



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CIVIL APPEAL NO.12 OF 2016**

**BILHA MIDEVA BULUKU ..... APPELLANT/APPLICANT**

**VERSUS**

**EVERLYNE KANYERE ..... RESPONDENT**

**RULING**

1. **Bilha Mideva Buluku**, the appellant herein, is mother to the late Kennedy Agigo Buluku who died in November, 2015 in a tragic road accident. Thereafter his widow, Evalyne Kanyere, the respondent herein, set in motion preparations to inter her late husband's remains. The appellant instituted proceedings before the Principal Magistrate's court at Vihiga, being **Civil Suit No.114 of 2015**, and sought restraining orders directed at the respondent ordering her not to inter the deceased's remains until the suit in that court was determined.

2. That request was acceded to and an order of injunction granted. Thereafter the court heard the dispute as a matter of priority and in its decision of 10<sup>th</sup> February 2016, the learned magistrate found the applicant's suit unsustainable and dismissed it. The consequence was that the respondent was at liberty to bury the remains of her late husband.

3. Aggrieved by that decision, the applicant moved to this Court and lodged the present appeal. Simultaneous with the memorandum of appeal, the applicant took out a motion on Notice brought under **Article 159** of the Constitution of Kenya, 2010, **sections 1A, 1B** and **3A** of the Civil Procedure act and **Order 42 rule 6(3)** and **(6)** of the Civil Procedure Rules 2010, and sought the following orders:-

1. **Spent**

2. **Spent**

3. **There issues an interim order to the effect that the body of the late Kennedy Ayiga Buluku which was preserved at Moi referral hospital Mortuary pursuant to the order of the Principal Magistrate Vihiga issued in Civil Suit No.114 of 2015 remain preserved at the same facility pending inter partes hearing this application.**

4. **In the event that the body will have been buried by the date of service of the order, an exhumation shall be effected forthwith under the supervision of the OCS Matunda Police Station and the Public Health Officer of the area where burial took place and be transported to Moi Referral Hospital for preservation pending other or further orders of this Court.**

The application was certified urgent and prayer 3 above granted in the interim and the motion was set for hearing inter partes on 16<sup>th</sup> February 2016.

4. During the hearing of this application Mr Musiega (Junior) appeared for the applicant and Mr Anziya for the respondent. Mr Musiega urged the motion and pleaded with the court to allow it. Learned counsel for the applicant relied on the affidavits by the applicant sworn on 11<sup>th</sup> February 2016 and 12<sup>th</sup> February 2016 for the body to remain at Moi Referral Hospital Mortuary pending the hearing and determination of the Appeal. Counsel submitted that the appeal had already been filed and was arguable. Counsel further argued that the appeal raises issues for determination and if the application was not granted, the appeal would be rendered nugatory.

5. Counsel relied on the decision in the case of **Chris Muga N. Bichage v Richard Nyagaka Tongai & 2 others** [2013] eKLR for the proposition that for an applicant to succeed in an application for injunction pending appeal, must show, first, that his appeal or intended appeal is arguable and not frivolous and secondly, that if the application is not granted, the success of the appeal were it to succeed, will be rendered nugatory. He therefore pleaded for the orders.

6. Mr Anziya, learned counsel for the respondent, opposed the application through a replying affidavit sworn on 16<sup>th</sup> February, 2016, and filed in court on the same day and submitted that the application was unmeritorious. Learned counsel, on his part submitted, that for an applicant to succeed in an application for stay or injunction under **order 42 rule 6** of the Civil Procedure Rules, he/she must show that he/she will suffer substantial loss if stay is not granted. That the application is made without undue delay, and that the party has furnished security.

7. Counsel submitted that the subject matter in this appeal is the remains of the deceased. Counsel submitted, referring to the decision in the case of **Apeli vs Buluku** [2008] IKLR 873, that there is no priority in a dead body. He therefore submitted that the applicant had not shown what substantial loss she will suffer if stay is not granted. Counsel took issue with the applicant's affidavit saying that in her entire affidavit, she has not said or shown what loss she will suffer since the dispute was between a mother and widow to the deceased.

