REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

SUCCESSION CAUSE 527 OF 1981

IN THE MATTER OF THE ESTATE OF THE LATE MBIYU KOINANGE- DECEASED

RULING NO. 2

The background information to this ruling is that, one George Kihara Mbiyu and Paul Mbatia Mbiyu presented an application by way of summons for nullification of the lease dated 15th September, 2001 relating to LR. NO. 209/9099 I.R. 34318. It was brought under section 47 the law of succession Act cap 160 laws of Kenya. A total of 8 rights relief were sought namely:- the summons to be certified urgent, restraint orders to issue against city shopping complex from entering into remaining in, excavating or erecting any structure or development on city plot No. LR. NO. 209/909 (I.R 34318) along Taifa road or in any other manner from interfering with the said parcel till the application is heard and disposed off, that Eddah Wanjiru Mbiyu and the law firm of A.M. Wahome and company advocates and CM Mbaabu and Company Advocates be directed to make full disclosures of any money received by them on account of the lease dated 15th September, 2009 of city plot LR. NO. 209/9099 and to deposit the said sums in this Honourable court forthwith, pending the hearing of the application of the said M/S City Shopping Complex Limited to vacate the said plot with immediate effect, the court, to nullify and invalidate the lease dated 15th September 2009 between Koinange Investment and Development Company Limited and City Shopping Complex Limited relating to the leasing of LR. 209/9099 City Hall way, order M/S City Complex limited to immediately vacate the said plot, that Eddah Wanjiru Mbiyu as chairperson of the board of Directors of Koinange Investment and Development Company Limited be directed to immediately convene an Annual General Meeting of the shareholders for the purpose of electing directors to represent the interest of this estate in the company, and lastly that the costs of the application be provided for.

The application was supported by grounds in the body of the application and grounds in the joint affidavit deponed by Paul Mbatia Koinange and George Kihara Koinange deponed on the 4th day of November, 2009 and filed simultaneously with the application dated 4/11/2009 and filed on 5/11/2009.

This filing of the said application attracted a preliminary objection dated 12th day of November, 2009 and filed

the same date by advocates for Koinange Investment and Development. A total of 9 objections were raised. In a summary forms these are that:- M/S City Shopping Complex Limited and M/S Koinange Investments and Development Company Limited are limited liabilities companies not party to the succession proceedings and as such the reliefs numbers b,d,e,f and g of the said application are not available against them, since the lease complained of is between the two entities, that cannot be handled in a succession proceedings but in a suit which the applicants ought to have filed, concede that, indeed the property sought to be protected is registered in the name of Koinange Investment and Development Limited, the said property is not a property of the estate subject of these proceedings namely the estate of late Mbiyu Koinange, the applicants who regard themselves as beneficiaries of the said estate of late Mbiyu Koinange have no locus standi to restrain the company from leasing its own property to City Shopping Complex Limited or any other person, the order sought against Koinange Investment and Development Limited requiring Eddah Wanjiru Mbiyu as the chairperson of the board of Directors of the company to convene an Annual General Meeting can only be made under the provisions of the companies Act chapter 486 of the laws of Kenya a matter requiring the filing of a separate suit in the high court, to seek the said reliefs, the orders sought against Koinange Investment and development limited can only be made after investigation by the Registrar or inspectors duly appointed by this Honourable court, under the provisions of section 164,165,1666,167,168,170,171 and 172 of the companies Act and for this reason, such orders can only be made by this Honourable court, upon institution of separate proceedings in the high court, that the procedure adopted by the applicants against limited liability companies in a succession cause denies the respondents the ability to challenge the application and defend themselves within the succession cause and respond effectively to the allegations made by the applicants, the orders sought against the law firms of A.M Wahome and company advocates ought to have been made if at all in accordance and in compliance with the provisions of the Advocates Act. The procedure followed in this applications by the applicants is unknown and ought to be struck off, the applicant do not stand to pray for the order sought against the said advocates because they are not the said advocates clients, one of the applicants Paul Mbatia Koinange has not demonstrated that the authority of Koinage Investment and Development Limited to swear the affidavit supporting the application dated 4th November 2000.

