



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 450 OF 2015

MARTHA WAMBUI.....APPELLANT/APPLICANT

VERSUS

IRENE WANJIRU MWANGI.....1ST RESPONDENT

THE REGISTERED TRUSTEES MATER HOSPITAL.....2ND RESPONDENT

RULING

1. By an application dated 15th October 2015, the applicant Martha Wambui seeks from this court orders for stay of judgment delivered on 13th October 2015 and its subsequent orders, pending hearing and determination of the appeal (sic) herein. She also prays for status quo to be maintained in the burial dispute in that the body of the deceased John Mwangi Kariuki should continue to be kept at Mater Hospital pending hearing and determination of this appeal plus costs of the application.

2. The application is predicated on the grounds that:

- a. The effect of the judgment delivered on 13th October 2015 is that the appellant herein cannot participate in the burial of the husband whom they have lived together as husband and wife for the last ten years.
- b. The appellant herein has been condemned to bear the mortuary charges of well over kshs 1.5 million yet she was dragged to court by the respondent.
- c. That the learned magistrate demonstrated open bias against the appellant by condemning her to pay the entire mortuary charges yet she had in good faith deposited up to kshs 300,000 in court as security.
- d. The appellant's children have also consequently been barred from participating in the funeral of their father.
- e. That the trial court has refused and or rejected to grant stay of execution of its orders and judgment pending appeal.
- f. Substantive justice has been a casualty in the end.

3. The application is further supported by the supporting affidavit of Martha Wambui the applicant

herein sworn on 16th October 2015 wherein she deposes that she was the defendant in CMCC 2013/2014 wherein judgment was on 13th October 2015 delivered by Honourable Kabaria ordering that the body of the deceased John Mwangi Kariuki be released to Irene Wanjiru Mwangi for burial to the exclusion of the applicant. That she is the wife to the deceased John Mwangi Kariuki who died on 7th May 2014 at the Mater Hospital after the two living together for over 10 years. That in the judgment and orders of 13th October 2015 the learned magistrate ordered the applicant to bear costs of preservation of the deceased's remain and the costs of the suit. That in a burial dispute like this, each party ordinarily bears their own costs. That she had in good faith deposited shs 300,000 in court as part of preservation costs of the deceased's body. That she has a meritorious appeal. That she and her children had been barred from participating in the burial of the deceased which shall break her and her children as a family hence they should be allowed to participate. That therefore the court should in the interest of justice stop the removal of the body from the morgue until the appeal is heard and determined. The applicant also annexed draft Memorandum, of Appeal dated 15th October 2015.

4. Although the application was filed on behalf of the applicant by her advocates Billy Amendi & Company Advocates on 4th November 2015 the applicant filed notice of intention to act in person and proceeded with her application unrepresented.

5. The application was opposed by the 1st respondent Irene Wanjiru Mwangi who filed a replying affidavit sworn on 2nd November 2015 maintaining that the trial court competently found that the applicant was not the deceased's wife and that the order for costs was a discretionary one hence the allegation that in burial disputes each party bears their own costs is unfounded. That the amount complained of was an integral part of the judgment of the trial court and there being no appeal filed, the orders of the trial court must be abided by. In addition, the respondent deposed that the deceased had already been buried hence there was nothing to be stayed. Further, that the applicant had not demonstrated that she deserved the orders sought and that her application was intended to frustrate the respondent and her children from burying the deceased. On 16th November 2015 the applicant with leave of court filed a further supporting affidavit annexing judgment in HCCA 286/2014 delivered by myself on 9th March 2015 and the mortuary fee note from Mater Hospital, together with a Memorandum of Appeal dated 15th October with no Civil Appeal number 2015. The applicant contended that the findings by the trial court on her status with the deceased was obiter dicta. Further that the order for costs is discretionary but the discretion must be exercised judiciously and that in this regard this court had by its judgment in HCCA 286/2014 following an interlocutory appeal from the same lower court proceedings ordered that each party bear their own costs of the appeal and of review on the lower court ruling.

6. The applicant further deposed that she had filed Civil Appeal No. 496/2015 on 16th October 2015. The applicant further deposed that the 1st respondent had on 15th October 2015 after judgment by the trial court secretly paid mortuary fees to the 2nd respondent and interred the deceased's body on 15th October 2015 before 008 hours unceremoniously despite the deceased's social standing in the society as if he was a criminal.

7. The applicant maintained that she has an arguable appeal which will be rendered nugatory unless stay on costs and status on marriage is stayed pending appeal.

