



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

PETITION NO. 56 OF 2018

ELIZABETH WANJIRA EVANS

(Suing as administrators of the estate of Rahab Wanjiru Evans, [Deceased])....1ST PETITIONER

CHRISTINE WANGARI GACHEGE.....2ND PETITIONER

MARY WANJIKU GACHIGI.....3RD PETITIONER

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

RULING

INTRODUCTION

1. On or about the 25th of September 2018, one Elizabeth Wanjira Evans, who described herself as the First administrator of the estate of one Rahab Wanjiru Evans, Deceased, filed and/or lodged the subject Petition against the Respondents herein and in respect of which the Petitioner sought several Reliefs pertaining to and/or in respect of L.R. NO. 209/11540, Grant number IR 56017/1, [herein after referred to as the suit property].
2. Subsequently, the subject Petition came up for directions and directions were given whereby it was directed that the Petition be canvassed and/or disposed of by way of written submissions.
3. Consequently, the parties herein have since proceeded to and filed their respective submissions with the Petitioner filing her maiden submissions on the 19th of August 2019, and further submissions on the 26th of August 2019.
4. On the other hand, the 2nd Respondent duly filed a Replying Affidavit sworn on the 20th of September 2019, as well as written submissions filed on the 1st of August 2019. For the avoidance of Doubt, the 1st Respondent did not file Written Submissions.
5. Pursuant to and upon the filing of the written submissions by the parties, the matter was placed before the Deputy Registrar on the 9th of February 2021, with a view to confirming and/or authenticating whether the written submissions had been duly filed and thereafter for purposes of further directions.
6. It is worthy to note that when the file was placed before the Deputy Registrar, same proceeded to and confirmed that the parties had filed their respective submissions and that the file was thereafter directed to be placed before the Judge for directions on highlighting of the submissions.
7. However, during the intervening period, a number of events took place, culminating into the filing of a Notice of Appointment by the law firm of M/S Gitonga Muthii & Co. Advocates, who indicated that same had been appointed by the Estate of Rahab Wanjiru Evans.
8. On the other hand, the said law firm also proceeded to and filed a Notice of Withdrawal of Petition, dated the 30th of July 2021, and to which same attached an authority to withdraw Petition, signed by Elizabeth Wanjira Evans and Mary Wanjiku Gachigi, respectively.

9. On the 26th of October 2021, the subject matter came up for further directions whereupon a dispute arose between the law firm of M/S Gitonga Muthii & Company Advocates, on one hand, and the law firm of M/S S.M Omae & Co. Advocates, on the other hand. Consequently, the Honorable Court invited the parties to make representations on the Dispute pertaining to Representation.

SUBMISSIONS BY THE PARTIES

M/S Gitonga Muthii & Co. Advocates Submissions

10. Counsel Mr. Ndichu appeared before the Court and indicated that same was appearing for the Petitioner, and in this regard, same pointed out that he was acting for the Petitioners as opposed to the law firm of M/S S.M Omae & Co. Advocates, who was said to be no longer representing the Petitioner.

11. Towards and on account of instructions to act for the Petitioners, Counsel pointed out that same had filed a Notice of Appointment to act for the estate of the deceased. On the other hand, Counsel also stated that same had also received instructions to withdraw the entire Petition and in this regard, Counsel proceeded to and filed a Notice of withdrawal of the Petition, dated the 30th of July 2021.

12. It is also worthy to note that Counsel pointed out that attached to the Notice of withdrawal, same had also filed an authority to withdraw the Petition, which was signed by 2 of the 3 appointed Administrators.

13. Owing to the foregoing, Counsel implored the Court to proceed and endorse the Notice of Withdrawal and mark the Petition as duly withdrawn.

M/S S.M. Omae & Co. Advocates Submissions

14. On his part, Counsel contended that he was previously acting for all the Petitioners, but the 1st Petitioner proceeded to and filed a Notice to act in person dated the 16th of March 2021.

15. Pursuant to and upon the said 1st Petitioner filing a Notice to act in person, Counsel stated that he therefore remained on record for the 2nd and 3rd Petitioners.

16. Besides, the Counsel further contended that the firm of M/S Gitonga Muthii And Company Advocates, were improperly on record and thus same could not purport to file a Notice of withdrawal of the Petition.

2nd Respondents Submissions

17. On behalf of the 2nd Respondent, Counsel Mr. Oscar Eredi submitted that the Petition herein raises substantial issues, which are of Public importance and therefore it would be in contravention of public policy to allow the Petitioners to withdraw the Petition.

18. Counsel further stated that if the Petitioners were still keen to withdraw the Petition, then same ought to be granted leave to file a cross-petition.

19. Nevertheless, Counsel signaled that he would be opposed to the withdrawal of the Petition and hence the Honourable Court should not adopt and/ or ratify the Notice of Withdrawal of Petition.

