REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL APPEAL NO. 49 OF 2015

MARY MANGA ANSELMY …... 1ST APPELLANT

ANSELMY WASHINGA MWALUKUMBI …........................... 2ND APPELLANT

VERSUS

DENIS MURAGURI MAINA …... RESPONDENT

RULING

Introduction

1. The issue for determination in this ruling is whether the trial court was wrong in the exercise of its discretion in granting an interlocutory injunction against the appellants in a burial dispute to warrant this appellate court’s interference with its discretion. The issue before the court relates to a burial dispute between the 1st appellant mother of the deceased and the respondent, who is her eldest son, as to the place for the interment of the deceased. While the 1st appellant seeks to have her deceased daughter buried at a cemetery at Kisauni, Mombasa County, the respondent seeks to bury his sister at his father's ancestral home in Kirinyaga County where the father who is also deceased is buried. It is contended by the respondent that this is in accordance with Kikuyu Customs to bury children on their father’s land.
2. Upon the demise of the deceased the subject of these proceedings, the 1st appellant planned to bury her deceased daughter at the Mbaraki Cemetery, Kisauni Mombasa and the respondent considering himself aggrieved by the decision to bury his sister at Mombasa cemetery rather than at his father’s ancestral home at Kirinyaga sued the mother as 1st appellant together with her brother as the 2nd respondent in Mombasa Chief Magistrate’s Court Civil Case NO. 239 of 2015, seeking orders stopping the planned burial at Mombasa and an order for burial at the father’s home at Kirinyaga.
3. After *inter partes* hearing, the trial court on 18th February, 2015 granted an injunction restraining the appellants (as defendants in the suit) from proceeding with the burial plans at the Mbaraki cemetery in Kisauni, Mombasa pending the hearing and determination of the main suit which was initially set for the 20th February 2015 and subsequently for the 5th March 2015 when the defendants filed an appeal against the grant of the interlocutory injunction. Simultaneously with the Memorandum of Appeal dated the 20th February 2015, the appellants filed a Notice of Motion of the same date, under certificate of urgency, seeking similar relief for the reversal of the interlocutory injunction order and for the court to allow the appellants to bury the deceased at the Kisauni cemetery, Mombasa.

4. By the Notice of Motion dated 20th day of February 2015, the appellants seek the following orders:

*"**ORDERS***

1. ***THAT****, this matter be certified urgent and service be dispensed with in the first instance.*
2. ***THAT****, this honourable court be pleased to set aside the order of injunction issued by Honourable G.O. Kimanga (RM) on the 17th February, 2015 in Mombasa CMCC No. 239 of 2015 Denis Muraguri Maina versus Mary Manga Anselmy & Another.*
3. ***THAT****, this honourable court be pleased to allow the 1st appellant/applicant to bury her daughter Yvone Wangari Maina at a place of her discretion."*

5. The Notice of Motion is expressed to be based on GROUNDS as follows:

a. ***THAT*** *the 1st appellant has been stopped through court injunction from burying her daughter at the place of her choice by the Resident Magistrate, Honourable G.O. Kimanga sitting at Mombasa in Mombasa CMCC 239 of 2015 between* ***DENIS MURAGURI MAINA versus MARTY MANGA ANSELMY AND ANOTHER.***
b. ***THAT,*** *the 1st appellant is aggrieved by the said decision and seeks to have the same set aside as it has no basis in law.*
c. ***THAT****, the decision was arrived at per incuriam.*
d. ***OTHER*** *grounds to be adduced at the hearing hereof."*

6. The Notice of Motion is supported by an affidavit of the 1st appellant sworn on 20th February 2015. The Respondent has also filed an affidavit in reply sworn on the 27th February 2015.