8. The 1st respondent with leave of court filed supplementary affidavit sworn on 13th January 2016 rebutting the depositions of the applicant's further supporting affidavit sworn on 12th November 2015. She contended that the applicant's reading of the court's decision was skewed. That this court in its judgment was dealing with security for costs and not party and party costs. Further that stay is not absolute and that it was the first time a Memorandum of Appeal was being brought to her attention. The 1st respondent further deposed that she was compelled to pay mortuary charges of over 1.86 million as well as legal fees for Mater Hospital for the hospital to release to her the deceased's body. She also annexed certificate of search showing the ability of the applicant to pay costs since she had acquired a

state of the art vehicle, a Land rover.

9. The parties agreed to file written submissions to dispose of the Notice of Motion dated 15th October 2015. The 2nd respondent, Registered Trustees of the Mater Hospital did not, however participate in the proceedings.

10. In her detailed written submissions filed on 8th December 2015, the applicant reiterates the contents of her application, the grounds, and supporting affidavits and gives the background to the matter subject of this application. She maintains that her appeal has high chances of success and that therefore she should not be condemned to pay costs of preservation of the deceased's body and of the suit as the appeal shall be rendered nugatory. The applicant also relied on decided cases of **Mary Wambui Munene V Peter Gichuki Kingara & 2 Others SC Application 12/2014**, EACJ decision in **Venant Masenge V The Attorney General of the Republic of Burundi Application 5/2013** 1st instance Division and **CA Civil Application Nairobi 108/2013 Kenya Kazi Security Services Ltd V Kenya National Private Security Workers Union**.

11. The 1st respondent's submissions were filed on 15th January 2016 giving the background to the matter giving rise to this application. According to the 1st respondent, the applicant had not fulfilled the conditions under Order 42 Rule 6 of the Civil Procedure Rules for the grant of stay of orders pending appeal. Reliance was placed on several decisions namely **Halai & Another V Thorntorn & Turpin [1963] Ltd [1990] KLR 365** where it was held that the court's discretion to grant stay is fettered by three conditions under Order 42 Rule 6 (2) of the Civil Procedure Rules which are: sufficient cause being established by the applicant; the court being satisfied that substantial loss would ensue from a refusal to grant a stay; and that the applicant must furnish security and that the application must be made without unreasonable delay.

12. The 1st respondent submitted that it had not been shown satisfactorily that any substantial loss would result if stay is not granted and relied on the case of **Peter Ndungu Ngae & 2 Others Vs John Mungaro Karomo [2015] e KLR** where the court held that: "**Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay of execution.**" On security for costs, it was submitted relying on **Kenya Tanzania Uganda Leasing Company Limited V Mukenya Ndunda [2013] e KLR** that security for due performance of decree must be given to safeguard the interests of the successful litigant who should not be denied the fruits of his judgment while balancing that interest with the interest of the unsuccessful litigant's undoubted right of appeal so that his appeal should not be rendered nugatory. Consequently, that in a bid to balance the two competing interests the courts usually make an order for suitable security for the due performance of the decree as the parties wait for the outcome of the appeal.

13. It was submitted that as the applicant had not offered any security yet she is capable of raising the same, it is only fair and just that she deposits the entire sum paid by the 1st respondent to the 2nd respondent shs 1,186,842 in court before being granted a stay.

14. It was also submitted that this application was brought after unreasonable delay and it has been overtaken by events because the orders issued on 13th October 2015 have already been implemented, and the deceased had already been laid to rest therefore there is nothing to be stayed pending appeal. Further, that the applicant does not deserve the orders sought herein to warrant the court exercising its discretion in her favour.

Determination

15. I have carefully considered the application by the applicant Martha Wambui which application was prosecuted by the applicant in person following her filing of notice of intention to act on person on 4th November 2015. The application was originally filed by the firm of Billy Amendi & Company Advocates on 16th October 2015.

16. Albeit the application seeks for stay of execution of the judgment delivered on 13th October 2015 and its subsequent orders pending hearing and determination of the appeal herein; and that status quo be maintained in the burial dispute in that the body of the deceased should continue to be kept at Mater Hospital pending hearing and determination of this appeal, no material was placed before this court to show that an appeal had been filed as espoused in Section 79G of the Civil Procedure Act. Nonetheless, the applicant later submitted that she had filed an appeal vide HCCA 496 of 2015 which prompted this court to establish the existence of that appeal and indeed, the court has confirmed that the said appeal was filed in time as per the applicant's further affidavit. Secondly, the court observes that it is not in dispute that the subject matter of the dispute in Milimani CMCC 2923/2014 was the burial dispute over the body of the deceased John Mwangi Kariuki and by the judgment of Honourable L.W.Kabaria (MS) delivered on 13th October 2015, the said body was released to Ms Irene Mwangi the 1st respondent herein for burial in conjunction with the family of the deceased led by Mr Kariuki Ngotho the father of the deceased.

