IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NYARANGI, PLATT & GACHUHI JJA)

CIVIL APPEAL NO. 3 OF 1987

JOASH OCHIENG OUGO & ANOTHER ………..……………….APPELLANTS

VERSUS

VIRGINIA EDITH WAMBUI OTIENO ………..…..…………RESPONDENTS

(Appeal from the High Court at Nairobi, Shields J)

JUDGMENT

This is an appeal from an order which Shields J made upon the dismissal of the appellants' application by chamber summons under order 39 rule 1 and 4 of the Civil Procedure Rules (the rules). It is an interlocutory appeal and so an appeal of an issue which is not determinable of the dispute. The appeal and this judgment are necessary if the suit pending in the High Court has to be decided on merits. The applications to the High Court which are the subject-matter of this appeal were made within the pending suit.

The facts of the case can be stated in stark simplicity. The late S M Otieno, a prominent practitioner at the criminal bar in the country, died at Nairobi Hospital, in Nairobi on or about December 20, 1986. On December 29, 1986, the widow of the deceased lawyer filed a suit in the High Court seeking *inter alia* a declaration that she is entitled to claim the deceased's body and perform a burial ceremony in priority to the defendants or any person claiming through them. On December 30, 1986 the plaintiff widow moved to High Court, Nairobi under order 39 rule 1 and 2 of the rules seeking orders that the defendants and each of them be restrained by injunction from removing the body of the deceased from the Nairobi City Mortuary pending the hearing and determination of the suit and that the Medical Officer of Health in charge of the City Mortuary or officers acting under him be restrained by injunction for disposing of the body of the deceased or releasing the body to any person except in accordance with a court order. The High Court (Shields J) heard the application *ex parte* and made an order in the following terms:

"The deceased I am told died intestate. His widow is plainly entitled to his corpse in accordance with the decision in civil appeal No 12 of 1979. I grant the interlocutory injunction sought in paragraphs 1 and 2 of the chamber summons. Costs to be costs in the cause. The plaintiff to have leave to serve the plaint, chamber summons and affidavit."

Two days later, that is on January 2, 1987, Shields J returned to the matter on this particular day to hear Mr Kwach for the defendants urge the application of the defendants filed in court on December 30, 1986. Mr Khaminwa appeared for the plaintiff. The learned judge delivered his judgment on January 5, 1987 as

a result of which he ordered that the order of injunction granted *ex-parte* in favour of the plaintiff do stand and secondly that the plaintiff is entitled to the corpse and thirdly that the defendants and each of them etc be restrained by injunction from removing the body of the deceased from where it now lies.

Simultaneously the defendants' application for injunction orders against the plaintiff were dismissed with costs. The defendants thereafter hurried to this court and successfully sought the injunction and order granted on January 7, 1987 pending the hearing of the interlocutory appeal.

The defendants will have none of that and so through their advocate Mr Kwach have appealed to this court on the following grounds:

*(*1) That the learned judge erred in law in granting the respondent an indefinite *ex parte* injunction against the appellants without giving the appellants the benefit of a hearing *inter partes*;

(2) That the learned judge erred in law and in fact in holding that the respondent as the widow of the deceased is entitled to his corpse on the authority of the decision of the Court of Appeal in Kisumu Civil Appeal No 12 of 1979: *James Apeli & Another v Prisca Buluku;*

(3) The learned judge misdirected himself in law and in fact in holding that because of his education, marriage, association and his professional success the deceased had thereby lost his tribal identity and could not be governed by or be subject to the customary laws, traditions and culture of the Luo tribe;

(4) The learned judge erred in holding in effect that only the respondent is entitled to claim the body for burial and that neither of these appellants (one of whom is the deceased's brother) nor Umira Kager the deceased's clan has any claim whatsoever over the body;

(5) The learned judge erred in law and gravely misdirected himself in accepting only the evidence of the respondent and rejecting the evidence of the appellants on the critical question of what the deceased's wishes were with regard to where he should be buried;

(6) The learned judge misdirected himself in disregarding the critical issue of the legal ownership and occupation of the land on which the respondent intends to bury the deceased in relation to the appellants' contention that they are entitled to bury the deceased on his ancestral land at Nyalgunga sub-location, Central Alego, Siaya District, in accordance with the Luo customary law;

(7) The learned judge erred in law in holding that the appellants have no *locus standi* to assert their claim to be entitled to the body for the purpose of burial in accordance with the Luo customary law and the express wishes of the deceased;

(8) The learned judge grossly misdirected himself in adopting the attitude that the respondent's case was so strong and the appellants' case so hopeless that the respondent was entitled to final judgment even without the elementary step of giving the appellants an opportunity of being heard or putting their case;

(9) The learned judge gravely misdirected himself in holding that since the deceased was married under the Marriage Act he automatically ceased to be governed by or subject to the Luo customary law or any other relevant laws of the land;

(10) The learned judge did not consider and totally disregarded the defence and counterclaim put forward by the appellants.