It is on record that counsel for the applicants to the application to which the preliminary objection was raised put in a response to the preliminary objection dated 10th day of December 2009 and filed on the same date. A summary of the content is as follows:- the preliminary objection cannot be disposed off by way of the counsels submission because there are factual issues that need to be brought to the attention of the court, the application was never served on Koinange Investment Development Company limited and applicants have no intention of doing so because, it is admitted that the subject matter of the application relates to LR NO. 209/9099 is an asset of the estate of the late Mbiyu Koinage, the firm filing the preliminary objection has no locus standi to prevent the same because there is no board of directors to appoint counsel to present the affairs of the said company, the application is directed at the questionarable conduct of an

administration of the estate Eddah Wanjiru Mbiyu, alleged to have fraudulently conveyed an estate asset without the leave of the high court, that the said Eddah Wanjiru Mbiyu is a special administrator appointed by this honourable court, under rule 10 schedule 5 and she has to act under the immediate control of the high court, the estate of late Mbiyu Koinahge manages all the affairs of the subject plots as it is an asset in all respect, which estate is the majority shareholder in the said company and runs all the affairs of the company, which company is nothing but an alter ego of the estate or an enterprise through which it manages the city plot, that Eddah Wanjiru Mbiyu hold no share in the company being a mere trustee on behalf of the estate by virtue of being an administrator, the move taken by appointing counsel to represent the company herein and file processes on its behalf without following the correct procedure, is nothing but a move as further once of the fraud being perpetrated against the estate by the said administrator and that the preliminary objection is only meant to delay the investigation that the applicants are asking the court, to carry out relating to the conduct of the administrator.

The court, duly fixed the said preliminary objection for disposal on its own merits. However on the appointed day counsel for one George Kihara Mbiyu conferred the court, that he had instructions from his client to withdraw the application to which the preliminary objection has been filed. To this end he had put an application to withdraw the said application apparently on behalf of both applicants, but clarified that as at the time he was making representation to court, he only had the instruction from one George Kihara Mbiyu but he had done a letter to Paul Mbatia informing him of the move but had not received any instructions from the said Paul Mbitia objecting to the said move.

The court, was informed that the reason for withdrawal is that George Kihara Mbiyu feels that it will not be in the best interests of the estate to pursue it. He has discovered from the claimants filed in opposition to the application sought to be withdrawn that there are two orders in existence emanating from the superior court, which have been registered against the title sought to be protected and which in effect seek to alienate the said property from the estate. The beneficiary of those orders are alleged to be one Nelson Ngethe and another house.

The said George was said to have also discovered that there are two appeals pending in the court of appeal in which the estate is trying to recover the said asset, and for this reason, the said George believes that the best interests of the estate will be served if the family got together and teamed up with the other advocates who were representing the estate in the CA to pool resources and recover the asset.

It was his opinion, too that, since the application was joint supported by a joint affidavit it cannot secure the axe. In other words it can not be truncated to filing on the basis of the other co applicants.

Other counsels on board were also heard on the issue. M/S. Mbaabu and M/S heritate the counsels who had filed the preliminary objection, M/S Ogula for messers Machira and M/S Mubea for city Shopping Complex and welfare for Alice Wahome for one of the administrators were also heard. These counsels not objecting to the withdrawal.

That they had no objection to the withdrawal and in lined with the sentiments of Mr. Njiro that since the

application was joint, supported by a joint affidavit it cannot be truncated so that one half is withdrawn and the other half remain unwithdrawn the entire applications stands withdrawn.

There was however opposition to withdrawal from two counsels namely Mr. Kiiru for Paul Mbatia Koinange one of the joint applicant and Miss Kariuki for one of the Administrators. The reason for opposing the notice of withdrawal by the applicant and co deponents is that the said Paul had not consented to the withdrawal.

(ii) He was informed about the withdrawal after the notice had already been filed.

(iii) The notice to withdrawal was unprocedural as it was filed in court on 5/2/2010 and then he was informed about it on 12/2/2010.

(iv) The same is malicious and has not been done in good faith as he was not consulted before the action was taken.

(v) It was done in bad faith as the counsel did not inform his client before taking action.

(vi) It is their stand that their clients action survives the withdrawal by the co applicants and are order view of pursuing the same to its logical conclusion.

(vii) The client has the right to protect the estate property from further alienation.

(viii) They rely on the legal text and case law submitted to court.

M/S Kariuki on the other hand opposed the notice to withdraw on the ground that

(i) George filed the application in his capacity as the court appointed manager of the estate of the deceased and with consultation and consent of one Margaret Njeri one of the administrators of the estate.

(ii) Having so been authorized George cannot withdraw the application without the consultation and consent of the said Margaret Njeri.

(iii) It is not true that George wishes to secure victory in the court, of appeal for the benefit of the estate because he is aware that the estate is the one which secured victory in the superior court only. It is the loses in the superior court who are betting for victory in the court of appeal.

