dated 5<sup>th</sup> November 2019 and brought under the provisions of section 1A, 1B, 3A, 63(e), 26 and 27 of the Civil Procedure Act, the defendants/Applicants sought the following orders;

**1) That the Honourable Court do order the Respondent herein to pay to the Applicants herein Kshs.875,400 (Eight Hundred and Seventy Five Thousand four hundred) kshs.1,063,000 (one Million and Sixty Three Thousand) being the costs claimed by Bungoma County Referral Hospital mortuary as costs for preservation of the body of JESCA SIRARA at that facility since January 2013 when the Respondent obtained an order restraining the Applicants herein from burying the remains of the deceased on L.R. No. NORTH TESO/ANGURAI/213 and that the body has been so held for the duration of this case and the duration of Kisumu Court of Appeal Case No. 87 of 2015 both of which were decided in favour of the Applicants herein and the suit property transferred by this court to the 1<sup>st</sup> applicant herein.**

**2) That the Respondent be ordered to settle this amount within 30 days from the date of making of the ruling.**

**3) That costs of this application be borne by the Respondent.**

2. The application is premised on the grounds listed on its face and the supporting and further affidavits sworn by Nyongesa Sirari. The grounds pleaded include the following;

*That the Respondent sued the Applicants herein and obtained an ex-parte order of injunction restraining applicants herein from burying the remains of the 1<sup>st</sup> Applicant's wife on L.R. No. NORTH TESO/ANGURAI/213.*

*a) That upon being served with the order, the respondents halted all burial plans and were forced to take the body to Bungoma County referral Hospital Mortuary.*

*b) That when the matter came up for inter-parties hearing, the Respondent through his Counsel agitated for and obtained an extension of the injunction for the duration of the case.*

*c) That the case ran from 2013 until the 28<sup>th</sup> of May, 2015 when judgment was pronounced in favour of the Applicants and the Judge ordered that the suit property L.R. No. NORTH TESO/ANGURAI/213 be transferred to and registered in the names of the 1<sup>st</sup> Applicant herein.*

d) That the Deputy Registrar of this Court thereafter signed transfer forms in favour of the 1<sup>st</sup> Applicant who ultimately obtained title in his names to the suit land.

e) That by the time transfer of the land was being effected into the names of the 1<sup>st</sup> Applicant in 2018, the mortuary charges had skyrocketed to Kshs.875,400 (Eight Hundred and Seventy Five Thousand four Hundred) Kshs.1,063,000 (One Million and Sixty Three Thousand).

3. In his supporting and further affidavits sworn on 16/10/2019 and 5/11/2019 respectively Mr. Sirari reiterated the facts stated on the grounds on the face of the application. He further deposed that by the time of transfer of the land was effected to his name, the mortuary charges had skyrocketed to Kshs.875,400. That by virtue of the order of stay obtained in the Court of Appeal, the burial plans of Mama Jesca Sirari on the suit land were again halted. The Applicant deposed that they are peasant farmers hence they cannot afford to settle the enormous mortuary charges.

4. The Plaintiff/Respondent opposed the grant of the orders vide his replying affidavit sworn on 4<sup>th</sup> November 2019. He deposed that this Court is *functus Officio* having delivered its judgment. That the Applicants were seeking to introduce new issues after the delivery of the judgment which was final and conclusive. The Respondent stated that the Applicants are only entitled to costs of the suit as per the judgment which costs do not include the mortuary bills. The respondent deposed further that there were no stay orders from 28/9/2017 therefore nothing stopped them from proceeding with the burial of the deceased.

5. It is the Respondent's case that the Applicants were at liberty to appeal the orders of the Court which granted the injunction pending hearing of the suit but they failed to do so. He stated that the bill annexed to the supporting affidavits relates to Jesca Atenge who is a stranger to these proceedings. He urged the Court to dismiss the application.

6. The parties advocates chose to argue the application by filing of written submissions. The Applicant's submission were filed on 3<sup>rd</sup> February 2020 while the Respondent's submission was filed on 26/2/2020. The Defendants/Applicants gave a brief history of the case from the time of its institution to the final decision made by the Court of Appeal. They submitted that the High Court granted an order of injunction against the defendants which order subsisted until the case was determined dismissing the plaintiff's case. Thereafter the Plaintiff/Respondent lodged an appeal against the dismissal to the Court of Appeal and obtained a stay of execution of the High Court decision. That the said Appeal was dismissed on 28/11/2017.