The respective cases of the parties

7. The 1st appellant's case is that she was never lawfully married by the father of the deceased the subject of these proceedings, alternatively, that the two have been estranged since 1995 when the father of the deceased died a fact established by the fact that she has since 1996 when she went to pick the children of the deceased with her, never set foot at the Kirinyaga home. It is conceded that the respondent nonetheless remained on his father's family home at Kirinyaga.
8. The 1st appellant contended that she was as the mother the closest relative of the deceased daughter and in that capacity therefore entitled to determine where the deceased would be buried. Relying on the degrees of consanguinity under section 39 of the Law of Succession Act, the appellant contends that she is the person next on the line of closeness to her deceased daughter in the absence of her deceased husband the father of the deceased the subject of these proceedings. The appellant also contends that her relationship with the deceased's father was not formalised as a marriage and therefore the Kikuyu Customary Law of the deceased husband was inapplicable. She was therefore not bound by such custom to bury the deceased at her father's ancestral home at Kirinyaga, but was free to bury her daughter at a place of her choosing.
9. For the respondent, a case on Kikuyu Customary law was raised contending that the deceased should be buried at the father's ancestral home in Kirinyaga where her deceased father was also buried in 1995 in accordance with Kikuyu Customary Law. The respondent urged that grant of the Notice of Motion at this stage may render the primary suit before the magistrate's Court nugatory should the plaintiff eventually succeed, or cause mental trauma for the parties in the event of the resultant orders of exhumation and reburial. The respondent contended that he and other kinsmen of the deceased from the paternal side, two of whom he said had been joined as co-plaintiffs in the primary suit, had priority to bury the bury the deceased and the balance of convenience lay with him as the issues raised in the appeal could be determined in the hearing before the trial court then scheduled for the 5th March 2015.
10. The counsel for the parties – Mr. Muchiri for the Appellants and Mr. Ratemo for the Respondent made oral submissions on the 3rd March 2015 and ruling was reserved, on the basis of the urgency

of the matter, for the 6th March 2015.

The law on Burial Disputes

11. The Court agrees with the observations of Ojwang' Ag. J. (as he then was) in ***Njoroge v. Njoroge & Anor.*** (2004) 1 KLR 611 that "in the social context prevailing in this country the person who is the first in line of duty in relation to the burial of any deceased person is the one who is closest to the deceased in legal terms."
12. I also agree with the principles highlighted by Waweru, J in ***Dr. Christopher Muthini Mbatha v. Dr. Florence Mukii Mukita*** [2008] eKLR, following ***Otieno v. Ougo & Anor.*** (No. 2) [2008] eKLR (G7F) 948 that "matters of burial are subject to the deceased's and the parties' personal law, and that the personal law of Kenyans is, in the first instance their customary laws."
13. I find the two caselaw authorities to be complementary rather contradictory in any way, although in the latter case, the court found that "the balance of convenience demands that the emotional burden upon the defendant caused by the death of the deceased should not be exacerbated by denying her the right to bury him where she has determined," the defendant mother of the deceased having been involved in bringing up the deceased since her divorce with the plaintiff husband four years previously.

Determination

14. The grant or refusal of an interlocutory injunction is the exercise of judicial discretion which can only be interfered with by an appellate court on known principles. The principles upon which an appellate court will interfere with the exercise of discretion by a trial court are well settled following the statement of Newbold, P. in the case of ***Mbogo v. Shah*** (1968) KLR 93, that –

"A court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and has as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice."

15. In this ruling, the court is not sitting on appeal from the trial court's decision to grant the injunction but rather an application in the appeal, albeit in the same terms as the final orders sought in the appeal. Neither is the court acting as the trial court for the final determination of the dispute between the parties presented to the court in the Plaint filed in the Chief Magistrate's Court. Accordingly, the court cannot take over the proceedings which are pending before the magistrates' court and pretend to determine the issues of fact pending before that suit. Such issues of fact are for determination by the trial court upon full hearing of the dispute by *viva voce* evidence with cross examination of the witnesses.
16. The Motion, however, seeks the same relief as the Memorandum of Appeal in this interlocutory appeal. It may be, therefore, convenient to consider whether, as if considering the appeal itself, the trial court exercised its discretion in accordance to the principles for the grant of interlocutory injunctions. The said principles for the grant or refusal of interlocutory injunction have been set out in similar tests under the ***Giella v Casman Brown*** (1973) EA 358 and the ***American Cyanamid Co. v. Ethicon Ltd,*** *(1975) 1 ALL ER, 504; (1975) AC 396 HL).*
17. In a recent decision, Mombasa HC Civil Suit No. 36 of 2011, ***Grace Samba & 27 Ors. v. Christine Nyamalwa*** of 20th February 2015, I expressed my appreciation of the tests as follows:

"As I understand it the central inquiry before the court, whether to grant interlocutory injunction sought by the Plaintiffs depends on well known principles. Firstly, I have considered that the principles for the grant of interlocutory injunctions whether under the ***Giella v. Casman Brown,*** *supra, cited by the Plaintiffs' counsel or under the* ***American Cyanamid Co. v. Ethicon Ltd,*** *(1975) 1 ALL ER, 504; (1975) AC 396 HL), the question of damages as an adequate remedy for the injury is central to the consideration whether to grant interlocutory injunctions. As held in* ***Giella*** *injunctions will not normally be granted if the injury is remediable by an award of damages. Secondly, the applicant must demonstrate at least an arguable case in accordance with the*

