



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Succession Cause 10 of 1986

IN THE MATTER OF THE ESTATE OF DOUGLAS KAMAU WAGEMA – DECEASED

JOEL MBOGO KAMAU.....PETITIONER/RESPONDENT

VERSUS

NAFTALI WARUTA KAMAU.....OBJECTOR/APPLICANT

RULING

The subject matter of this ruling is the Summons dated 15th October 2009 taken out pursuant to *rule 73* of the Probate and Administration Rules in which **NAFTALI WARUTA KAMAU**, the ‘Objector/Applicant’, herein, is seeking for the following orders:

1. ***“That the Honourable Court be pleased to expunge from the record the consent letter dated 15th April, 1993, filed by the petitioner herein.*”**

2. ***That upon the same being expunged, the Honourable Court be pleased to set aside all the proceedings and consequential orders ensuing from the purported consent letter dated 15th April, 1993.*”**

3. ***That costs of this application be provided for.”***

JOEL MBOGO KAMAU, the Petitioner/Respondent herein, opposed the summons by filing a Replying Affidavit he swore on 26th January 2010.

It is the submission of the Objector/Applicant that he was not privy to the consent letter dated 15th April 1993 in which it is stated that the objection proceedings were withdrawn and that the Objector had renounced his interest over the Estate of Douglas Kamau Wagema alias Kamau Wagema, deceased. It is alleged that the signature appended on the aforesaid letter was a forgery made to unlawfully disinherit the Objector and other members of the family. The Petitioner on his part urged this court to reject the application on the basis that the objector (Applicant) duly executed the consent letter and that he has come to court too late in the day when the succession proceedings are complete.

I have considered the material placed before this court and the oral submissions made by learned counsels from both sides. It is not

in dispute that a consent order dated 15th April 1993 addressed to the Deputy Registrar of this court was filed in this court. The same shows that it was executed by both the Petitioner and the Objector. The terms of the consent reads as follows:

1. ***“The Objector herein Naftali Waruta Kamau be and is hereby allowed to withdraw his objection proceedings in this suit.***
2. ***The Grant of letter of administration and confirmed Grant be issued in favour of the petitioner Joel Mbogo Kamau absolutely.***
3. ***Plot Number LAIKIPIA/OL-ARABEL/213 which is a subject to these proceedings be registered in the name of the Petitioner. The Petitioner to meet all expenses relating to the transfer of the said piece of land.***
4. ***Each party to bear its own/his costs and consequently there be no orders as to costs.”***

The letter is copied to the firm of M/S Ghadijally & Company Advocates. The question which needs to be determined is whether or not the Objector executed the document. If it is true that he did not execute the consent order whether or not the Objector has properly invoked this court's jurisdiction. Let me start with the first issue. According to the Petitioner, the Objector duly signed the consent order. He annexed to his replying affidavit a copy of a letter dated 9th November 1994 in which Ghadijally & Company Advocates wrote to the Deputy Registrar specifically stating that the parties have settled the matter out of court. It is noteworthy to state that the firm of Ghadijally & Company Advocates represented the Objector herein. That firm filed the objection which was withdrawn by the consent order. The Objector/Applicant has not contested the contents of the aforesaid letter neither has he challenged its authenticity. This fact means that the Objector/Applicant actually executed the agreement. He cannot now turn around and disown an agreement he bound himself. The Applicant has further filed a forensic document examiner's report prepared by Antipas Nyanjwa dated 28th April 2009. The report indicates that the documents which were examined were the standard signatures, the known signatures, a copy of the national identity card as compared with the document in dispute. The document examiner was of the view that the consent letter was a forgery since questioned signatures did not tally with the known signature of the Objector/Applicant. I must state that the document examiner was prompted to carry out the examination by the firm of Gathara Mahinda & Company Advocates on behalf of the Objector. The petitioner was not involved in that process. In such a case it is possible for the Objector to manipulate his signature to achieve his objective. It is inconceivable how the document examiner arrived at his conclusions without the signature of the Petitioner. This court is entitled to question the reliability of the report because the same is based on the examination of evidence (signatures) of one side yet the document in dispute was allegedly executed by two parties. The document cannot just be declared to be a forgery yet not all the signatures appended on the document and the signatories themselves were not interrogated by the document examiner. In the case of **DHALAY =VS= REPUBLIC [1995 – 1998] E.A. 29** it was stated *inter alia* that:

“Where a qualified expert gives an opinion and reasons therefore and there is no other evidence in conflict with such opinion, then such opinion is not for rejection. It can only be rejected where the court is satisfied on good grounds that the opinion is not soundly based.”

I have already stated the report is one sided. It is subject to manipulation by the interested party. The report cannot be objective in the absence of the input by the Petitioner.

The other aspect which has crossed my mind is the period the Objector/Applicant took to file the current application. He waited until Mr. Ghadijally, his former advocate, passed on to file the application. The only inference I can make is that there is something the Objector/Applicant wanted to hide which may have been within the knowledge of his deceased advocate. On the basis of the above reasons, I am convinced the application has no merit. The same is not genuine. I agree with the submissions of the Petitioner that the same was made

too late in the day when the succession proceedings have been concluded.

The other issue raised relates to the competency of the application. It is argued that the application should have been premised under *Order XLIV* of the Civil Procedure Rules as opposed to being brought under *rule 73* of the Probate and Administration Rules. A careful perusal of the application will reveal that the Applicant is seeking to set aside the consent order on the basis that the consent was fraudulently made. I must state that the Applicant is perfectly right to invoke the inherent jurisdiction of the court under *rule 73* of the Probate and Administration Rules. I find the objection to be without merit.

In the end I find the Summons dated 15th October 2009 to be without merit. The same is ordered dismissed with costs to the Petitioner.

Dated and delivered at Nyeri this 11th day of June 2010.

J. K. SERGON

JUDGE

In open court in the presence of

Kimunya for Objector/Applicant.

No appearance for Charles Kariuki for Respondent.