



REPUBLIC OF KENYA



**Ngotho v Maithia & 2 others (Family Appeal 2 of 2024)
[2024] KEHC 5199 (KLR) (Family) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 5199 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
FAMILY APPEAL 2 OF 2024
HK CHEMITEI, J
APRIL 30, 2024**

BETWEEN

HON IRENE RUGURU NGOTHO APPLICANT

AND

ANNAH NDUKU MAITHIA 1ST RESPONDENT

JOSEPH MWANGI KAMAU 2ND RESPONDENT

AAR HOSPITAL 3RD RESPONDENT

RULING

1. In her Notice of Motion dated 17th April 2024 the Applicant prays for the following orders:-
 - (a) That the court grants a temporary stay of execution of the judgement dated 15th April 2024 in MCFC NO EO6 OF 2024 as consolidated with MCFC NO E016 OF 2024 pending the hearing and determination of prayers 4 and 5.
 - (b) That the court be pleased to grant order of temporary injunction restraining the 3rd Respondent whether by itself, its servants and or agents from releasing the deceased body and burial permit to one Peter Kamau Njoroge as directed by the lower court pending the hearing and determination of prayer 4.
 - (c) That the court do grant an order of stay of execution of the judgement delivered on 15th April 2024 in MCFC NO E06 OF 2024 Nairobi, Milimani Anna Nduku Maithia v. AAR hospital as consolidated with MCFC NO E016 OF 2024 Nairobi Milimani Irene Ruguru Ngotho v. Anna Nduku Maithia & 2 Others pending the hearing and determination of the appeal herein.



- (d) That the court be pleased to direct that the appeal herein be prosecuted on utmost priority basis on account of the subject matter being burial.
 - (e) That the court be pleased to make any further orders or directions as the court may deem just and appropriate in the circumstances.
 - (f) The costs of this application be in the cause.
2. The application is supported by the sworn affidavit of the applicant dated 17th April 2024. In the said affidavit the applicant states that she was dissatisfied with the decree and judgement of the trial court in which it ordered the release of the deceased body to Peter Kamau Njoroge.
 3. According to her she was dissatisfied with the trial courts finding that she was not a spouse to the deceased despite strong evidence that she had stayed with him for a longer period especially when she had three miscarriages.
 4. She believes that she has a strong and arguable appeal and the application ought to be allowed.
 5. Although the Respondents appeared before this court when the matter came up for directions they however failed to file any replying affidavit in opposition to the application. Counsel for the third Respondent however was non-committal just as he did at the trial court. He left the matter to the court and that the 3rd Respondent was willing to comply with the directions of the court.
 6. I have perused the unopposed application carefully. I have also perused the trials court judgement and the Applicant's supporting evidence.
 7. What is undisputed is that both the Applicant and the Respondents are laying claim on the deceased body. The substratum of the Appellant's appeal is that the trial court failed to appreciate the fact that she had a long cohabitation with the deceased which led her into some miscarriages and finally she was able to conceive and deliver her baby during the pendency of the burial dispute.
 8. For all intent and purposes she was the deceased wife and thus entitled to bury his remains. She went on to state that the deceased had in fact build a house for her in her parcel of land.
 9. The trial court found that the short period she stayed with the deceased could not be equated to a marriage and in any case the issue between her and the 1st Respondent could well be taken up at the succession level.

Analysis and determination

10. The grounds for stay pending appeal are essentially known as provided under Order 42 Rule 6 of the [Civil procedure rules](#). The same states as hereunder;
 - “No order for stay of execution shall be made under subrule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant”
11. Taking cue from the above portion of the law it is true that the application has been made without any undue delay, namely, within 7 days after the lower court's judgement.



12. But will the appeal be rendered nugatory if the application is disallowed? Will the applicant suffer any loss which cannot be compensated?
13. Taking the facts herein it is clear that none of the women at least from the evidence on record can claim a direct statutory marriage with the deceased. The Applicant as a matter of fact boast of two issues, namely, that the deceased had a child with him whom I suppose he never saw as he was born after his demise and secondly a house which she claims he was building for her in her parcel of land.
14. Other than that she has no other claim and without prejudice to the appeal, the trial court was right in finding that the cohabitation was not all that long. Again that is an issue which shall be taken up at the level of succession as rightfully put by the court.
15. I respectfully do not find any evidence that the Applicant will suffer any loss should the application be disallowed. She for instance did not show any evidence that she was going to bury the body in her place and what she will suffer if the said Peter Kamau Njoroge is given the body.
16. Her rights in my view shall be addressed at the succession level where she will have all the time to establish whether she was a wife within the meaning of Section 29 of *cap 160* or not. She will also be able to establish whether the new born child indeed belonged to her and the deceased.
17. To allow the application will cause further psychological trauma to the larger family of the deceased beside the financial liability involved. Although it is common knowledge that burial disputes in this country are known to elicit emotions and the related reactions, I respectfully think that in the ordinary sense of the word, parties ought like in this case be concerned with the question of inheritance.
18. In other words, the best place to fight at times ought to be at the succession court where presumably all parties have more or less equal opportunities. The deceased body other than some cultural, spiritual, ceremonial and emotional satisfaction in most cases does not aid the parties during succession proceedings. It is not enough in such cases to argue for example that because one had the opportunity to inter a deceased body then he had more rights over the estate. Sometimes it calls for more evidence.
19. I think this is a right matter to apply the provisions of section 3A of the *civil procedure Act* which states as hereunder;

“Saving of inherent powers of court.

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”

20. At the same time I find the provisions of Article 159(2) of the *Constitution* applicable herein. The same states that:-

“(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

- (a) justice shall be done to all, irrespective of status;
- (b) justice shall not be delayed;
- (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);



- (d) justice shall be administered without undue regard to procedural technicalities; and
- (e) the purpose and principles of this *Constitution* shall be protected and promoted.”

21. The court I think has stated much to show that when all the factors are put together it is in the best interest of the parties that the trials court finding is upheld. The Applicant although she may not have the deceased body as she wished for the reasons given above will still have a chance to ventilate her issues elsewhere.
22. She has not satisfied the grounds provided under Order 42 rule 6 (*supra*). The application is hereby dismissed. Let the deceased be buried as directed by the trial court.
23. Costs shall await the outcome of the appeal.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAIROBI THIS 30TH DAY OF APRIL 2024.

H K CHEMITEI

JUDGE

