In re Estate of Kimani Muhoro (Deceased) (Succession Cause E1025 of 2021 & E1215 of 2022 (Consolidated)) [2022] KEHC 15879 (KLR) (Family) (18 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15879 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

SUCCESSION CAUSE E1025 OF 2021 & E1215 OF 2022 (CONSOLIDATED)

MA ODERO, J

NOVEMBER 18, 2022

BETWEEN

NANCY GAKII MAITIMA .... PETITIONER

AND

STEPHANIE ANGELA WANJIKU KIMANI .... 1ST OBJECTOR

PHILIP GICHIRU NYADIMO .... 2ND OBJECTOR

RULING

1. Before this Court for determination is the summons dated 6th july 2022 by which the applicant nancy gakii maitima seeks the following orders:-

   “ 1. Spent.

   2. Spent

   3. that the honourable court do defer the delivery of ruling in respect of the Objectors summons dated 13th August 2021 pending new directions by Lady Justice Maureen Odero on the summons dated 23rd September 2021.”

2. The Application which was premised upon section 47 of the *Law of Succession Act*, Cap 160, Laws of Kenya, Rule 49 and Rule 73 of the Probate and Administration Rules and any other relevant provision of the law was supported by the Affidavit of even date sworn by anthony wanyingi an advocate of the high court of kenya representing the applicant.

3. the respondents stephanie angela wanjiku kimani and phillip gichuru nyadimo both opposed the application through the replying affidavit dated 27th july 2022 sworn by the 1st respondent. the matter

was canvassed by way of written submission. The Applicant filed the written submissions dated 4th August 2022 whilst the Respondents relied upon their written submissions dated 26th August 2022.

Background

4. This Succession Cause relates to the estate of the late kimani muhoro who died intestate on 17th march 2021. a copy of the death certificate serial number 1066389 forms part of the record. Following the demise of the Deceased the Applicant who claims to be a widow of the Deceased obtained letters of Administration Ad colligenda bona which were issued to her on 13th July 2021

5. The Applicant filed a summons dated 24th May 2021 seeking to restrain the Respondents from intermeddling with the estate of the Deceased. The Respondents herein who are the children of the Deceased filed a Notice of Objection to making of Grant dated 11th June 2021 and thereafter filed a summons for Revocation of Grant dated 19th August 2021.

6. The matter was mentioned in court on 17th March 2022 and the Judge directed that the summons dated 24th May 2021 would be heard first. The court then directed counsel for the Respondents to file and serve a reply to the said application and further directed the parties to file and exchange written submissions. Thereafter the Ruling was reserved for 10th June 2022.

7. However on 10th June 2022 the court did not deliver its ruling but instead suo moto set aside its directions of 17th March 2022 and directed that the application dated 24th May 2022 would be heard and determined together with the application dated 19th August 2021 seeking revocation of the Grant ad colligenda bona which had been issued to the Applicant.

8. Mr Nganga counsel appearing for the Applicant then sought time to file his reply to the summons dated 19th August 2021. The court directed that the reply be filed within seven (7) days and also directed that the parties file and exchange written submission.

9. Thereafter the matter was mentioned twice on 6th July 2022 and on 1st July 2022 when on both dates counsel for the Respondent indicated that they had filed their submissions. Counsel for the Applicants was absent on both dates thus there was no indication as to whether their Reply and submissions had been filed as had been directed by the court. The court then reserved the Ruling for 29th July 2022. However, before the ruling date this present application was filed by the Applicant seeking to arrest the ruling.

10. Counsel for the applicant avers that on 10th June 2022 when the matter came up for mention to confirm the filing of written submissions, the Advocate for the Respondents inaccurately informed the court that the Applicant had not filed a reply to the summons dated 19th August 2021. That the court then relying on this inaccurate information directed the Applicant to file a reply to the said summons.

11. Further counsel for the Applicant blames the Respondents Advocate for failing to inform the court that the Applicant had filed an application dated 23rd September 2021 seeking to strike out the applications dated 11th June 2021 and 19th August 2021 filed by the Respondent.