American Cyanamid formulation and a prima facie case under the Giella test. I have in the past expressed preference for the arguable case standard of American Cyanamid on the reasoning, as held by Platt, JA in the twin decisions of ***Banana Hill Investment Ltd. v. Pan African Bank Ltd & 2 Others*** *(1987) KLR 351 and* ***Mbuthia v. Jimba Credit Corporation Ltd*** *(1988) KLR 1, that it is not the function of the court at the interlocutory stage to attempt finalized determination of disputed matters of fact and law. Thirdly, under both formulations, the inquiry as to the balance of convenience falls for consideration subject to an arguable case under the* ***American Cyanamid*** *test, and where the Court doubts whether there is a prima facie case under the* ***Giella*** *test."*

18. Did the magistrate's Court exercise its discretion wrongly? Even if the ***Giella v. Casman Brown*** test were followed, it is clear from the ruling of the trial court that the learned Resident Magistrate did consider the tests of prima facie case, adequacy of damages and balance of convenience. At page 3 of the ruling, the court ruled that –

"The Applicant avers that there is no reason as to why then the deceased should be buried at a public cemetery at Mombasa when there is an ancestral home where even their father is buried. To this the Respondents have not given any reasons. Mere fact that the deceased lived with the 1st Respondent does not in my considered view, present itself as concrete reason to decide to bury her in a public cemetery when the deceased has a known home of origin. Besides there is no evidence that such decision was reached upon consultations with the deceased paternal relatives at Kirinyaga. Further the applicant relies on custom even though not expressly detailed, I am of the opinion that unless repugnant to morality, such custom will be applicable. The assertion by the Respondents that they are not aware of Kikuyu Customs as pertains burial rights is untenable and I so disregard it with contempt it deserves.

Upshot the Applicant has made out a prima facie case to warrant grant of injunction orders as prayed and proceed to grant the interim injunction in terms of prayers 3 and 4 on the face of the application pending the hearing and determination of the case herein. Costs are also awarded to the Applicant."

19. The learned magistrate found a *prima facie* case (it probably should have been an arguable case) in the respondent's contention on the applicability of the Kikuyu Customary law and on non consultation of the paternal relatives of the deceased. Although it not so said, it would appear that the court considered the balance of convenience in holding that "*Mere fact that the deceased lived with the 1st Respondent does not in my considered view, present itself as concrete reason to decide to bury her in a public cemetery when the deceased has a known home of origin.*".
20. There was no question raised that damages were an adequate compensation, and this court is prepared to accept that the emotional loss occasioned by the burial of the deceased at the one or other place as desired by the competing parties is a loss that may not easily be ascertained and remedied by an award of damages.
21. In these circumstances, I do not find that the learned trial magistrate in any way exercised his discretion wrongly to justify the interference by this court. Neither am I persuaded that the learned magistrate was clearly wrong in his exercise of his discretion or that there has been a misjustice as the suit was shortly set for full hearing on the merits. The parties respective contentions as to applicability or otherwise of the Kikuyu Customary law and the consequent appraisal of the 1st appellant's close proximity under the degrees of consanguinity, are matters for the determination of the trial court and not the appellate court in the appeal or motion there-under, as in this case.
22. On the ***American Cyanamid*** test, it would appear to me that the respondent in this case has an arguable case on the applicability of the Kikuyu customary law to the dispute before the court and on the question of presumption of marriage between the 1st appellant and the deceased father of the deceased the subject of these proceedings. The ***balance of convenience*** under both the ***Giella*** and ***American Cyanamid*** tests would lie in the final determination of the dispute by the trial court, even though subject to appeal, to avoid any subsequent reversal which may occasion traumatic exhumation of the deceased's body in the event that it is interred in the meantime.

23. Accordingly, for the reasons set out above, the Notice of Motion dated 20th February 2015 is declined with no order as to costs in view of the familial nature of the proceedings. The Court lauds the trial court for the priority hearing that it had given to the hearing of this matter when it scheduled the full hearing for the 20th February 2015 upon the grant of the interlocutory injunction on the 18th February 2015.
24. In the interests of an expedited conclusion of the obviously urgent suit, the trial court is directed to proceed to hear the full suit on priority and daily basis until final determination. For that purpose, the Chief Magistrate's Court Civil Case No. 239 of 2015 will be mentioned before the trial court on Monday the 9th March 2015 for directions as to hearing.

DATED AND DELIVERED THIS 6TH DAY OF MARCH 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of**: -**

Mr. Muchiri for the Appellant

Mr. Ratemo for the Appellant

Miss Linda - Court Assistant.