REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Succession Cause 398 of 2008

IN THE MATTER OF THE ESTATE OF WAIRIMU NJUGUNA – DECEASED

AND

MOSES NJUGUNA GICHIA ..... APPLICANT

VERSUS

JAMES EVANSON MWANGI GITAU ..... RESPONDENT

R U L I N G

Before me is an application dated 21st May 2009 in which **Moses Njuguna Gichia (Moses)** seeks in the main two orders; first that there be a stay of execution of the orders of this court made on 18th May 2009 pending the hearing and determination of summons for revocation of grant and secondly, that the orders of 18th May 2009 aforesaid be set aside and the application dated 19th May 2009 be heard on its merits. The application is expressed to be brought pursuant to rules 49 and 73 of the probate and administration rules.

In support of the application **Mr. Benson Ndumu Kimani** learned counsel for **Moses** has sworn an affidavit. In pertinent paragraphs he has deponed that **Moses** was a resident of Kericho in the Rift Valley Province. He used to communicate with him over this matter though through his nephew, **Bernard Gichia Wahome (Bernard).** When this cause was however transferred from the High Court of Kenya at Nairobi to this court, he instructed **Moses** through **Bernard** to look for an advocate in Nyeri to take over the conduct of the cause. Later he was advised that **Moses** had been displaced following the political crisis that engulfed the country following the disputed 2007 National elections. Subsequent thereto counsel was served with an application dated 19th March 2009 and immediately informed **Moses**. However on 16th April 2009 **Bernard** collected **Moses's** file from him and indicated that he was expecting to meet him. When **Moses** did not show up as expected, **Bernard** contacted counsel and informed him that he had credible information as to the IDP camp where **Moses** was residing and asked him to have the application adjourned. Counsel then contacted **Mr. Kiminda esq., an advocate** in Nyeri and asked him to hold his brief and adjourn the application. **Mr. Kiminda** proceeded to make the application for adjournment but it was denied and the court proceeded to allow the application seeking that the Deputy Registrar of this court be authorised to sign all the necessary documents on behalf of **Moses**. Counsel further deponed that he could not have filed a replying affidavit to the application for want of instructions. That **Moses** has no other land except the suit premises and that **James Mwangi Gitau (James)** a beneficiary of the estate and who made the application and got the order sought to be reviewed was not a beneficiary of the deceased's estate and was included in the summons for

confirmation of grant by means of deceit. Unless the orders of 18th May 2009 are set aside, they will render the summons for revocation of grant nugatory.

The application was opposed by **James**. In replying affidavit dated 29th June 2009 he deponed that there were no sufficient grounds placed before court to enable it to exercise its discretion in favour of **Moses**. The application was a mere afterthought and purposely meant to delay the just conclusion of this cause. The supporting affidavit was defective. Finally **James** deponed that there was no explanation by **Moses** why there had been inordinate delay in prosecuting the application for revocation of grant.

When the application came up for hearing before me on the 27th July 2009, both **Mr. Kiminda** and **Mr. Mwangi** learned counsel for **Moses** and **James** respectively agreed to argue the same by way of written submissions. The said written submissions were subsequently filed and exchanged. I have had the benefit of reading and considering them.

From the submissions made, it would appear that prayer 2 in the application has already been overtaken by events and consequently is not available to **Moses**. **James** has submitted that the orders of 18th May 2009 have already been executed. Accordingly granting that prayer would serve no useful purpose as the necessary transfer documents have already been signed by the Deputy Registrar of this court as ordered. **Moses** had no response to this submission. That being the case, it must then be assumed that, that is the correct position. If the Deputy Registrar has already acted on the orders aforesaid and the record herein seem to bear **James** out on that fact, then, if I was to order a stay of the same, I will be making an order in vain. Court orders are never made in vain.

That then brings me to prayer 3 in the application. It is a prayer for the setting aside of the order made on 18th May 2009 aforesaid. That prayer is predicated upon counsel's inability to obtain instructions from **Moses** in sufficient time to be able to draw up a replying affidavit. The inability of counsel to access instructions was because **Moses** was a victim of post election violence and had relocated to an IDP camp.