12. Counsel for the Applicant further avers that on 10th June 2022 he was not available to attend the online court session so he requested a Mr Nganga Advocate to hold his brief. That the said Mr Nganga did not have the full history and was not well versed with the matter and the previous proceedings. Counsel for the Applicant further stated that on 1st July 2022 Mr Wanyinyi Advocate was holding brief for Mr Kamotho for the Applicant attended the mention but the physical file was not available in court and he was directed to follow up at the registry. That on the same date, the Applicant was served with a mention notice by counsel for the Objectors to appear on 6th July 2022. On the said date, Mr Kamotho

for the Applicant is stated to have been indisposed and his brief was held by Mr Wanyingi. That on the said date being 6th July 2022 Mr Wanyingi was at Kikuyu Law Courts where he had two matters coming up for judgment and one criminal hearing. It was added that the matters before the lower court in Kikuyu were slated to commence at 9.00 am and the criminal matter was to start at 9.30 and extended to around 10.30 am. That by the time Mr Wanyingi joined the virtual court in the matter herein he was informed that the session was over and that directions had been given that a ruling was to be delivered on 29th July 2022 for summons dated 24th May 2021 and summons dated 19th August 2021.

13. Counsel for the Applicant argued that if the court proceeds to write a ruling on the Objectors summons dated 19th August 2021 it will in essence be dismissing the Applicants summons dated 23rd September 2021 without a hearing, the same thus occasioning grave injustice to the Applicant. That there is an urgent need to have the court mention the matter to give directions on the conflicting position caused by inaccurate information conveyed by the Objectors counsel.

14. As started earlier the application to defer the Ruling was opposed. The Respondent states that the statement by their advocate informing the court that no reply had been filed to their application dated 19th August 2021 was in fact true. That since the information was conveyed in the presence of counsel for the Applicant he was at liberty to refute the same.

15. The Respondents stated that the court has always been aware of the application dated 23rd September 2021 and that it was the duty of the Applicant to inform the court of their pending applications and to prosecute the same. That the Applicant were given ample time and opportunity to respond and file submissions in respect of the application dated 19th August 2021. That counsel for the Applicant has always been aware of the mention dates issued by the court.

16. The Respondents further averred that despite being fully aware of the mention dates counsel for the Applicant failed to file their reply or submissions to the application dated 19th August 2021 and also failed to attend court on 6th July 2022. As a result, the court set the date for ruling in their absence.

17. The Respondents state that the Applicant cannot now seek to hold the court hostage due to their own (and their Advocates) indolence in attending court mentions and complying with directions made by the court. It was submitted that the decision to have the two applications dated 19th August 2021 and 24th May 2021 heard and determined together was a decision which had been made by the court 'suo moto'

18. The Respondents submitted that the delay of the ruling would prejudice the Respondents and would also serve to delay the determination of the real issues before court. The Respondents accuse the Applicant of using the impugned grant to interfere with the Deceased's estate to their detriment. They urge that the present application is baseless, is a sham and is an abuse of court process. The Respondents urge the court to dismiss this application with costs.

Analysis and determination

19. I have carefully considered the application before this court, the Reply filed thereto as well as the written submissions filed by both parties. The Applicant sought by this application to arrest the court ruling in respect of the two applications dated 24th May 2021 and 19th August 2021 on grounds that her application dated 23rd September 2021 would be rendered moot and would be defeated without being heard. The Applicant appears to have been aggrieved by the courts decision to hear and determine the two applications together rather than hearing and determining the Applicants Notice of Motion dated 24th May 2021.

20. The application dated 23rd September 2021 'belonged' to the Applicant. It was her duty through her Advocate to bring the existence of this application to the attention of the court and to prosecute the same. The Applicant cannot blame counsel for the Respondents for failing to highlight the Applicants application. He had no duty to do so. The lamentations now being raised regarding the application dated 23rd September 2021 is nothing but a red herring.

21. The courts have inherent powers to make such decisions and grant such orders as are necessary to ensure the just equitable and expeditious disposal of all mattes before it.

22. In the case of in the *Matter of the Estate of George M'mboroki* Meru HCSC No. 357 of 2004, Ouko J (as he then was) stated as follows:-

> " The *Law of Succession Act*, like section 3A of the *Civil Procedure Act* has a saving provision as to the court's jurisdiction under section 47 which is affirmed by rule 73 of the *Probate and Administration Rules*. It is therefore accepted that the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them."

23. Similarly Kimaru J (as he then was) in the case of *Rev Madara Evans Okanga Dondo – vs – Housing Finance Company of Kenya* Nakuru HCCC No. 262 of 2005 stated: -

> " The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term "inherent", is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them." (own emphasis)

24. Whilst it is appreciated that a court does have the power and authority to arrest a Ruling/Judgment that power ought to be exercised only in exceptional circumstances. It should not be used to aid a party whose conduct in the proceedings has been wanting nor should it be used to the detriment of any party. A party seeking to have a Ruling arrested must give sufficient reasons for their request to be granted.