ISSUES FOR DETERMINATION

20. Having listened to the Representations and/or submissions by the various Advocates, particularly on the issue of Representation and the validity of the withdrawal, I am of the opinion that the following issues suffice for determination;

i. Whether the law firm of M/S Gitonga Muthii And Company Advocates are properly on record for the estate of the deceased.

ii. Whether the Notice of withdrawal of Petition dated 30th July 2021 is legitimate and/or valid.

ANALYSIS AND DETERMINATION

Issue Number One

Whether the law firm of Gitonga Muthii is properly on record for the estate of the deceased.

21. It is apparent and/or evident from the face of the Notice of Appointment of Advocates that the firm of M/S Gitonga Muthii & Co. Advocates are said to be appointed by the estate of Rahab Wanjiru Evans, to act for it in the subject Petition.

22. Having been so appointed by the estate of Rahab Wanjiru Evans, the law firm of M/S Gitonga Muthii & Co. Advocates have thus signed off as Advocates for the Petitioner and not for the estate of the deceased.

23. Suffice it to say, that the Estate of the deceased is not a legal entity and/or person that can allegedly appoint, engage and/or instruct a law firm to appear for it.

24. To the contrary, the only person/persons who are conferred with and thus seized of the requisite authority to engage and/or retain Counsel where appropriate to act for and on behalf of the estate of the deceased are the duly appointed administrators and not otherwise.

25. To appreciate and underscore the primacy of the foregoing observation, it is important to take cognizance of the provisions of **Section 82 of the Law of Succession Act, Chapter 160, Laws of Kenya**, which provides as hereunder;

“82. Powers of personal representatives

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best: Provided that—

(i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

(ii) no immovable property shall be sold before confirmation of the grant; CAP. 160 Law of Succession [Rev. 2017] 32

(c) to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;

(d) to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as to them may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of such estate, and to make any transfer which may be requisite for giving effect to such appropriation:

Provided that except so far as otherwise expressly provided by any will—

(i) no appropriation shall be made so as to affect adversely any specific legacy; (ii) no appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his parent or guardian (if any) or by the manager of his estate (if any) or by the court shall be required.”

26. From the foregoing position, it is important to note that it is only the duly appointed administrators that can engage an Advocate to appear and act on behalf of the estate of a Deceased.

27. In the premises, the law firm of Gitonga Muthii & Co. Advocates, who filed the Notice of Appointment of Advocates, stating that same were appointed by the estate of Rahab Wanjiru Evans, without disclosing particulars of the persons who appointed same, is not therefore lawfully on record.

28. Other than the fact that the Estate of the deceased cannot appoint and/or instruct Counsel without acting through the duly appointed administrators, and it is also important to note that a Notice of Appointment of Advocates can only be crafted and filed if the person appointing the Counsel had previously acted in person and not otherwise.

29. Nevertheless, in respect of the subject matter, there is no evidence that the body referred to as the Estate of Rahab Wanjiru Evans, had hitherto acted in person, if at all, to warrant the filing of a Notice of Appointment of Advocate. Clearly, the Notice of Appointment of Advocate, is incompetent, and thus an invalid document.

30. To support the foregoing observation, it is important to take note of the provisions of **Order 9 Rule 7 of the Civil Procedure Rules, 2010**, which provide as hereunder;

“[Order 9, rule 7.]

Notice of appointment of advocate.

7. Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications.”

Issue Number Two

Whether the Notice of withdrawal of Petition dated 30th July 2021 is legitimate and/or valid.

31. Having found and held that the firm of M/S Gitonga Muthii & Co. Advocates, who were allegedly appointed by the estate of Rahab Wanjiru Evans, were appointed by a body that is incapable of exercising a right to appoint Counsel, and having held that the said law firm are not validly on record, it would thus appear that the Notice of Withdrawal of Petition was therefore similarly incompetent.

32. Nevertheless, it is important to note that the grant of Letters of Administration that was issued in respect of the Estate of the deceased herein, was issued jointly to four persons, namely;

a) Christine Wangari

b) Elizabeth Wanjira Evans

c) Peter Gachigi Njogu

d) Mary Wanjiku Gachigi

33. To the extent that the Grant of letters of Administration was issued to and/or in favor of the Four persons jointly, it is imperative to note that the four persons were therefore incorporated together and unified by the Grant of Letters of Administration, and thus same have only one singular capacity, which is indivisible and/or not severable.

34. Owing to the singular and unified capacity, the Administrators of the estate of the deceased, cannot purport to appropriate and/or possess any personal capacity whereby one, two or otherwise can seek and/or purport to speak for the estate of the deceased without the involvement and participation of the other co-administrators.