8. Learned counsel concluded by saying that since the applicant had not proved substantial loss to be suffered, the application should not be granted. On the assertion by the applicant that she was willing to pay mortuary charges. Counsel submitted that that was not enough since it was the respondent who was still paying mortuary charges. Counsel's parting shot was that conditions for granting stay or an injunction under **order 42 rule 6** had not been satisfied and urged that the application be dismissed.

9. Burial disputes are not new in this country which shows the emotion parties attach to their loved deceased ones. In this case as I can gather from the record, the dispute is not about who should bury the deceased's remains, but where the body should be interred. That is the issue for the court hearing the appeal. The issue now is whether or not this court should stop the respondent, widow to the deceased, from burying the remains until the appeal is heard and determined, and each side has tried to justify their positions for granting or not granting the orders sought.

10. The applicant has moved this Court, principally, under **order 42 rule 6(3)** and **(6)** of the Civil Procedure Rules, although I think **sub-rule 6** is more appropriate since the applicant has already filed a formal application. **Order 42 rule 6(6)** provides:

*“Notwithstanding anything contained in sub-rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from the subordinate court or tribunal has been complied with.”*

11. The sub-rule gives this court discretionary power to grant an injunction on terms that it thinks just so long as the procedure for filing an appeal from the subordinate court has been complied with. Appeals from subordinate courts have to be filed within 30 days from the date of the decision of the lower court

and such appeal is filed when a memorandum of appeal has been filed. **Section 79G** of the Civil Procedure Act Provides:-

**S.79G “Every appeal from a subordinate court to the High Court shall be filed within thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.”**

12. The decision of the lower court was made on 10<sup>th</sup> February, 2016, and a memorandum of appeal filed on 11<sup>th</sup> February, 2016, a day after the decision of the lower court. That the applicant has complied with the procedure for filing an appeal before this court, is not in doubt and the court is therefore seized of the matter and has the requisite jurisdiction and power to determine whether or not to grant the injunction sought while exercising its appellate jurisdiction.

13. When a court is considering an application for injunction pending appeal, it should be guided by the principles as stated by Visram J(as he then was) in the cause of **Patricia Njeri & 3 others v National Museum of Kenya** [2004] eKLR namely:-

- a) **an order of injunction pending appeal is a discretionary one and the discretion will be exercised against an applicant whose appeal is frivolous.**
- b) **The discretion should be refused where it would inflict greater hardship than it would avoid.**
- c) **The applicant must show that to refuse the injunction, would render the appeal nugatory.**
- d) **The court should also be guided by the principles in Giella v Casman Brown Ltd 1973 EA 358.**

14. Even though the court is dealing with an application for injunction at appeal stage, the court would have to be satisfied that the applicant has made a case in terms of **Giella v Casman Brown** 1973 EA 358, that he has a **prima facie** case with a probability of success, that he will suffer irreparable damage which cannot be compensated by an award of damages or that if in doubt the court should decide the case on a balance of convenience. The court should at the same time bear in mind that there is an appeal pending and therefore consider the prospects of that appeal succeeding in order to determine whether an applicant has a prima facie case, the ultimate objective of course being to safe guard rights of the appellant in the appeal.

15. As was held in the case of **Butt v The Rent Restriction Tribunal, Civil Appeal No.6 of 1979**, in the case of a party appealing, exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory. It should therefore preserve the status quo until the appeal is heard. The same position was taken by the Court of Appeal in the case of **Mukuma v Abuoga** [1988] KLR 645, where the court held that where a party is exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory by preserving the status quo until the appeal is heard.

