**IN THE HIGH COURT OF KENYA**
**AT KITALE**
**Succession Cause 93 of 2002**

**IN THE MATTER OF THE ESTATE OF WILFRED PHILIP WAWERU KAIRO (DECEASED)**

**AND**

**IN THE MATTER OF AN APPLICATION**

**BETWEEN**

**MARY NGUHI WAWERU & IRENE W. WAWER…....APPLICANTS**

**AND**

**EMILY NYONGESA & EDWIN NYONGESA…….RESPONDENTS**

**R U L I N G**

The applicants herein are the Administratrixs of the estate of the late

**WILFRED PHILIP WAWERU KAIRO**. They have moved the court by a summons pursuant to Section 45 of the Law of Succession Act and Rule 73 of the Law of Succession Rules.

Essentially, the applicants are seeking an injunction against the respondents, with a view to having the said respondents restrained from entering, alienating, utilizing, wasting and/or in any other way purporting to exercise proprietary interest over the Land known as **KIMININI/KINYORO BLOCK 4/RAFIKI/52.** That piece of land is said to measure 5 Acres, and is also said to belong to the estate of the late **WILFRED PHILIP WAWERU KAIRO.**

It is common ground that the respondents were the children of **MILDRED NAFULA SIMIYU,** who had been the objector in these Succession Cause.

The applicants' case is that when determining the objection herein, the **Hon. KARANJA J**. had directed that the respondents be provided a home. The rest of the property of the deceased, including **KIMININI/KINYORO BLOCK 4/RAFIKI/52,** is said to have been given to the lst applicant, **MARY NGUHI WAWERU**, and her children.

That notwithstanding, the applicants now accuse the respondents of forcefully invading that piece of land, and barring the lst applicant and her children therefrom.

The said actions of the respondents are described as intermeddling with the free property of the estate of the deceased. It is for that reason that the applicants have asked this court to grant an order of an injunction, which would bar the respondents from intermeddling.

In support of the application, the first applicant has sworn three affidavits. In the further affidavit, the said applicant deponed, inter alia, that the objector had cohabited with the deceased at SIUNA FARM. Indeed, the applicants pointed out that the photographs which the respondent had produced in evidence were of the permanent house built on SIUNA FARM.

On the other hand, the applicants pointed out that the objector had never lived on **KIMININI/KINYORO BLOCK 4/RAFIKI/52**, which shall hereinafter be cited as "the property in issue". They say that there was never a house built for the objector on the property in issue.

Therefore, the applicants submitted that the property in issue cannot have been the objector's home, as contemplated by the learned Judge in her judgment.

That contention is said to find backing from the will of the deceased, in which he had expressly stated that he had built a home for the objector on SIUNA FARM.

In the light of those contentions, the applicants submitted that

> "***a slip of the pen by the judge cannot give to the respondents that which is not intended for them."***

And to further emphasize the point, the applicants submitted that in the objector's submissions, she had expressly stated that she and her children used to reside at SIUNA FARM.

That being the case, as spelt out by the applicants, the court was asked to find that when the learned trial judge decided to award to the objector the home which the deceased had built for her, the judge intended to give to the objector SIUNA FARM, and not the property in issue.

***MUYALE V MULEFU {1985} KLR 236*** was cited as authority for the proposition that the court was mandated to correct a misdescription.

***OMBOGO V STANDARD CHARTERED BANK OF KENYA***

***2000} 2 E.A. 481*** **was cited as authority for the proposition that the court has inherent powers to stop intermeddling in an estate of a deceased person.**

**The applicants then invited the court to consider that application as uncontested. The reason for that invitation was that the replying affidavit drawn by the law firm of Kiarie & Company Advocates ought to be struck out together with the said firm's Notice of Appointment, because they did not comply with the provisions of Rule 60 of the Probate and Administration Rules.**

**The applicants submitted that the Notice of Appointment of Advocate appeared to be in accordance with the provisions of the Civil Procedure Rules, which were inapplicable to Probate and Administration matters.**

**There is no doubt that pursuant to Rule 63 of the Probate and Administration Rules, the following provisions of the Civil Procedure Rules would apply to proceedings under the rules made pursuant to S.**90 of the Law of Succession Act; Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX together with the High Court (Practice and Procedure) Rules. In effect, other provisions of the Civil Procedure Rules do not apply to Probate and Administration proceedings.

