



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL SUIT NO. 25 OF 2013

SAMUEL MUNGAI MUCHERU.....1ST PLAINTIFF

DIANA GATHONI MUCHERU.....2ND PLAINTIFF

OBADIAH MBURU MUCHERU.....3RD PLAINTIFF

DAVID NJUGUNA MUCHERU.....4TH PLAINTIFF

-VERSUS-

ANNE NYATHIRA.....DEFENDANT

RULING

1. The Motion dated 7th April 2014 seeks stay of execution of the judgement of this court delivered on 1st April 2014. The effect of the judgement was that the deceased, Ibrahim Mucheru Muhothi; was to be buried at his ancestral home at Gakoe. This is also a prayer for grant of leave to appeal against the said judgement.
2. The application is premised on Order 42 rules (1) (2), and Order 43 rule 1(3) of the Civil Procedure Rules, and Sections 1, 1A and 3A of the Civil Procedure Act.
3. The respondents oppose the application. They filed grounds of opposition dated 8th April 2014. They argue that there is no arguable appeal, substantial loss has not been demonstrated, among others.
4. Counsel of both parties urged the positions of their respective clients on 22nd April 2014.
5. I will first of all dispose of the prayer relating to leave to appeal. The relevant law on this is Section 66 of the Civil Procedure Act. An applied lies as a matter of right, under that provision, from a decree, or any part of it, and an order of the High Court to the High Court. Leave of the High Court for the filing of an appeal against its decrees is therefore not required.
6. Order 42 rule 6(2) of the Civil Procedure Rules sets out the factors that ought to influence this court while considering an application brought under Order 42 rule 6(1). These factors are:-
 - a. That the application has been brought without unreasonable delay:

- b. That substantial loss may result to the application unless the order is made;
- c. That security for due performance ought to be required.

(7) Outside the facts or conditions set out in Order 42 rule 6(2) of the Civil Procedures Rules, nothing else is required of the applicant.

(8) The impugned judgement was delivered on 1st April 2014. The applicant filed the instant application on 7th April 2014 and appeared before the Duty Judge on the same day. There was therefore no delay in the bringing of the application.

(9) The subject matter of this dispute is the remains of the deceased. If the said remains are intervened, and the applicant succeeds in her appeal there may have to be an exhumation of the remains from the place of interment at Gakoe for reburial at Gatukuyu. The disturbance of the remains of a person who has been laid to rest is a matter that is formed upon in African culture. It is something that can be conceived as a loss of substantial proportions.

(10) The body of the deceased is being preserved at a contrary, and expenses are being incurred daily in that regard. The delay in the disposal of the body will mean costs will continue to accumulate. It is imperative that security for due performance be furnished in the circumstances.

(11) I am disposed to allow the application dated 7th April 2014. I hereby allow it in the following terms:-

- a. That there shall be stay of execution of the judgment delivered hereon on 1st April 2014 pending the hearing and determination of the appeal intended to be filed by the applicant at the Court of Appeal;
- b. That the applicant herein shall furnish security for due performance in the event of the said appeal being unsuccessful;
- c. That the applicant shall in the next seven (7) days of this order deposit a sum of kshs.250,000.000 in court;
- d. That each party shall bear their costs.

W. Musyoka

Judge

Ruling is delivered dated and signed in open court on the 9th day of May 2014 in the presence of:-

Mr. Ongicho for Mr. Kahonge for the plaintiffs.

Mr. Makumi for the defendant