17. From the applicant's own affidavit in support and her submissions, the deceased's remains were interred on 15th October 2015. It follows that there is no substance in the form of a dead body capable of being preserved or retained at the 2nd respondent's facility until this appeal is heard and determined on merit however meritorious the appeal may be. When this issue was brought to the attention of the applicant while this application was pending, she changed her position and sought for stay of execution of costs of the suit and of execution of the order that she pays the costs of preservation of the deceased's remains. It is on the basis of the latter that this court did grant a temporary reprieve until delivery of this ruling.

18. The court also observes that the mortuary preservation charges have already been cleared by the 1st defendant and that it was that clearance that facilitated the execution of the order No. 1 of the trial court, to have the remains of the deceased John Mwangi Kariuki released to the 1st respondent for interment.

19. Accordingly, this court is of a very clear view that the prayers regarding the continued preservation of the deceased's body at Mater Hospital is overtaken by events and it must therefore fail and I hereby dismiss that prayer No. 3 of the Notice of Motion dated 15th October 2015 since courts cannot make orders in a vacuum, which orders are incapable of enforcement and that it would therefore be a vain exercise of discretion.

20. What remains on record being capable of being stayed, therefore is the order No. 2 and 2 wherein the trial court ordered the applicant herein to bear the costs of preservation of the deceased's remains and that the shs 300,000 deposited in court be part of what would be due to the 2nd respondent; and costs of the suit.

21. According to the applicant, she was dragged to court by the 1st respondent and therefore she should not have been ordered to pay mortuary preservation costs. Further, that in burial disputes, the lower court should have ordered that each party bear their own costs of the suit. She therefore would pursue to challenge those orders on appeal and seek for their setting aside because she believes she has an arguable appeal with high chances of success particularly on the question of whether or not she was the deceased's spouse.

22. My observation on the issue of who dragged the other to court between the applicant herein and the 1s respondent is that the judgment in CM CC 2923/14 is clear that the applicant herein filed HCC 637/2014 seeking injunctive orders against the 1st respondent Irene Wangui and Mater Hospital to restrain the removal or other dealing with the body of John Mwangi Kariuki and for the said body to be released to the applicant herein and she even filed an application simultaneously, seeking similar orders.

The 1st respondent on the other hand filed CMCC 2923/2014 and which latter suit was by consent of the parties recorded on 27th May 2014 consolidated with the HCC 637/2014. Accordingly, the idea of

the applicant having been dragged to court does not arise, and I would dismiss that assertion.

23. The issue for determination therefore is whether the applicant is entitled to a stay of execution for costs of preservation of the deceased's body and costs of the suit in the lower court pending appeal. In determining that issue, the court must answer the question of whether the applicant has satisfied this court on the conditions necessary for the grant of stay pending appeal and if so, what orders should this court make. Further who should bear the costs of this application? On whether the applicant has satisfied the court on the conditions necessary for grant of stay of recovery of costs pending appeal, the applicant has maintained in her submission that this being a burial dispute, the court below should not have ordered her to pay costs of the suit. She cited the decision of this court on the interlocutory appeal wherein I ordered that each party bear their own costs. However, each case has to be considered on its own facts and circumstances. In the earlier decision by this court, albeit the subject matter was the same burial dispute, costs are in the discretion of the court hearing the case and in any event, to the successful party. In awarding costs, the court need not necessarily give reasons since the award of costs is dictated by Section 27 of the Civil Procedure Act Cap 21 Laws of Kenya. However, it is when exercising the discretion to deny the successful litigant costs that a court of law must of necessity give reasons for such exercise of discretion to deny such successful litigant costs.

24. In the instant case, it is worth noting that the applicant herein had caused the body of the deceased to be preserved at Mater Hospital pending hearing and determination of the suit and the interlocutory appeal wherein she was partially successful. She had also sought for mandatory injunction which the High Court declined to grant her at the interlocutory stage. She had claimed that she was the deceased's wife, which fact the trial court found was not proved to the required standard of balance of probabilities.

25. To order for stay of execution for recovery of costs of the suit and costs of preserving the deceased's remains at Mater Hospital pending hearing and determination of the intended appeal, the applicant must satisfy the court on the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules that:

1. The application is filed timeously and without undue delay.
2. That the applicant shall suffer irreparable/substantial loss unless stay is granted and that the appeal, if successful shall be rendered nugatory.
3. That the applicant has deposited security for the due performance of decree.

26. On the first condition of whether the application herein was filed without undue delay, the judgment of the lower court in Milimani CMCC 2923/2014 was delivered on 13th October 2015. The application for stay was filed under certificate of urgency on 16th October 2015, just three days after delivery of the judgment. That being the case, I have no difficulty in finding that the application was filed timeously and without undue delay.