16. Whether or not to grant an injunction pending appeal, involves exercise of discretion and that discretion has to be exercised judicially. In the case of **Mrao v First American Bank of Kenya Limited & 2 others**, 2003 KLR 125 **Bosire JA** stated as follows on the jurisdiction to grant an interim injunction:-

**“The power of the court in an application for an interlocutory injunction is discretionary. Such discretion is judicial. And as is always the case judicial discretion has to be exercised on the basis of the law and evidence.”**

The nature of discretion exercised by the court being discretionary, the court should try to ensure that the appeal were it to succeed is not rendered nugatory. In the case of **Charter house Bank Limited v**

**Central Bank of Kenya & others** [2007] eKLR the Court of Appeal held, with regard to granting of injunctions pending appeal –

**“the purpose of granting an injunction pending appeal is to preserve the status quo and to prevent the appeal, if successful, from being rendered nugatory. (see also Madhu Paper International Limited v Merr [1985] KLR 840..”**

Unlike in applications for stay pending appeal where for instance it involves a monetary decree, where one has to show substantial loss, an injunction pending appeal may involve property or other situations that may be difficult to reverse should the appeal succeed – thus calling for maintenance of status quo by preserving the prevailing situation to allow the court determine the appeal.

17. When dealing with an application for injunction pending appeal, the court must be alive to the fact that there is a possibility of granting an injunction whose ultimate result would be hardship. In such a situation the court should consider not to grant the injunction at all thus alleviate the hardship that would have been occasioned, if an injunction was granted and only grant the injunction when deserved.

18. In considering whether or not to grant an injunction pending appeal, the court while trying to ascertain if appeal is arguable, or put differently whether the appeal, raises serious questions for determination, the court does not have to go deeply into the appeal itself. It must bear in mind that the appeal is yet to be heard and avoid making comments that may prejudice the trial of the appeal itself. The court should only consider the grounds raised in the memorandum of appeal **vis a vis** the impugned decision and form its own opinion whether there is an arguable appeal to warrant the status quo being maintained.

19. In the application before me, the applicant has opposed the interment of the deceased’s remains at Matunda or anywhere else the respondent proposes to lay her husband’s body to rest; saying that it is against Maragoli culture and practice. The applicant fears that should the deceased’s body be laid to rest at Matunda, is abominable and will cause disaster and bad omen to her family. The body has been lying at Moi Teaching and Referral Hospital since the deceased’s demise incurring daily mortuary charges although parties did not disclose the amount.

20. The applicant, as mother to the deceased, has held a firm position that according to Maragoli culture, the deceased did not have a home at Matunda or anywhere else where his body can be buried while the respondent widow says that her late husband had acquired a piece of land where he had established a home and therefore his body could be laid to rest there. These are not issues for determination in this application but in the appeal itself.

21. In view of the above rival positions taken by the parties herein, the Court is faced with this situation; either to grant an injunction which would mean mortuary fees continues to escalate and discomfort to parties, or dismiss the application which would mean burial takes place at Matunda which in the applicant’s view, will invite a curse on the family. On the other hand should the appeal eventually succeed, it will mean exhumation of the body which will also cause inconvenience and parties will once again be back to where they are now.

22. The core business of the court is to determine disputes presented before it and can only achieve that mandate by allowing parties to fully ventilate their cases before it. Considering the dispute herein and the issues raised in the memorandum of appeal and more so the issue of where the body should be buried, and also taking into account the fact that this court has only seen the judgment and a summary of the evidence in the impugned decision, I am inclined to grant the application but on terms.

23. Consequently, the application dated 11<sup>th</sup> February 2016 is hereby allowed and the court makes the following orders:-

- 1) The body of the late **Kennedy Ayiba Buluku** now lying at the Moi Teaching and Referral Hospital do remain preserved at the Hospital pending the hearing and determination of this appeal.

- 2) The applicant **Bilha Mudeva Buluku** do deposit in court a sum of Kenya Shillings Fifty Thousand (Kshs.50,000/-) to cater for mortuary charges within thirty (30) days from the date hereof, and in default, order No.1 above shall stand vacated.
- 3) The applicant's counsel do file and serve a record of appeal within thirty (30) days from the date hereof.
- 4) The appeal be mentioned on 19<sup>th</sup> April, 2016 for further directions.
- 5) No order as to costs.

**Dated and delivered at Kakamega this 10<sup>th</sup> day of March, 2016.**

**E.C. MWITA**

**JUDGE**