7. After the dismissal of the Appeal, the defendants submitted that they proceeded to execute the High Court judgment/decreed by registering the suit land in the name of the 1<sup>st</sup> defendant. It is their submission that during the pendency of the case before the High Court and Court of Appeal, the costs of preserving the remains of Jesca Sirari – deceased escalated which bill now stands at Kshs.1,063,000 as shown in the annexed invoices. It is their further submissions that costs follow the event (Section 27 of Civil Procedure Act) therefore the Plaintiff/Respondent should be ordered to settle the mortuary bills. They buttressed their submission citing the holding in the Case of **Grace Komo Vs Dan Ndwiga NBI HCC 62 of 2013** where Hatari Waweru J stated thus, ***"This sum shall go towards payment of mortuary costs at the conclusion of the case. In default, there will be liberty to apply."***

8. The Plaintiff/Respondent submits that the attached handwritten mortuary bill was not counter signed nor approved by Bungoma Referral Hospital. Secondly that the amount sought is not part of the costs given by the Advocates Remuneration Order as party and party costs. Thirdly that the Applicants did not pray for such expenses in their pleadings. He cited the Case of **Adetoun Oladeji (NIG) Ltd Vs Nigeria Breweries PLC S.C 91/2002** which was quoted in the Case of **Independent and Boundaries Commission & Ano Vs Stephen Mutinda Mule & 3 others (2014) eKLR**. Judge Pius Aderemi J.S.C. rendered himself thus,

***"...It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."***

9. I have considered the pleadings filed and the submissions rendered. The issue for determination is whether the Court can grant the orders sought or it is *functus officio*. The parties confirm that an order of injunction was issued restraining the defendants from burying the remains of Jesca Sirari pending hearing and determination of the suit. The suit in the High Court was determined on 28<sup>th</sup> May 2015 with the Environment and Land Court entering judgment for the defendants as prayed in the counter-claim. The Plaintiff/Respondent was dissatisfied with this finding and lodged an appeal to the Court of Appeal. His Appeal was however unsuccessful.

10. The Applicants have confirmed that they executed the decree obtained from the High Court as the property was registered in the name of the 1<sup>st</sup> defendant. They also confirm that party and party costs were taxed and they were paid the costs. What they have not told this Court is why they did not include the costs of mortuary bill at the time of taxation of the party and party costs and yet they argue that it constitutes part of the costs payable to them.

11. The Respondent annexed the re-amended defendants' statement of defence and counter-claim to his replying affidavit. In the said defence and counter-claim, the defendants did not plead for payment of the mortuary bill. Secondly the record does not indicate that the plaintiff was directed to give an undertaking as to damages pursuant to the injunctive orders obtained. Can the costs incurred for preservation of the deceased body be treated as part of the party and party costs?

12. Party and Party Costs is described as an award granted by a court in a legal proceeding to one party requiring another party to pay an amount of the first party's legal costs. Therefore costs anticipated under Section 27 of the Civil Procedure Act is the costs of prosecuting and or defending a suit. In my view costs of mortuary bill cannot be classified under the party and party costs. I am persuaded to go by the Plaintiff/respondent position that the claim for payment of mortuary bill ought to have been pleaded and proved for a determination to be made on the same.

13. In a scenario where it was neither pleaded nor an order for undertaking to damages made, it is irregular to introduce the claim by way of an interlocutory application as this is a substantial claim that can be classified under special damages. The applicants are thus trying to re-open the case without stating so. Since the suit was finally determined as between the parties, this Court has been rendered *functus officio*. It is immaterial that the applicants are peasants not capable of paying the outstanding bills. They were ably represented therefore they can only blame themselves for the omission. The case of **Grace Komo supra** cited is distinguishable first because the order was made before the case was finalized. Secondly the amount was stated as specifically given for security of mortuary costs pursuant to an application made by the defendants during the pendency of the suit. The order was that specific to an application made before that court and not generally in respect to the subject on award for party and party costs.

14. In light of the foregoing, I find the amended application dated 5/11/2019 to be misconceived, without merit and is hereby dismissed. Parties to meet their respective costs of the application.

**Dated, signed and delivered at BUSIA this 4<sup>th</sup> day of June, 2020.**

**A. OMOLLO**

**JUDGE**