



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Succession Cause 416 of 2006

IN THE MATTER OF: GRACE WANJIKU NGUGI (DECEASED)

BETWEEN

JOHN MBUGUA NGUGIPETITIONER

VERSUS

THOMAS NGUGI MBUGUAOBJECTOR

RULING

Pursuant to Sections 26,28 and 29 of the Law of succession Act and under rule 45(1), 59(1) and 73 of the Probate and Administration Rules, Thomas Ngugi Mbugua took out the summons dated 23rd March 2007 in which he prayed for interalia:

- (a) *An order for reasonable provision to him from the Estate of Grace Wanjiku Ngugi (deceased).*
- (b) *Payment of Australian Dollars 7,600 by John Mbugua Ngugi, the Petitioner herein, to him to cover school fees due to Edith Cowan University, Australia pending the hearing of the summons.*

The summons is supported by the affidavit of Sylvia Wambui Kuria a holder of a power of attorney donated to her by Thomas Ngugi Mbugua.

When served with the summons plus the supporting affidavit, John Mbugua Ngugi filed a replying affidavit he swore on 29th March 2007 to oppose the application. He also filed a notice of preliminary objection and grounds of opposition of the same date. As practice demands, the preliminary objection had to be disposed of first, and that is the subject matter of my decision herein. In brief the preliminary objection raises basically two main issues namely:

- (i) That the Petitioner is yet to obtain a full grant of letters of administration, hence he cannot be compelled to do an illegality by making the Respondent the administrator prior to the formal order by the court.
- (ii) That the affidavit of Sylvia Wambui Kuria is fatally defective, incompetent, scandalous, and is sworn in contravention of the provisions of order XVIII of the Civil Procedure rules hence available for striking out.

When the preliminary objection came up for hearing, Mr. Gikandi, learned advocate for the Petitioner

concentrated on the issue relating to the incompetence of the affidavit of Sylvia Wambui Kuria. It is the submission of the learned advocate that Sylvia Wambui Kuria swore the aforesaid affidavit in excess of her power of attorney. It is said that the facts she deponed to are not within her knowledge hence she could not step into the shoes of Thomas Mbugua Ngugi, her Principal.

Mr. Ng'ang'a, learned advocate for the Objectors is of the view that Ms Sylvia Wambui Kuria swore the disputed affidavit within the powers given to her by the power of attorney.

I have considered these competing arguments. I have also perused the disputed affidavit. It is apparent that Sylvia Wambui Kuria swore the affidavit in support as though she was Thomas Ngugi Mbugua. In short, the name of Sylvia Wambui Kuria has been superimposed in place of that of Thomas Ngugi Mbugua. The law under Order XVIII rule 3(1) of the Civil Procedure rules states:

“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.”

The import of this provision was succinctly interpreted by the court of Appeal in the case between **Kenya Horticultural Exporters [1977] Ltd and Pape t/a Osirua Estate [1986] K.L.R. 706**. In this case the court of Appeal stated inter alia:

“That order XVIII rule 3(1) of the Civil Procedure Rules is not to be understood to provide that an affidavit in interlocutory proceedings may be sworn by a deponent who is unable of his own knowledge to prove facts, or that such an affidavit may be confined entirely to statements of information and belief even if the sources and grounds are shown. The words “may contain” suggest that the main body of such an affidavit has to be confined to facts which the deponent is able of his own knowledge to prove.”

The affidavit executed by Sylvia Wambui Kuria is obviously in contravention of order XVIII rule 3(1) hence the same is available for striking out. The fact that she has a power of attorney does not entitle her to do all manner of things on behalf of the principal. The aforesaid provision imposes an obligation on the deponent of such affidavits to apply his mind to matters which are or should be within his own knowledge. Consequently I am of the considered view that a party cannot do through an attorney some act the competency of which arises by virtue of some duty of a personal nature requiring skill or discretion for its discretion. If one was to apply for the deponent of such affidavits to be summoned to be cross-examined under order XVIII rule 2(1) of the Civil Procedure rules, it is obvious that Sylvia Wambui Kuria will be required to appear because she is the one who appended her signature on the affidavit. She will obviously not been in a position to answer the queries. For the avoidance of doubt, I am convinced that the duty imposed under Order XVIII rule 3(1) must be performed personally and cannot be done by attorney.

In the end I am convinced that the preliminary objection is well founded. Consequently the affidavits sworn by Sylvia Wambui Kuria are hereby ordered struck out and expunged from record. There being no competent supporting affidavit as anticipated under rule 59(6) of the Probate and Administration rules, the summons dated 23rd March 2007 cannot survive. It is ordered struck out with costs to the Petitioner.

Dated and delivered at Mombasa this 24th day of August 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Wameyo for the Respondent

Mogaka h/b Sangoro

H/b Mereka & Co. for the Applicant