25. In the case of *Gateway Insurance Company Limited v Jimmy Kiamba*, Treasurer Nairobi County Government & 2 others [2016] eKLR Hon Justice Odunga (as he then was) stated as follows:-

> " Accordingly, it is my view that in appropriate cases, the Court is entitled to arrest the delivery of a decision in order to do justice if circumstances warrant it. However, that is a jurisdiction which cannot be exercised in a superficial and casual manner. Arresting a judgement and any judicial process for that matter is a power which ought not to be exercised lightly……. Therefore whereas the powers to arrest the decision may be invoked, it is a power which ought to be invoked very sparingly and in exceptional circumstances and not to assist a person who is intent upon abusing the process of the Court. Being a discretionary power, as held in *Shah vs. Mbogo* [1967] EA 116 at 123B, the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice." (Own emphasis)

26. The record in this matter is very clear and does not warrant any repetition. It is obvious that counsel for the Applicant did not file his Reply to the application dated 19th August 2021 in time nor did he file his submissions as directed by the court. Mr Kamotho for the Applicant was present in court on 10th June 2022 and sought time to file a Reply to that application. The Applicant cannot now saddle blame on the Advocate for the Respondents accusing him of misinforming the court that no reply had been filed. Neither can counsel for the Applicant hide behind the claim that the Advocate holding his brief was not well versed with the matter. Where an Advocate appears in court to hold brief for another he is deemed to have been fully appraised of the matter in court. Therefore if a response had truly been filed as is implied by counsel for the Applicant then why did counsel holding his brief request the court for time to file a Reply?

27. No reasons have been advanced as to why the Advocate for the Applicant failed to appear in court on 1st July 2022 which date was taken in their presence. Further, counsel for the Applicants admits that he was served with notice for the mention date on 6th July 2022. Again, the Advocate did not appear in court neither did he file written submissions as directed by the court. The Advocate cannot advance as a reason for his failure to attend the excuse that Mr Wanyingi who was holding his brief had several matters before the Kikuyu Law Courts and was therefore unable to attend the virtual court session on time. If Mr Wanyingi had too much on his plate that particular day, he ought not to have accepted to hold brief in this matter.

28. In the case of *Union Insurance Co. of Kenya Ltd vs Ramzan Abdul Dhanji* Civil Application No. Nai 179 of 1998 the Court of Appeal observed as follows: -

> " Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it." (own emphasis)

29. I find that the Applicant was accorded an opportunity to be heard (by directing that submissions be filed). Counsel for the Applicant was fully aware of the mention dates which had been given by the court in this matter. The Applicant was granted opportunity and time to file a reply to the application dated 19th August 2021 and submissions thereto but failed to utilize the opportunity given. Failure to comply with the courts directions cannot be blamed on the court or on opposing counsel. The Advocate for the applicant is seeking to cast blame for his own omissions on other parties. The blame lies squarely at his feet.

30. With respect to the prayer that the application dated 23rd September 2021 be heard first this in my view is a mere afterthought. At no time prior to now was this issue raised. Indeed Counsel for the Applicant had already without complaint complied with the courts directions and had filed written submissions in respect of the application dated 24th May 2021 but chose to ignore the direction made in respect of the application dated 19th August 2021.

31. The application dated 23rd September 2021 seeks to strike out all the other applications filed by the Respondent. Does the Respondent not deserve a hearing on merit? The pending ruling will in my view determine the real issues in this matter and will be more instrumental in charting the way forward for this Succession Cause.

32. All in all, I find that no reasonable, sufficient and/or justifiable cause has been advanced for the deferral of the court's ruling. This was just a delaying tactic to enable the Applicant put her house in order. I find no merit in the summons dated 6th July 2022. The same is hereby dismissed in its entirety.

33. Having said that, I am mindful of the fact that a client ought not be penalized on account of the lapses of his/her Advocate. The Applicant does deserve the right to be heard.

34. Section 47 of the *Law of Succession Act* provides:-

> "The High court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders herein as may be expedient."

35. Rule 73 of the *Probate and Administration Rules* provides:-

> "Nothing in these Rules 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 prevent abuse of the process of the court."

36. In the interest of justice I do direct that the Applicant file and serve her Reply to the application dated 19th August 2021 as well as submissions in respect of the same application within seven (7) days of the date of this Ruling. Mention on 25th November 2021 for a fresh ruling date to be given. The costs of this application will be met by the Applicant.

Dated in **Nairobi** this **18th** day of **November, 2022**.

MAUREEN A. ODERO

JUDGE

SUCCESSION CAUSE NO. 1025 of 2021 RULING