35. However, in respect of the instant matter, two administrators, namely Elizabeth Wanjira Evans and Mary Wanjiku Gechege, (who is different from Mary Wanjiku Gachigi), have purported to sign an authority to withdraw, without the involvement and/or participation of the other two co-administrators.

36. In my humble view, the two co-administrators, cannot purport to act for and/or on behalf of the estate of the deceased, in total disregard of the participation and/or involvement of the rest of the co-administrators.

37. In any event, the only time that a segment of the co-administrators can act without the involvement of the others, is where the rest of the co-administrators have passed on and/or died, leaving the survivors only as the administrators. Only then, can a segment comprising of the surviving administrators be heard to act by themselves.

38. However, in respect of the subject matter, the Court has not been informed that the rest of the Administrators have since passed on and it is only the two who signed the authority to withdraw who are the survivors, and thus authorized to act in the manner indicated.

39. To underscore the foregoing position, I can do no better than to invoke and rely on the provisions of **Section 81 of the law of Succession Act**, which provides as follows;

“81. Powers and duties of personal representatives to vest in survivor on death of one of them Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them: Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the court has made a further grant to one or more persons jointly with him.”

40. I have pointed out that the Grant of Letters of Administration constituted and therefore conferred upon the administrators of the estate a singular and unified capacity, which is not severable and therefore any one or two of the other Administrators cannot act in their own way, without involvement of the others.

41. Owing to the foregoing, it is my finding and holding that the two administrators who have signed the authority to withdraw the Petition, under the pretext of majority Decision, have acted upon a misconception of the nature of the capacity imbued upon same.

42. Consequently, I find and hold that the Notice of Withdrawal of the Petition, that is anchored on the illegitimate authority dated the 30th of July 2021, is legally untenable.

43. In view of the foregoing, I therefore hold that the Petition herein has not been lawfully and/or legally withdrawn and thus same remains alive for determination and/or resolution in accordance with the submissions filed.

44. Be that as it may, I must point out that if the Notice of Withdrawal of Petition was crafted and drawn by a duly instructed Counsel, then same would have a right to file a Notice of Withdrawal and the Court would have had no difficulty in endorsing the Notice of Withdrawal, even on the face of opposition by Counsel for the 2nd Respondent.

45. For clarity, a party who has filed pleadings before the Court and who seeks to withdraw whatever has been filed, cannot be blocked and/or denied the right to do so, and any party aggrieved by such withdrawal can only seek for and obtain recompense on the basis of costs.

46. In support of the foregoing position, I can do no better than to re-echo the holding of the Supreme Court in the decision in the case of **Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** where the Court observed as hereunder;

“A party’s right to withdraw a matter before the court cannot be taken away. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed appropriate. Recently, a single judge of this Court in John O. Ochanda vs Telkom Kenya Limited, Motion No. 25 of 2014, in granting an application for withdrawal of a Notice of Appeal, stated inter alia:

“I do hold the view that a prospective Appellant is at liberty to withdraw a Notice of Appeal at any time before the Appeal has been lodged and any further steps taken. No proceedings have commenced strictly. I am also of the view that just like under the Civil Procedure Rules or Court of Appeal Rules, the right to withdraw or discontinue proceedings or withdraw a Notice of Appeal respectively ought to be allowed as a matter of right subject to any issue of costs which can be claimed by the respondents if any.” (Emphasis provided)”

47. Based on the foregoing legal position, the objection that was mounted and/or ventilated by Counsel for the 2nd Respondent on the issue of withdrawal was therefore misconceived.

48. Be that as it may, I have found and held that the Notice of Withdrawal was not lawfully filed and thus same is invalid and otherwise a nullity.

FINAL DISPOSITION

49. Having made the observations obtaining in respect of the enumerated issues, I now make the following Dispositive Orders;

- i. *The law firm of M/s Gitonga Muthii & Co. Advocates, are not lawfully on record for the Petitioners or at all.*
- ii. *The Notice of Appointment of Advocate dated 30th July 2021, filed by the firm of M/S Gitonga Muthii & Co. Advocates is contrary to the provisions of **Order 9 Rule 7 of the Civil Procedure Rules, 2010.***
- iii. *The said Notice of Appointment of Advocate be and is hereby expunged from the record.*
- iv. *The Notice of Withdrawal dated 30th July 2021, be and is hereby expunged from the Record.*
- v. *The Petition herein remains alive and existent and same ought to be determined on the basis of the written submissions that were duly filed and form part of the record, until same is lawfully and/ or Legally Withdrawn.*
- vi. *Costs of the Preliminary proceedings shall abide the course.*

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF OCTOBER 2021.

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT

MILIMANI

In the Presence of;

June Nafula Court Assistant

Mr. Ndichu for the Estate of the Deceased.

Mr. S.M Omae for the 2nd and 3rd Petitioners

N/A for the Respondents.