



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 31 OF 1987

VIRGINIA EDITH WAMBUI OTIENO.....APPLICANT

VERSUS

JOASH OUGO & ANOTHER.....RESPONDENT

RULING.

This matter no doubt correctly referred to by the Press as a “saga” has eventually come before me; and I am very happy for this. It gives me opportunity to issue a warning to Advocates and litigants. The warning is simply this:-

TO THOSE SO ENGAGED

STOP FOOLING AROUND WITH THE JUDICIARY

AND JUDICIAL PROCESSES

(1) CONSTITUTIONAL RIGHT TO COME TO THE
COURTS – YES

(2) THE DUTY OF OUR COURTS TO HEAR AND
DETERMINE CAUSES WITH PATIENCE,
TOLERANCE AND EXPEDITION – YES

BUT YE ADVOCATES AND LITIGANTS MUST
ASSIST THE COURTS TO REMAIN TRUE
UMPIRES AND NOT SUBJECTS OF YOUR
PRIVATE EMPIRES.

It is becoming too widespread a tendency in our democratic Kenya for people to deliberately mistake tolerance and sympathy for weakness.

I WANT TO SEE NO MORE OF THE CAT AND
MOUSE PLAY IN THE COURTS AS IN THIS THE
“S.M’S” CASE.
DECIDE WHAT IS YOUR TRUE COMPLAINT AND
COME TO US: AND THEN BY CONSTITUTIONAL
AND SWORN DUTY WE WILL UMPIRE.

There is today before me, the mention of Appeal No 31 of 1987 for directions as to the hearing of the same.

It is necessary for me to recapitulate the courts’ history of the litigation involved.

Firstly, there was application by Advocate Mr Kwach for the blood relations of the late S M Otieno after the judgment of Honourable Mr Justice Shields giving the corpse of the late S M Otieno to his wife Mrs Virginia Edith Wambui Otieno for burial.

The injunction succeeded by an order for stay i.e that the corpse remains in the mortuary until determination of appeal.

This appeal No 3 of 1987 was heard and it was allowed on the 12th January, 1987 ordering a full trial on the merits.

The trial was conducted by Hon Mr Justice Bosire and decision given that the deceased’s body be handed over to Joash Ougo the deceased’s younger brother and Virginia Edith Wambui Otieno jointly or to any one of them for burial, at Nyamila Village, Nyalgunga Sub-Location, Siaya District.

Advocate Mr Khaminwa for Mrs Otieno then lodged notice of appeal and in addition filed Civil Application No 18 of 1987 for stay of execution pending further order of the Court of Appeal.

The application was heard, stay was granted and Advocate Khaminwa given 28 days to file the appeal.

This was because the Court of Appeal appreciated the urgency of the matter.

The appeal from the judgment of Hon Mr Justice Bosire was in fact filed on the 13th March, 1987 and procedural impeding arose, i.e.

Before the Court of Appeal could list the appeal for hearing, a letter dated the 16th March, 1987 was received from Advocate Mr Khaminwa by the Registry objecting to Judges of Appeal Nyarangi, Platt and Gachuhi to sit in the hearing of the Appeal, although no Bench had as yet been decided upon to hear the appeal.

By a letter dated the 17th March, 1987 in response to this objection, Advocate Mr Kwach for the Respondents sought priority hearing of the appeal and urged that if Mr Khaminwa wishes to challenge the Bench he should do so in Open Court.

Advocate Mr Kwach has now filed an application to rescind the Order for stay granted to Mrs Otieno; and Court records show that in the course of the would-be determination of the perhaps primary contention of burial rights, action has been instituted on behalf of Mrs Otieno in relation to administration of the estate of the deceased S M Otieno. It may well be that this step has been taken by way of futuristic preparedness or abundant caution, and cannot be criticized in law whatever the result.

However, my concern relates to the fact that Advocate Mr Khaminwa (and I dare say the majority of Advocates of these Courts), he full well knowing that at the time of filing the objection to the three Judges of Appeal, and despite the cry of urgency, it was physically impossible to constitute a Bench with only two probably available Judges of Appeal, he nevertheless lodged the objection.

The record of proceedings so far, show that with respect to the interjection of the objection. Mr Khaminwa explained to the Senior Deputy Registrar, Court of Appeal as follows:-

“The appellant’s instruction to us do not in any way whatsoever cast any reflection or doubt on their Lordship’s impartiality or ability to hear and determine this matter dispassionately. However, we are prepared to repeat our client’s instructions in Open Court or in Chambers as the case may be.”

The letter of objection itself contains these relevant portions:-

“That the Hon Chief Justice may, in the interest of justice being seen to be done, wish to appoint a different Bench (from the one which heard the other appeal) to hear the present appeal.”

“In the Civil Appeal No 3 of 1987 their Lordships said–

“The question that lies at the heart of this matter is whether or not the deceased is subject to the Luo Customary Law.” Their Lordships appear to have tied the hand of the High Court by their own view of the case and if the matter were to come before their Lordships’ again, the same view, perhaps may be expressed. In these circumstances the appellant respectfully asks that consideration should be given to her request that a different Bench should sit to hear her appeal.”

With great respect, it is my firm view that purported words of courtesy in the objection correspondence apart, the gist of the objection is no more and no less than saying-

“In the interest of justice we ask for Judges of Appeal other than Judges of Appeal, Nyarangi, Platt and Gachuhi to hear the final appeal.”

Up to this very moment no Bench has been appointed to hear the appeal; Mr Khaminwa recited and firmly adhered to the above objection text.

For the Respondents, Mr Kwach principally relied on his letter in response to the objection dated the 17th March, 1987 referred to above.

Still apparently pursuing the quest for urgency, which has been implemented by the Courts from the inception of the litigation, Mr Khaminwa tendered a certificate issued by Dr G K Mwaura the Police Pathologist dated the 30th March, 1987 which *inter alia* recites –

“The body was found to be embalmed and not decomposed. The body is going to retain in that state for a minimum of one year.” Thereupon Mr Kwach retorted that “in order to win an Injunction and Stay of execution in the Court of Appeal on the 18.2.87 my learned Friend (Mr Khaminwa) informed the Court from the Bar, that he had a Report from the Pathologist that the body could be preserved for only another 2 months from that date.”

Mr Khaminwa did not contradict this; and I refrain from commenting on this limb of the representations before me, except to point to my warning at the commencement of this ruling.

I must say in passing and as an aside that for my part, if burial as such be the true cause of the unending wrangle, and particularly through this Lenten Season, the matter might easily have been settled in the back-room or vestry of a church, and the body already properly and with deserved dignity laid to rest, instead of giving the incidental dirty impression of tribal dissention now apparently destined to run into March next year. With so much else to do, I pity the Courts. It appears that there is truth in the classical

saying, that when beggars die there are no comets seen.

Perhaps legislation may eradicate such as this saga.

Returning to the instant concern of this Court and in conclusion I rule that this is not an appropriate instance for a Chief Justice to disqualify Judges from hearing a matter or case in their absence; and that in order that justice may be seen to have been done, it is hereby ordered that the objection be dealt with tomorrow the 3rd April, 1987 at 10 a.m in Open Court before Judges of Appeal Nyarangi, Platt and Gachuhi.

Dated and Delivered at Nairobi this 2nd Day of April, 1987

C.H.E MILLER

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CHIEF JUSTICE