(iv) The application is vital and the same should be prosecuted to its logical conclusion as it seeks to preserve the asset from being alienated by stranger.

(v) The court is urged to uphold the wishes of the client Margaret Njeri.

Mr. Wandaka for David Njiru Mbiyu supported the stand of M/S Kiiru and Kariuki in opposing the notice of withdrawal of the joint application and added that the application survives for disposal because the same could not be withdrawn without the consent of Paul Mbatia Koinange.

In response dispensace insuit reiterated the earlier stand that the application and supporting affidavit cannot stand after one of the applicants has withdrawn.

(ii) That the legal text and case law cited by these opposed to the withdrawal notice applies to suits and not joint application and joint affidavit.

(iii) Maintains that the received instructions before filing notice of withdrawal.

On case law on legal texts those opposed to the withdrawal references was made to Halis burys laws of England volume 38 paragraph 280 where it is stated inter alia that:-

"One or two or more plaintiffs giving in respect of separate cause of action may withdraw without leave, but not where he is a necessary party to the claim made by the other plaintiffs. A summons may not be withdrawn without leave.

The case in **RE MATHEWS OATES VERSUS MONEY (1905) CHEMERY DIV. 460** where it was held interalia that in the case of a difference between co-plaintiffs, the proper counsel is to make an order that the name of one of them should be struck out as plaintiff and added a defendant. But such an order will only be made on security of being given for the defendants costs.

Due consideration has been made by this court, of the above rival arguments, regarding this courts', decision to either uphold or not to uphold the notice to withdraw the joint application and it is of the opinion, that the issue will be resolved best by considering the underlying common factors which to affect its disposal. In this courts opinion these are:-

1. The proceedings herein fall into the specialized category of succession proceedings distinct from the general category of civil proceedings. It is common ground that this specialization is signified by the existence of a specialized legislation governing its proceedings distinct from the civil procedures applicable to ordinary civil process. This legislation is the law of succession Act (L.S.A.) and the Probate and Administration rules and regulations made there under.

   It is also common ground that the estate subject of these proceedings distributed to the beneficiaries and that the subject of the joint application sought to be protected by the joint application has been alleged to be an asset belonging to the estate of the deceased and allegedly included in the inventory of the assets forming the estate property.

2. It is common ground that the application is joint, the affidavit in support of the same is also joint. This being the case the assumption is that the instructions to file the same must also have been joint, a matter confined by counsel who filed the notice to withdraw.

3. It has transpired that one of the joint applicants namely George Kihara Mbiyu has given firm instruction to his counsel to withdraw the said joint application where as the other joint applicant Paul Mbatia has given firm instruction to his counsel to oppose the withdrawal of the said application.

4. It is also transpired that the Margaret Njeri Mbiyu an administrator had an interest in the said joint application. A reading of paragraph 2, 8 and 17 of the supporting affidavit reveals that she has a hand in the presentation of the said application as she is alleged to have been the one who gave instructions to have the said application filed. It has been argued on her behalf that having given instructions to file the same, the same cannot be withdrawn without her consent and she is therefore opposed to the withdrawal of the same.

5. It is common ground that no provision of law has been cited as the enabling provision on which the authority to withdraw has been anchored. It is also common ground that the principles of law relied upon by the party objecting to withdraw relate to civil litigation.

6. It is common ground that some of the parties against whom the joint application sought relief to not fall into the category of administrators on beneficiaries of the proceeds of the estate subject of these proceedings. Neither have they been formally joined to these proceedings as parties.

The court, has gone further and considered the above set out common grounds in the light of the rival arguments herein, and it is of the opinion, that the following are the points for determination in disposing off the issues of whether to uphold or not to uphold the notice to withdraw.

1. Which principles of law in this court, to apply, General principles of civil litigation or the principles of law governing succession proceedings?
2. What is the effect of one joint applicant wanting to withdraw the joint application with the other joint applicant with holding the withdrawal?
3. What is the effect of the assertion of Margaret Njeri Mbiyu that, since she was the initiator of the filing of the application, the same cannot be withdrawn without her consent
4. On the merits of the said application as gathered from the content of the reliefs sought, content of the grounds in support of the same and content of the preliminary objection raised against it, with sustenance of the said joint application and disposal of the same on its own merit serve any purpose?