This is all fine. However, who has brought forth that information? It is counsel for **Moses** who has sworn an affidavit to that effect. Ordinarily in a contentious matter such as this one, it is expected that parties and not their advocates swear affidavits. In swearing the said affidavit, counsel clearly offended the provisions of order 18 of the Civil Procedure rules and the oaths and statutory declarations Act. Order 18 rule 3(1) in particular provides that:-

Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.

It is trite law that affidavits must deal only with facts which the witness can prove of his own knowledge. However, a witness may still depone on matters of which he has information of or belief provided the sources and grounds thereof are stated. See **Halsburys Laws of England, 3rd Edition**. The counsel's affidavit in this matter runs foul of the above injunctions. He has sworn to contentious matters. He has sworn to matters of information and yet nowhere does he disclose the sources and grounds thereof and whether he verily believed the said information and grounds to be true. Further by deponing on matters of fact, the learned counsel had descended into the arena of conflict and therefore could not competently play the role of a counsel in the matter. It is not competent for a party's counsel to depone to evidentiary facts knowing very well that he will never take the witness box and be cross-examined on the same. In the case of **Kisya Investments Ltd & Others v/s Kenya Finance Corporation Ltd NBI HCCC No. 5304 of 1993** (UR), **Ringera J** as he then had this to say:-

"**..... By deponing to such matters the advocate courts an adversarial invitation to step from his privileged position at the bar into the witness box. He is liable to be cross-examined on his disposition. It is impossible and unseemly for an advocate to discharge his duty to the court and to**

his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case.....”

With respect I totally agree with these observations in the circumstances of this case. That is the situation that **Moses's** counsel finds himself. It is not enviable position to find oneself. Besides, counsel did not bother to get an affidavit from **Bernard** to back up his assertions. I would also want to imagine that counsel has been able to locate **Moses** in the IDP camp which remains undisclosed. If that be the case, why again did he not cause the said **Moses** to swear an affidavit in support of his allegation. In the absence of those affidavits, one can easily say that what counsel has deponed to in support of the application is based on conjecture and is in fact hearsay.

Yes, counsel claims that **Moses** is in an IDP camp. However there is no evidence to that effect. IDP camps are known by names. How come that the alleged IDP camp where **Moses** is allegedly based has no name or has not been disclosed. This makes me suspicious of that deposition. I do not think that **Moses** through his counsel is being candid.

The grant herein was confirmed on the 18th November 2004 in Murang'a PMC Succession cause number 75 of 2003. According to Moses the summons were so confirmed by deceit. It is then that sometimes in January 2005 he filed summons for revocation of grant in Nairobi HC Succession cause number 101 of 2005. It is this Nairobi succession cause that was subsequently transferred to this court. The application having been so filed, it was not until 12th April 2005 that it was presented before the judge for directions. Directions were duly given. Thereafter the cause did not see the light of day until 8th February 2006 when the application came for hearing before **Kubo J**. On that occasion parties agreed to have the matter proceed by way of affidavits and submissions. Thereafter the matter went into a slumber until 15th in July, 2008 when again it was listed for hearing before **Gacheche J**. On that occasion **Gacheche J** made an order transferring the same to this court. From the foregoing, it is apparent that **Moses** has not been keen on prosecuting his application for revocation of grant. Accordingly no useful purpose would be served for granting prayer 3 of the application if that is his attitude to the proceedings. There is no assurance that he has since left the undisclosed IDP camp nor has counsel deponed that he has since received further instructions in the mater so as to file a replying affidavit. In any event, it is a cardinal principle of law that litigation must somehow come to an end. In the circumstances of this case I think that **Moses** is determined to lock out **James** from enjoying the fruits of the judgment herein for no apparent reason.

It is also not lost on me that, **Moses** was the petitioner in this cause. He is the same person who applied for the confirmation of grant and had the name of **James** inserted therein as a beneficiary of the estate. How can he now turn around and claim that **James's** name found itself therein through deceit. Yes, **Moses** may have been misled by his son, **Peter Irungu Gichia** when filing the application for confirmation of grant. But that is a matter between him and his son.

For all the foregoing reasons, I am satisfied that this application lacks merit and it is accordingly dismissed with costs to **James**.

Dated and delivered at Nyeri this 22nd day of October 2009

M. S. A. MAKHANDIA

JUDGE