



**Chomba & 3 others v Kiiru & another (Probate & Administration
9 of 2014) [2022] KEHC 17268 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 17268 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PROBATE & ADMINISTRATION 9 OF 2014
SM GITHINJI, J
SEPTEMBER 29, 2022**

BETWEEN

**PETER KIIRU CHOMBA 1ST APPLICANT
JOSEPH NJUGUNA KIIRU 2ND APPLICANT
MARGARET NYAMBURA 3RD APPLICANT
MURAGE KIIRU NGUGI 4TH APPLICANT**

AND

**LEONARD GICHORA KIIRU 1ST RESPONDENT
JULIUS MUNGIRI KIIRU 2ND RESPONDENT**

RULING

1. Vide a Chamber Summons application dated 25th March, 2022, the Appellants sought the following orders;
 - a. Spent.
 - b. The matter be referred back to the Chief Justice for directions.
 - c. The orders issued referring the matter to Justice Githinji for final determination be set aside.
 - d. Upon granting of order (c) above the matter be placed before a Judge sitting in Eldoret High Court for hearing and determination.
 - e. There be stay of proceedings pending hearing and determination of this application.
 - f. The costs be provided for.



2. The application was supported by the grounds on the face of the application as well as the Supporting Affidavit of Joseph Njuguna Kiiru sworn on the 26th day of March, 2022. He deponed that they had filed an objection which proceeded partly for hearing, the 1st Objector having passed on before testifying. He also deponed that only two witnesses out of 5 have testified and that the matter was being handled by Justice S. M. Githinji at Eldoret High Court before he was transferred to Malindi High Court.
3. He asserted that directions were issued by the Chief Justice upon an application made by the Petitioners and that neither his advocate or himself were served with the application. It was also his assertion that the Petitioners are forum shopping to get the most favourable Judge and that there are no substantial reasons justifying why the matter should be placed before Justice S.M Githinji who is currently at Malindi High Court whereas there are two High Court Judges suited to hear and finalize the matter. Finally, that the matter has been pending for over 8 years and that the matter needs to be finalized expeditiously.
4. In Response, a Replying Affidavit was sworn by Leonard Gichora Kiiru on the 12th day of April, 2022. He deposed that the directions by the Honourable Chief Justice was pursuant to their request and contrary it's the objectors who have been filing all manner of applications with the intent of derailing and stalling the progress of this cause. It was his assertion that the request to have the trial court hear and conclude the matter was administrative and there was no need to extract an order that was administratively given and that the objectors by filing the present application and electing to attack a judicial officer without proof of bias is contempt and dishonourable.
5. He also asserted that had the Honourable Chief Justice declined their request, the matter would have proceeded before any other court without the mudslinging being vented.
6. Parties filed their written submission with the Objectors/ Applicants having filed their submissions on the 8th day of June, 2022. Counsel submitted that the Petitioners/ Respondents are forum shopping and seeking for a favourable avenue to have their grievances aired which amounts to abuse of court process. He also submitted that the Petitioners/ Respondents in acquiring the orders to have the matter referred back to Justice S.M Githinji concealed some crucial information and todate they are yet to serve the correspondence with the Chief Justice.
7. He relied on the case of Muchangi Industries Limited vs Safaris Limited (Africa) & 2 others as well as section 3A of the *Civil Procedure Act*. It was his submission that it would be prejudicial to the objectors/ Applicants for the matter to proceed in Malindi High Court since it will be costly.
8. Further, he submitted that the Petitioners/ Respondents in their replying Affidavit have not demonstrated why the matter should be heard by a Judge who has already been transferred to Malindi High Court and that there is nothing peculiar about the case that it must be determined by a Judge who has been transferred. Similarly, that the matter has not been substantially heard as only 2 out of 5 witnesses have testified.
9. Counsel submitted at great length on the issue of bias citing the cases of *Kimani vs Kimani* (1995) Vol 1 EALR as cited with authority on the case of *Nathan Obwana vs Robert Bisakaya Wanyera & 2 others* (2013) eKLR where the Court of Appeal allowed an appeal on the grounds that the presiding judge had exhibited a biased attitude towards women in general. According to counsel, the trial judge has exhibited an appearance of bias by allowing to proceed with the matter at the request of the Petitioners/ Respondents. He further relied on the cases of *Medicament and Related Classes of Goods* (2001) 1 KLR 700 a Court of Appeal case in England and *Attorney General vs Anyang Nyong'o & Others* (2017) 1 E.A 12.



10. The Respondents on the other hand filed submissions on the 16th day of June, 2022. Counsel submitted that the application seeks to attack the directions given by the Honourable Chief Justice in her capacity as the head of the Judiciary as set out in article 161 (2) (a) of *the Constitution* and that the power to review/ vary or vacate such an order can only be made in a constitutional Petition brought under Article 22 of *the Constitution*.
11. According to counsel, there is a serious disconnect between the application, the affidavit and the submissions rendered and that the judge who is the subject of the allegations set out by counsel, is unknown to the parties majority of whom reside abroad. He submitted that the request that the matter be referred back to the Chief Justice and fresh directions do issue is a misnorma and that the Chief Justice never dealt with the matter under consideration and was only invited by a letter to allow the presiding Judge conclude the matter.
12. Finally, it was his submission that no application was made neither were there orders made and that the Chief Justice by virtue of Article 161 (2) cannot assume jurisdiction in a matter before the High Court.

Disposition

13. I have considered the application before me, the response as well as the respective submissions by the parties.
14. The genesis of this application is the letter by the Honourable Chief Justice dated 4th March, 2022 directing that Honourable S.M. Githinji do conclude the matter virtually from his new station. In essence, the learned Chief Justice is directing Githinji J (myself) to proceed to hear the case. The Appellants on the other hand, have filed an application seeking to have the matter referred back to the Chief Justice for directions and that the directions issued on the 4th day of March, 2022 be set aside. It appears to me that the Appellants were aggrieved by the directions of the Honourable Chief Justice and looking at the application it is not clear to me under what provisions of the law it was made.
15. The applicant has alleged bias in the matter but it is worth mentioning that there is proper judicial channel to address matter of bias of judicial officers while performing their duties. In my view, the directions that were issued by the Honourable Chief Justice remain no more than administrative, and there cannot be an appeal against an administrative directive and it would be futile and a waste of time to grant the orders sought in the application filed by the applicant. Having held that no appeal lies from written directions of the Chief Justice, the only logic conclusion is that the application dated 25th March, 2022 must fail in its entirety.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 29TH DAY OF SEPTEMBER, 2022.

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S.M. GITHINJI

JUDGE

In the Presence of; -

CORAM: Hon. Justice S. M. Githinji

Magare Musundi & Company Advocates for the Appellants

Ngigi Mbugua & Co. Advocates for the Respondents.