Under Order 3 Rule 8 of the Civil Procedure Rules, where a party, after having sued or defended in person, appoints an advocate to act on his behalf, he shall give notice of appointment. Clearly therefore, a Notice of Appointment of Advocate is a creature of the Civil Procedure Rules. It is unknown in the Probate and Administration Rules.

By virtue of Rule 60 of the said Probate and Administration Rules, every interested person, (whether or not he had been served with notice thereof), who wishes to be heard upon or to oppose any application,

and has not already appeared in the proceedings, shall enter appearance in Form 26.

The said Form 26 bears the heading "**ENTRY OF APPEARANCE (GENERAL FORM)"**

According to the respondents, they did not file a Notice of Appointment of Advocates, pursuant to the Civil Procedure Rules. Their position is that the purpose of the Notice of Appointment of Advocate was to notify the court and the other parties that an advocate had been appointed.

They also pointed out that pursuant to Rule 70 of the Probate and Administration Rules the forms provided may be used as amended or adapted to suit the circumstances.

In that light, the respondents pointed out that they were the children of the objector, who had not originally been parties to the proceedings. They say that they had become enjoined to the proceedings through the present application.

That notwithstanding, the respondents did not go further to explain why the said circumstances could justify their advocates filing a Notice of Appointment of Advocates, instead of an Entry of Appearance.

In my considered view, Rule 60 encampuses the respondents circumstances, as they are doubtlessly interested persons, who wished to oppose the application. Accordingly, the respondents' advocates should have filed an Entry of Appearance, and not a Notice of Appointment of Advocate. I also fail to appreciate how the said notice of appointment could be constructed as amendment or an adaptation of the prescribed Entry of Appearance.

In the result, I find that the advocates for the respondents have not come on record in the manner prescribed. That leads to the question as to whether or not the court should then consider the application as uncontested.

That is a serious issue as the respondents had filed a replying affidavit. Therefore, if the court were to consider the application as uncontested, the court would have to disregard the replying affidavit.

In that regard, the applicants submitted that the replying affidavit should be struck out because it had been drawn and filed by a firm of advocates who were not properly on record.

It is instructive to note that the applicants made substantive submissions on the merits of their application before concluding with the submissions on the issues regarding the competence of the Notice of Appointment of Advocate as well as that of the Replying Affidavit.

The applicants did, inter alia, take the court through the contents of the Replying Affidavit. Therefore, if the said affidavit was to be struck out, it would render such submissions superfluous.

Also, the respondents' advocate was present in court throughout the submissions of the applicants. If his presence was unnecessary; because he had not come before the court properly, the applicants ought to have asked the court, at the outset, to exclude counsel as well as the replying affidavit.

In my considered view, having heard the substantive argu ements on the application, justice would only be done if the application was resolved substantively.

In order to enable the court delve into the substance of the application, in a regular manner, the Notice of Appointment of Advocates, and the Replying Affidavit on record shall stand struck out. However, the respondents are granted leave to file a compliant Entry of Appearance in line with Form 26, within the next four (4) days of this ruling.

The applicants are awarded the costs of the Notice of Appointment and of the Replying Affidavit which have been struck out.

Meanwhile, as I await the regularization of the respondents' position, I order that the status quo be maintained.

I also invite the respondents to consider their position very carefully. In so doing, and to ensure that this matter is not delayed at all, the respondents are required to limit the scope of their Replying to that which was constituted in the document which has now been struck out. It is only by so doing that the parties will be limited to the submissions already made.

For now, the respondents have a judgment which gives to them the 5 acres at **RAFIKI FARM**. They were also given all the moveable and immoveable properties on that 5 acre piece of land. The reason for that judgment was that the learned trial judge had held that;

*"**the deceased had built the house at Rafiki Farm for the objector and the children to live in. According to the objector, they are still living in that home."***

Since that was the only property given to the objector and the respondents, my understanding is that the respondents may well risk the loss of SIUNA FARM, if they should insist on retaining the one property which the trial court intended them to have. In order to resolve that stalemate, the respondents will be required to attend court, when the application next comes up. The reason for their being required to attend court is to have them both answer, on oath, the question as to where exactly they reside, as between RAFIKI FARM and SIUNA FARM. The importance of that question stems from the fact that the trial court had already held that the objector and the respondents were only entitled to the home built for them by the deceased. If that house is situated on **SIUNA FARM**, that would be all that the respondents are entitled to.

**Dated** and **Delivered** at **KITALE**, this 7th day of May, 2007.

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**FRED A. OCHIENG**

JUDGE