27. On whether failure to grant stay will occasion the applicant substantial loss, what the applicant concentrated on in her application is for stay of removal of the deceased's body from the morgue for burial which prayer has been overtaken by events following the release of the deceased's remains to the 1st respondent for interment about 2 days after the judgment in the lower court was delivered. In her submissions, the applicant has dwelt on how her appeal has prima facie high chances of success and that therefore she should not have been ordered to pay costs of preservation which are discretionary and that the trial court ignored the decision of this court on the interlocutory appeal that since it was a burial dispute between two alleged windows, each party bears its own costs. However, she has not demonstrated what substantial loss she will suffer if the order of stay is declined. It should also be noted that costs for preservation of the deceased's body in the morgue had to be paid anyway, whether by the 1st respondent or any other party interested in the body of the deceased, for causing the delay in its removal for burial without any probable cause. There could have been no discretion to be exercised in such a case to the detriment of the 2nd respondent who was only retaining the body for preservation as

the real interested parties battled it out in the court corridors for justice. It therefore follows that in all fairness, there in no way the trial court could have ordered that each party bear their own costs of preserving the deceased's remains in the 2nd respondent's morgue for all the over one year.

28. In **Charles Gichina Mwangi V Henry Mukora Mwangi [2000] e KLR** the Court of Appeal held that where there was evidence that the order sought to be stayed had been complied with, then it would be superfluous to stay execution pending appeal. The court stated:

“.....in the circumstances there is nothing t stay. That being the position, the application for stay must be, as it hereby is, dismissed with costs.....”

29. In this case, having found that the nature of the orders sought to be stayed include the stay or removal for interment of the body of the deceased which body has already been removed and buried; and therefore what remains is the issue of costs of preservation of the deceased's body at the 2nd respondent's facility and costs of the suit, I find that it has not been demonstrated that the applicant shall suffer any substantial loss if she pays the costs for mortuary charges and costs of the suit and that therefore if the appeal succeeds then the said appeal shall be rendered nugatory. It has also not been shown that should the applicant settle the costs as ordered which include shs 300,000/- earlier deposited as security for costs then she shall be unable to recover the same from the 1st respondent who is the deceased's widow. The 1st respondent swore an affidavit showing that the applicant was a person of means and that she had acquired a Land rover station wagon KCA O80B and that therefore it follows that her earlier allegation that she was unemployed and unable to raise security for shs 500,000 costs is no longer the factual position. The trial court ordered for the security for costs of shs 300,000/- to be part of the mortuary charges. The applicant has offered that the shs 300,000 deposited in court be retained as sufficient security for the due performance of decree.

30. From the above exposition, it is clear that there is no demonstration that the appeal shall be rendered nugatory if stay is declined. It has however been shown that the application was filed timeously and that the applicant is willing to deposit security for the due performance of decree. In any event, the issue of deposit of security for the due performance of decree is not a matter of willingness by the applicant, but for the court to determine. In this case, although the 1st respondent maintained that all the conditions under Order 42 Rule 6(2) of the Civil procedure Rules must be fulfilled before stay is granted, this court finds it otherwise. Grant of stay being a discretionary order, and the fact the court is expected to balance out the interests of the successful litigant and the applicants' unfettered right to file an appeal to fully ventilate her grievances means that the court has discretion to consider other factors such as good cause being shown why stay should be granted. And in order not to oust the applicant from the judgment seat on her appeal challenging the order for payment of costs of preserving the deceased's body in the morgue and costs of the suit in the court below, I make the following orders:

a. That there shall be stay of execution for recovery of costs of the suit in the court below and costs of preserving the deceased's body at the Mater Hospital as ordered by the trial court pending hearing and determination of the appeal as filed conditional upon the applicant depositing into court an additional sum of shs one million (shs 1,000,000) within 60 days from the date hereof). This is in addition to the shs 300,000/- earlier on deposited in court as security for costs. These sums shall be security for the due performance of decree making a total of 1,300,000.

b. In default of (a) above, the sum of shs 300,000 as deposited in court to be released to the 1st respondent as part of costs for preservation of the deceased's body and the 1st respondent be at liberty to execute for recovery of the balance of the mortuary charges and costs of the suit.

c. The applicant to compile, file and serve a complete record of appeal within 90 days from the date hereof. In view of the revelation that there is an appeal HCA 496 of 2015 I direct that this file be kept together with HCA 496/2015 and be kept by the Deputy Registrar in the strong room for safe custody.

d. This matter to be mentioned before the deputy Registrar on 14th July, 2016 to confirm compliance with orders No. (a) and (c) above.

e. Costs of this application shall be in the appeal.

Dated, signed and delivered in open court at Nairobi this 12th day of April 2016.

R.E. ABURILI

JUDGE

Ruling read and pronounced in open court as scheduled in the presence of:

Ms Martha Wambui the applicant in person

Miss Wambugu holding brief for Mr Mukele for the 1st respondent

N/A for 2nd respondent

Court Assistant: Henry

R.E.ABURILI

JUDGE