It is proposed to ask the court for an order that the judgment/order of the High Court be set aside and an order be made in terms of the chamber summons taken out by the appellants on December 31, 1986 restraining the respondent by herself or her agents or servants or otherwise howsoever from burying the body of Silvanus Melea Otieno (the deceased) now lying at the City Mortuary anywhere other than on his ancestral land at Nyalgunga sub-location, Central Alego, Siaya District, until trial or further order and for costs of this appeal.

The gravamen of Mr Kwach's contention is that the case raises serious issues of facts and of law upon which the appellants ought to be heard. In reply Mr Khaminwa submitted that Luo customary law does not apply to the action, that the appellants had an opportunity to adduce evidence on the issues of fact and that in any case the plaintiff's claim is founded on statutory provisions and on common law which are matters of law requiring no proof by oral evidence.

The question that lies at the heart of this matter is whether or not the deceased is subject to the Luo customary law. On the pleadings a dispute of primary fact emerged, making it necessary for evidence to be adduced to prove the relevant customary law as a matter of fact. There was no evidence before the judge on the disputed issue and therefore it was a misdirection for the learned judge to find that it is hard to envisage the deceased as subject to the particular customary law. In the total absence of evidence on the customary law pleaded in the defence, it was an error for the judge to reach conclusions with regard to sub-section 2 of section 3 of the Judicature Act, cap 8, a provision of law which at that stage lay outside the scope of the proceedings.

We deal next with the question of the *ex parte* orders made on December 30, 1986. It is to be noted that the plaintiff applied for orders to restrain the defendants by injunction from removing the body of the deceased from the Nairobi City Mortuary and to restrain similarly the medical officer of health. The judge's order was that the plaintiff is entitled to the corpse.

There was no warrant for making the assumption that the plaintiff asked to be permitted to have the corpse and we find ourselves unable to accept the argument by Mr Khanimwa that the particular order is valid. We would emphasise that the error is not just one of form but of substance. The general principle which has been applied by this court is that where there are serious conflicts of fact, the trial court should maintain the status quo until the dispute has been decided in a trial.

The judge confirmed the *ex parte* order on January 5, 1987. It was a misdirection to confirm a wrong order and consequently all there was before the judge on January 2, 1987 was the defendant's application, which was filed on December 31, 1986, for orders that the *ex parte* order be discharged and that the plaintiff or her agents etc be restrained by injunction from burying the deceased until trial or further order. In view of the misdirections we are bound to interfere with the judge's discretion.

There remains, however, one further principal point relied on by the judge. And that is the decision of this court in *James Apeli & Another v Prisca Buluku* (Mrs) Civil Appeal No 12 of 1979. It is quite apparent from the judge's observations that the judge applied the decision in that case to the instance case. But *Apeli* was concerned from start to finish with facts relating to exhumation and not with a dispute related to burial. The facts were so dissimilar that there was no basis in law for its application here and equally for any reference to section 146 of the Public Health Act, cap 242.

There is then the reference by Mr Khaminwa to section 66 of the Law of Succession Act, cap 160 which provides:

"When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference:

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled to intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will."

With respect to section, we would observe that it deals in its essentials with Succession. Also that the issue here is not to whom a grant of letters of administration should be made. The plaintiff cannot avail herself of section 66.

Given the nature of the case, one would hardly think that justice can be done without hearing both sides. Actually there are very few cases where justice can be done without hearing both parties. A submission at the end of the complainant's case that there is no case to answer as a matter of law is to be distinguished from a submission, at that stage, that the complainant's case should be rejected on the merits.

The result, therefore, of this appeal is that (1) that the appeal succeeds and the judgment and orders of the High Court (Shields J) are set aside, (2) it is ordered in terms of the chamber summons taken out by the appellants on December 31, 1986 that the plaintiff is restrained by injunction either by herself or her agents or servants or otherwise howsoever from burying the deceased anywhere other than Nyalgunga sub-location until trial (not a re-trial because there was no trial) of the suit by the High Court or until further order. The trial shall be held by a different judge. Costs of the appeal to the defendants in any event.

Dated and Delivered in Nairobi this 12th day of January, 1987

J.O. NYARANGI

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JUDGE OF APPEAL

H.G PLATT

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JUDGE OF APPEAL

J.M GACHUHI

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JUDGE OF APPEAL