



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 1 OF 2014

PROFESSOR FLORA LUSENO.....1ST PLAINTIFF

MICHAEL RITHO.....2ND PLAINTIFF

ELIZABETH RITHO MANYONGE.....3RD PLAINTIFF

V E R S U S

JOHN RITHO.....1ST DEFENDANT

GEOFFREY RITHO.....2ND DEFENDANT

SAMUEL KANOGO RITHO.....3RD DEFENDANT

THE ARCH DIOCESE OF NAIROBI KENYA REGISTERED TRUSTEES OF THE

MATER MISERICORDIAE HOSPITAL T/A MATER HOSPITAL.....4TH DEFENDANT

AGGREY LUSENO (REPRESENTING THE LUSENO FAMILY).....INTERESTED PARTY

RULING

1. The application for determination is the Motion dated 24th February 2014. It seeks several orders. The principal orders being that the defendants be restrained from disposing of the body of the deceased, compelled to disclose the whereabouts of the body, be compelled to allow the Plaintiffs access to the husband of the deceased, and be compelled to make arrangements for the burial of the deceased’s remains. There is an alternative prayer that in the event that the body has already been interred, an order allowing the plaintiffs to exhume the body and to deposit it with Umash Funeral Home.

2. The grounds upon which the Motion is premised are set out in the face of the application. The application is based on the facts deposed by the third plaintiff in her affidavit sworn on 24th February 2014.

3. The factual background is that the deceased, that is to say Gladys Luhunga Ritho, died on 14th October 2014. Pathological tests revealed that she had died of poisoning. Her husband, Samuel Kanogo Ritho, is at a location in the United Kingdom that is unknown to the plaintiffs, who take the position that he is being held there illegally by the defendants. The defendants are said to have removed the body of the deceased on 22nd February 2014 from the Mater Hospital mortuary where it was being preserved to an

unknown location. The third plaintiff had possession of the original burial permit from the Mater Hospital and the removal of the body was done without her consent or concurrence.

4. The matter was placed before Kimaru J. on 25th February 2014. It was certified urgent and ordered that the same be served on the defendants for *inter partes* hearing on 27th February 2014.

5. There is on record an affidavit of service sworn on 27th February 2014 by Haron Moroga, filed in court on the same date, indicating that the said process server had received a hearing notice on 25th February 2014 for service upon the defendants – at their addresses in the United Kingdom. He avers that he sent the documents to the respondents by DHL courier service the same day. He has attached a document from DHL, as evidence that the documents were sent to the defendants, and a copy of the document served, bearing a notice dated 25th February 2014 of the hearing schedule for 27th February 2014.

6. When the matter came up for hearing on 27th February 2014, counsel for the plaintiffs informed the court that the application had been served, and prayed that as there had been no reply to the application, the same be granted in terms of prayers 3 and 4. The court, upon being satisfied that the defendants had been served and had not replied to the application, acceded to the request and allowed the application dated 24th February 2014 in terms of prayers 3 and 4.

7. A formal order of the orders granted was extracted the same day. The extracted order read as follows:-

“IN COURT ON 27TH FEBRUARY 2014 BEFORE JUSTICE KIMARU

ORDER

UPON READING the application dated 24th February 2014 presented to this court on the same day by counsel for the plaintiffs/applicants under Order 40, Rule 2 and 4 and Order 51 of the Civil Procedure Act and the inherent jurisdiction of this court, AND UPON HEARING the supporting affidavit of ELIZABETH RITHO MANYONGE sworn on 24th day of February, 2014 together with annexures thereto: AND UPON HEARING counsel for the applicant in the absence of the respondent though served:-

IT IS ORDERED:-

- 1. THAT pending hearing and determination of this suit an order of injunction be and is hereby issued restraining the Defendants/Respondents, their agents, servants, employees or whosoever from burying, cremating or in any manner disposing off the body of Mrs. GLADYS LUHUNGA RITHO (DECEASED).**
- 2. THAT a mandatory injunction be and is hereby issued compelling the Defendants/Respondents to produce the body of MRS. GLADYS LUHUNGA RITHO (DECEASED) and deposit the same at Umash Funeral Home under the control of the 3rd plaintiff or such other funeral home as the 3rd plaintiff may direct pending completion of police investigations to the case of her death.**

GIVEN under my hand and the seal of the court this 27th February 2014.

