



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

Civil Case 221 of 1998

DOROTHY WANGUI KARAGU (Alias GATHERU KARUGU).....PLAINTIFF/APPLICANT

Versus

JOHN MWANGI KAMARU..... DEFENDANT/RESPONDENT

RULING

The purpose of this Notice of motion dated 6th January, 2006 is not clear, that in prayer number 2 Agnes Wairimu Maina and Catherine Nyakinyua Ndung'u both said to be daughters of Dorothy Wangui Karugu alias Gatheru Karugu to be substituted as plaintiffs and/or Guardians

“of the minors herein

DOROTHY WANGUI KARUGU, EUNICE WANJIKU AND NDORIS WANGUI.”

That in prayer 3 the amount of money deposited on behalf of the minors herein H.F.C.K. Nyeri Branch Account NO.S.A.-200-0044999 be released to the substituted as Plaintiffs and/or Guardians of the minors herein. In prayer 4 it is stated that in the alternative to prayer 3 above, the H.F.C.K. Nyeri Branch, be ordered (when they not party to these proceedings) to issue cheques directly to the schools in which the minors are studying to cater for their school fees on the Application of the substituted Plaintiffs and guardians of the minors herein.

The Applicant is said to be Dorothy Wangui Karugu alias Gatheru Karugu who was the Plaintiff in the suit and became a judgment creditor after judgment was entered in her favour and she proceeded to execute the judgment by having the sum of money awarded in the judgment and, approved by the court as share of each minor, invested in the HFCK Nyeri Branch on behalf of the minors. She also got her approved share and that followed a subsequent application by Chamber Summons dated 27th February, 2001 judgment having been entered 17th January, 2000.

She was the Plaintiff in this suit because she was the Administrator of the estate of Jacinta Wangari Karugu under a Limited Grant of Letters of Administration *ad Colligenda bona* under section 67 (1) of the Law of Succession Act, Cap. 160 Laws of Kenya for the purpose of instituting and prosecuting this suit. That was in this Court's Succession Cause No. 303 of 1997.

This Notice of Motion dated 6th January, 2006 is being prosecuted in this Civil Case without disclosing to this court whether the two ladies intended to be substituted, namely, Agnes Wairimu Maina and Catherine Nyakinyua Ndungu are the ones to whom a full Grant of Letters of Administration Intestate has been issued. If they are not, then they do not qualify to be substituted in the place of Dorothy Wangui Karugu alias Gatheru Karugu in this suit.

Also, when did Dorothy Wangui Karugu become a minor as indicated in prayer 1? She is the Applicant as the Plaintiff and at the same time including herself as one of the minors so that instead of the minors being two, they are now three so that she also will have a cheque issued by H.F.C.K. directly to her school. So she schools yet she is the one being said in ground (b) on body of the Notice of Motion that she “is an extremely aged woman who does not have the energy to run up and down on behalf of the minors.” She is the same person who has deponed the supporting affidavit dated 6th January, 2006 and complains in paragraph 5 of the same affidavit that when it was ordered that the money be deposited in H.F.C.K Nyeri and it was so deposited

“the Application to that effect and the orders thereto were done by my then counsel without my instructions, consent and/or knowledge.”

A relevant question is: as a holder of a limited grant of letters of administration *ad colligenda bona*, how better did she want to handle that money?

From that complaint, however, it becomes clear that the Applicant’s counsel who was handling this matter then was different from her present counsel. Who was he? I will go back to that question after a short while. But in the meantime let me point out that this case maybe an example of cases where the issuance of a Limited Grant of letters of administration for collection and preservation of assets in the estate of a deceased person is abused. That temporary administrator is only supposed to collect the assets and preserve them to await the issuance of a full grant of letters of administration about which section 67 (1) says a notice of the relevant application must be published inviting objections to be made within a period not less than thirty days. It is the administrator under what I am calling a full grant of letters of administration Intestate that gets the power to distribute assets in the estate he/she is administering and assumes his/her powers and duties under sections 82 and 83 of the Law of Succession Act. A holder of a limited grant is not covered under those two sections and they are the only sections of the Act spelling out powers and duties of “a personal representative” who is defined under section 3 (1) of the Act as meaning “the executor or administrator of a deceased person”. “Administrator” is defined as meaning “a person to whom a grant of letters of administration has been made under this Act.” That excludes “a person to whom a *limited* grant of letters of administration has been made” under the Act.

Going back to the question of the person who was the Applicant’s counsel at the time the judgment in this suit was entered and executed, the record shows that she was m/s Lucy Waruguru Mwai from the law firm of Lucy Mwai & Company Advocates. I have not been given evidence that she ceased acting for the Applicant in this suit and that being the position it becomes evident the Advocates, M/s Gacheche Wa Miano, who filed this Notice of Motion dated 6th January, 2006 succeeded in making me hear them as advocates representing the Applicant in this suit when they were not and what I am saying is vindicated in the first prayer of the Notice of Motion which asks for orders

“THAT GACHECHE WA MIANO Advocate be granted leave to act for the Plaintiff/Applicant herein in place of Lucy Mwai & Co. Advocates.”

To-date that prayer has not yet been granted yet Advocate Gacheche Wa Miano fully prosecuted this Notice of Motion before me without a hint that he had first to be granted leave to do so by the Court under Order III rule 9A of the Civil Procedure Rules. The proper procedure in a situation like this is for the advocate intending to take over, to file a separate application in terms similar to those in prayer one in this Notice of Motion, served upon all other parties on record in this suit including the counsel intended to be replaced. Let that application be heard on a date known to all the parties and let the court grant leave. It is after leave has been so granted by court that the incoming counsel may now file an application containing other prayers he wants to make like those from prayer number two to four in this Notice of Motion. The two applications, in my view, ought to be separate because when one application is made in the form this Notice of Motion has been brought, first, there is the danger of the advocate concerned or the applicant in general, overlooking, as it has been done in this Notice of Motion, the prayer asking for leave so that the court is not addressed concerning that prayer and secondly, and this is the most important reason in my view, the correct position in law is that the Notice of Motion or the pleadings having been filed by a person who has not obtained leave of or power from the court to do so, is the whole of it, an

incompetent Notice of Motion or are incompetent pleadings liable to striking out at the outset.

It follows from what I am saying therefore, that this Notice of Motion dated 6th January, 2006 is incompetent and ought not to have been entertained but since I have been made to entertain it up to this stage, I will not strike the said Notice of Motion out, but will dismiss it not only on that technical point but also on its merits. Accordingly the Notice of Motion is hereby dismissed.

There will be no order as to costs as there was no appearance for John Mwangi Kamuru said to be the Respondent/Defendant.

Dated this 29th day of May, 2006.

J. M. KHAMONI

JUDGE