REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 284 OF 1996

(IN THE MATTER OF THE ESTATE OF SAMUEL WAHOME GATHERU (DECEASED)).

WACHIURI WAHOME…….APPLICANT

RULING

The applicant filed a summons dated 29th January, 2015 in this cause although it is titled as "*Succession Cause No. 284 of 1996 & Succession Cause No. 490 of 2009"* seeking the following orders:-

"a) That this application be certified as urgent and be heard exparte in the first instance.

1. ***That this Honourable Court be pleased to issue ORDERS that all the proceedings presided over by the Honourable Justice J.K. Sergon in both Succ Cause No 284 of 1996 and 490 of 2009 and all orders issued therein stand vacated.***

2. ***That the Honourable Court be pleased to issue orders expunging from the ruling delivered on 18th December 2014 by the Hon. Justice J. Ngaah on behalf of the Hon. Justice Wakiaga parts of paragraph 9 of the ruling which make reference to a ruling made by Hon justice Sergon on 2nd June 2010.***

3. ***That the Honourable Court be pleased to issue orders staying proceedings in both Succ Cause No 284 of 1996 and 490 of 2009 pending hearing and determination of this application.***

4. ***That costs be in the cause."***

The application was made under **rules 49** and **73** of the **Probate and Administration Rules** and **Order 45 rule 1** of the **Civil Procedure Rules;** it supported by an affidavit sworn by the applicant himself on 28th January, 2015.

The applicant has sworn that on 14th February, 2011, he filed an application in this court urging Hon. Sergon to disqualify himself from hearing "their" matters and that the court orders the transfer of **Nyeri High Court Succession Cause No. 490 of 2009** to the Chief Justice at Nairobi for directions.

The reason for that application was that the applicant feared that the applicant may not get a fair hearing before Justice Sergon.

According to the applicant, since the Hon. Justice Sergon subsequently disqualified himself from the matter, he wants those parts of the proceedings that were conducted before the learned judge to be expunged from the record. He has also sworn that pursuant to his application, Hon. Mr Justice Wakiaga ordered the hearing of the Summons for Confirmation of Grant dated 23rd October, 2010 begins afresh on

16th July, 2012. Infact, according to the applicant, the hearing started afresh on 16th July, 2012 as directed by the court.

The applicant has sworn that when the learned judge gave his ruling his application dated 24th February, 2014, he made references to a ruling delievered by Justice Sergon on 2nd June, 2010.

As I understand the applicant, Justice Wakiaga ought not to have made any reference to the proceedings before Justice Sergon in his ruling which I delivered on his behalf on 18th December, 2014 and to the extent that he did so, the learned judge was wrong.

The application was opposed; Mr Muchiri, counsel for the petitioners/respondents filed grounds of objection on their behalf. In those grounds, it was stated that the application is frivolous and an abuse of the due process of the court; that it has been deliberately filed to delay the hearing of the cause herein; that the same is *res judicata* and is similar to an application that has already been heard and determined and that it is, in any event, fatally defective and should be struck out.

Gladys Wangui Wahome who has described herself as one of the beneficiaries of the estate of the deceased also swore an affidavit opposing the application; she reiterated that if the application dated 15th May, 2013 is heard as directed by this court and the estate is ultimately distributed this cause would be brought to its fruitful conclusion.

Parties agreed to have the application determined by way of written submissions. I have duly considered the application, the supporting affidavit thereof and the respondents' grounds of objection together with the replying affidavit in opposition to the application. I have also considered the submissions filed by the respective parties.

The record shows that upon the application by the applicant, Justice Sergon recused himself from the matter and directed that the proceedings in this cause be conducted by Hon Mr Justice Wakiaga. It is therefore obvious from the record that when Wakiaga J was seized of this matter he was conscious of the order which Sergon J made.

It follows that reference by Wakiaga, J. in his ruling to a previous ruling by Sergon J. in this cause was neither an oversight nor a mistake on the part of the judge; it was a deliberate and an informed conscious decision. In my view it is not a mistake apparent on the face of the record susceptible to review under **Order 45 rule 1** of the **Civil Procedure Rules**. If the applicant is under the impression that the learned judge is mistaken in law, then the proper route for him to have taken is to appeal against the decision and not apply to subject the same decision to a judge of coordinate jurisdiction hoping that he might be of a different persuasion. This is what the Court of Appeal said in **National Bank of Kenya Ltd versus Njau (1995-1998) 2EA 249 (CAK)**; at page 253 of the judgment, the Court said:-

> ***A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground of review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of the law cannot be a ground for review. (Underlining mine).***

Secondly, it does not follow that merely because Sergon J recused himself from the matter then everything done before the recusal must be turned upside down. While the past may inform the application and the ultimate decision for a judge to recuse himself, recusal looks to the future. This fact is manifest from the applicant's own application for the recusal in which he stated as one of the grounds of the application that "*the objectors/applicants do not expect a fair hearing in the Nyeri High Court following the proceedings which had been going on in the said court*." In the affidavit in support of his application he stated *inter alia*, "*that going by the facts deponed to herein, we do not expect any justice*

from Hon. Justice Sergon…"

If there is any order or ruling that was made prior to the judge's recusal and which the applicant is dissatisfied with, nothing stopped him from taking advantage of any of the possible avenues open to him to address his grievances. Expunging such a ruling or order simply because the judge who issued it has recused himself is certainly not one of those avenues.

In any event the substantive summons for revocation of grant dated 15th May, 2013 which was directed to be heard first has not been heard; without purporting to pre-empt its outcome, I would suppose that the determination of that application will to large extent resolve conclusively and with finality the substantive issues in dispute between the parties.

For the reasons I have given, I am satisfied that the applicant's application is not merited and it is hereby dismissed with costs.

Signed, dated and delivered in open court this 30th October, 2015

Ngaah Jairus

JUDGE