



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. CIV. APPLICATION NO.527.04**

**IN THE MATTER OF: EXHUMATION OF THE BODY OF ANNA**

**NAFULA UWE**

**AND**

**PIUS WEYUSIA WAMALABE ..... APPLICANT**

**VERSUS**

**THE ATTORNEY GENERAL ..... RESPONDENT**

**Coram: Before Hon. Justice Mwera**

**Akanga for the Applicant**

**Mrs. Umara for the Respondent**

**A. Shah for Ms. Mooraj – Interested Party.**

**Court clerk – Sango**

**R U L I N G**

Coming under O.9B r. 8 Civil Procedure Rules and S. 3A Civil Procedure Act the now 2nd respondent, one Uwe Meixner, had this main prayer laid before court on 6.6.04:

1. That the orders made on 1-9-04 be set aside and that the respondent join the cause as a 2nd respondent being given time to oppose the application which gave rise to those orders.

The background to this application is that the principal applicant in this miscellaneous cause (Pius Wamalabe) filed an application dated 10/6/04 under S.146 (Cap 242) and S. 3A Civil Procedure Act seeking orders that the body of one Anne Nafula Uwe, who died and was buried at Likoni (Mombasa), be exhumed and preserved at Coast General Hospital and thereafter:

“3. That the court order the said body to be buried by the applicant in accordance with Bukusu cultural rites applicable either (on) her husband’s premises or the applicant.”

On 11-6-04 Khaminwa J certified the application urgent and directed that the application be served on the Hon. The Attorney General and all interested parties. It was to be heard on 21-6-04.

On 21.6.04 the court directed that the person on whose land Anne was buried be served with the application dated 10-6-04 and that it would now come for hearing on 1-9- 04.

On that day Mr. Weloba for the applicant (Pius) and Mr. Maroro (for the Attorney General) appeared. It was shown that the person on whose land the deceased was buried had been served with the application. He was not present and neither had he opposed the application. This was one GENGE ABDALLA MWANYANJE. Mr. Maroro did not oppose the application and the court ordered that exhumation would take place followed by preservation of the body at Coast General Hospital before reburial either on the land of the 2nd Respondent OR that of the applicant (Pius), and of course costs. These are the orders the 2nd respondent wants set aside and the main reason is that he was not properly served with the application dated 10-6-04. That he would have opposed it.

This court then started by joining the 2nd respondent in the proceedings and then went on to hear the prayer to set aside the orders of 1.9.04.

Ms Kasmani told the court, and Mr. Akanga for the applicant did not deny it, that the 2nd respondent was served with the application dated 10-6-04 on 26-7-04. It was bearing the hearing dated of 21.7.04 but actual hearing was actually 1.9.04. From all this it can be summed up that even if the 2nd respondent was supposed to come from prison (where he was and is still on some criminal matters), for being served on 26-7-04, there is no way he could have participated in the proceedings of 21-7-04. It was long gone. In any event the 2nd respondent was served with this application, but therein it was not indicated that its hearing had been moved to 1-9-04. In such circumstances he would not be expected and indeed he did not attend the proceedings on 1-9-04 which culminated in the orders he seeks to be set aside. In such circumstances it is proper and fair that these orders be set aside and that the 2nd respondent reply to the application dated 10-6-04 with a view to take part in its rescheduled hearing Mrs. Umara for the Hon. A.G. said that that office would be bound by any orders. The foregoing are those orders.

The other and indeed compelling reason is that the applicant prayed that Anne be reburied on the 2nd respondent’s land or that of the applicant (Pius). So if the court orders that, reburial take place on the former’s land and yet he seems opposed to it, he will definitely be prejudiced. And a party towards whom court orders are/might be directed and particularly where he is not in favour of the same, that party ought to be heard before the orders are made.

Next the court, though alive to the principle that one who depones to an affidavit must be one who can be cross-examined on the depositions, and counsel like Ms Kasmani does not fall in such a category

here, yet considering the circumstances of the 2nd respondent (he is held in remand) and that Ms Kasmani properly stated as to the source of her information (the 2nd respondent), the affidavit in support of this application need not be faulted. Any other points of fact disclosed or challenged in any way may properly feature at the hearing of the application dated 10.6.04.

In sum prayers granted as sought. The application dated 10/6/04 to be set down for hearing as soon as is practical with the 2nd respondent replying to it in the usual way.

Orders accordingly.

**Delivered on 28th December 2004.**

**J.W. MWERA**

**JUDGE**



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