ISSUED at Nairobi on 27th February 2014.

Signed

DEPUTY REGISTRAR

FAMILY DIVISION

HIGH COURT OF KENYA, NAIROBI.”

8. On 4th March 2014, a certificate of urgency of even date was lodged in the cause, supported by an affidavit sworn on the same date, by the third plaintiff. The purpose of those documents was to inform the court that the remains of the deceased had been buried on 22nd February 2014 by the second defendant at Nyakianga Kayu Location in Murang'a County in a function that did not involve close family and friends of the deceased, including the plaintiffs. In the affidavit of 4th March 2014, the third plaintiff prays for the orders of the exhumation of the body and its preservation at a funeral home to be agreed upon by the plaintiffs.

9. The application dated 24th February 2014, under the certificate of urgency dated 4th March 2014, was then placed before Kimaru J. on 25th March 2014. It was ordered that the defendants be served for *inter partes* hearing on 27th March 2014.

10. There is no evidence that the defendants were served with a hearing notice in respect of the hearing scheduled for 27th March 2014. There is however on record an affidavit in reply to the application sworn on 21st March 2014 by the second defendant responding specially to the allegations of fact made against the defendants by the plaintiffs. There is also a notice of preliminary objection dated 20th March 2014, filed by the defendants stating that the application dated 24th February 2014 had been fully and finally determined on 27th February 2014, meaning therefore that the matter was *res judicata*. There are also grounds of opposition of even date raising a variety of issues. The defendants also filed a list of documents on 25th March 2014.

11. When the matter came up on 27th March 2014, the issue of the application dated 24th February 2014 was not addressed as the only order recorded at that appearance was grant of leave to the first and second plaintiffs to amend pleadings.

12. On 17th July 2014, it was directed that the application dated 24th April 2014 be heard in priority to all other applications. On 2nd October 2014 it was directed, by consent, that the said application was to be disposed of by way of written submissions to be filed and highlighted on 13th November 2014. On 27th November 2014 it was ordered that the application be determined on the basis of the affidavits on record.

13. The various parties to the proceedings filed detailed written submissions. They also filed lists and bundles of the authorities that they were relying on. I have carefully gone through the record, inclusive of the submissions, and the authorities cited and supplied. The only issue for me to determine is whether there is anything for me to address in the application dated 24th February 2014 considering the orders made on 27th February 2014.

14. I have taken time to narrate the history of this matter from the 24th February 2014 when the application in question was filed. The matter came up for *inter partes* hearing on 27th February 2014, of the Motion. As the defendants had not responded to the application, the same was allowed. In my view that effectively disposed of the matter. There was nothing more pending disposal in the said application. The orders made on 27th February 2014 were at the *inter partes* stage.

15. I note that once the plaintiffs discovered that the remains of the deceased had been interred, they moved back to court and sought to revive the application dated 24th February 2014 by filing a certificate of urgency and an affidavit. With respect, once the orders were made *inter partes* on the Motion on 27th February, 2014, the court effectively became *functus officio* so far as that application was concerned. No further orders could be made on it, and the only remedy available to the plaintiffs was the filing of a fresh application founded on the new facts.

16. As the application dated 24th February 2014 was disposed of on 27th February 2014, there is nothing

more for me to say on it. I cannot make any orders at all on any of the prayers sought in it. My hands are tied. There is nothing more for me to say on the said application.

DATED, SIGNED and DELIVERED at NAIROBI this 2ND DAY OF OCTOBER, 2015.

W. MUSYOKA

JUDGE