Due consideration has been made by this court, concerning the above own framed issues and the court, proceeds to answer them as follows:-

1. In respect to question one it is evident that the joint application lingers both on the civil procedure as the Probate and Administration rules. The applicable provision in the probate and administration rules is rule 73, which enshrines the interent jurisdiction of the court, and enables the court, to do justice to both litigants and prevent abuse of the court powers. This court, has judicial notice of the fact that, this rule has its counter part and the old CPA, provisions of section 3A of the CPA. The court, has judicial notice of the fact that like its counter part under the CPA it is usually invoked to afford a litigant avenue through which to pass and access justice where no other provision of law exists to afford such a litigation avenue to access the relief being sought. In the circumstances of this case rule 73 of the Probate and Administrations rules is available to the applicant who has filed notice to withdraw as it is common ground that no other avenue exists for the said applicant to access the relief being sought.

   Turning to the Civil Procedure Provisions order 24 CPA exists and denotes powers to a litigants to withdraw process filed by such a litigant however technical problems would enjure the applicant sought access the relief under the CPA provisions since these do not apply to succession proceedings except where specifically provided for

withdrawal if processes under the L.S.A has not been provided for to be in accordance with the said provision.

Regarding the effect of one joint applicant pulling out is that, the application ceases to hold in respect of the withdrawal applicant. Apparently would appear that like in any other joint proceedings the process would appear to hold on or survive in favour of the non withdrawing applicant. The court, tends to agree with the legal authority cited by the objecting counsel that this is the correct position. However while the court, agrees that such a situation would prevail where a process like a plaint or defence is involved a process like a joint application would pose attendant challenges because of the legal requirement that it be supported by an affidavit or affidavits in addition to grounds in its body. Herein the application was supported by a joint affidavit. This court, has judicial notice of the facts that rules 3 and 4 of order 18 CPR dealing with affidavits talks of a deponement in essence this would automatically rule out the issue of joint affidavit. However this court, is due to the notice of motion practice prevailing in succession matters where joint affidavits are entertained and in fact accepted as a matter of vote the law has no doubt that it would appear, this is the basis upon which the joint affidavit was filed herein namely to try and safeguard an asset alleged belonging to an estate.

The challenge however arises, because the court, has to determine whether the joint affidavit is capable of being tramatized so that the oath of the party withdrawing is taken only and that of the party not withdrawing is preserved to sustain the application. In this courts', opinion this is impossible the joint oath has to stand or fall together.

The court, is of the opinion, that had the joint application been supported by separate affidavits, then the same could have survived and disposed off on the basis of the affidavit of the party not withdrawing.

The joint affidavit therefore stands faulted. Once faulted the joint application does not meet the legal requirements of a valid application and therefore stand faulted and cannot be sustained.

Concerning instructions from one Margaret Njeri, these do not hold because they were done outside the proceedings. Their mention in the faulted affidavit also affects them, they also had nothing to do with the firm instructions given to the counsel to withdraw.

Turning to the merits, the court, is of the opinion, that the application has bound to fall because it sought to draw into succession proceedings parties who have proclaim on the estate properties as beneficiaries. It is then trite law that valid claims capable of being entertained in a succession proceedings for those canceled by beneficiaries against the holder of the grant. It therefore the finding of the court, that the claim was being agitated in a worse forum. The same should have been agitated in a civil proceeding by the administrator in a civil litigation against persons not claiming as beneficiary. This being the case, sustaining the application in whatever form will not further the interests of justice in their succession till it will jus be a waste of judicial time.

By reason of the reasons given in the assessment the court, proceeds to make the following final orders.

1. George Kihara Mbiyu is entitled to withdrawn from pursuing the application sought to be withdrawn.
2. The consent and consistence by one Margaret Njeri was done outside the ostensible authority between George

Kihara Mbiyu and the counsel and as such it is not binding on the cause.

3. There is no rule of law which bars a party from withdrawing a process teach and lawfully presented to court.

4. Even if it were to be taken that the joint application survive the axe, the joint affidavit does not because. the oath was taken jointly and one deponment withdrawn in oath, the affidavit becomes valueless and stands faulted. The application could only have survived if the same had been supported by separate affidavits in which case the application could have survived on the affidavit of the party not withdrawing once the affidavit has been faulted the application stands faulted as it will not be in compliance with the legal requirements. That it be supported by an affidavit.

5. The application would not have survived the merits because it has been presented in a wrong forum in so far as it has drawn in parties who have no access to the estate of beneficiaries. The proper forum for agitation of the issue quashed should have been a civil suit and the action presented by administrators who are the persons mandated by law and the court, to protect estate property. As such retaining the application will not serve any useful purposes.

6. The withdrawn notice filed herein has been upheld.

DATED, READ AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH 2010

R.N. NAMBUYE

JUDGE