In re Estate of Eliakim Agadize Lwangu (Succession Cause 252 of 2003) [2024] KEHC 12158 (KLR) (11 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12158 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE 252 OF 2003

RN NYAKUNDI, J

OCTOBER 11, 2024

IN THE MATTER OF THE ESTATE OF ELIAKIM AGADIZE LWANGU

BETWEEN

JOEL LWANGU MISOGA ..... PETITIONER

AND

MARY JAHENDA LWANGU ..... 1ST OBJECTOR

OSCAR KEGODE LWANGU ..... 2ND OBJECTOR

ALLAN EGADIZE LWANGU ..... 3RD OBJECTOR

RULING

1. The applicant approached this court vide an application dated 12th March 2024 seeking the following orders;

    i. That the Hon. Justice R. Nyakundi be pleased to recuse or disqualify himself from further conduct of this matter.

    ii. That Hon. Court he pleased to remove and transfer the suit front High Court at Eldoret to the High Court at Kapsabet for hearing and final determination.

    iii. That upon granting Prayers No.1 & 2 hereinabove, dais Hon. Court be pleased to order that-

    iv. That the matter herein starts de-novo.

    v. That this Court be pleased to grant the Applicant Leave to file their further list of witnesses and witness, statements

    vi. That the costs of this application be in the determination.

2. The application is premised on the grounds set out therein and the contents of the affidavit in support of the application sworn by the 2nd applicant

3. The applicant contends that the suit property Nandi/Koibarak'B'/496 which is the subject of the proceedings is located in Nandi County and therefore this Honourable Court doesn't have geographical jurisdiction to handle this matter. He urged that the matter should be transferred to Kapsabet High Court. The applicant deponed that the suit property was jointly owned by the deceased and his wife Esther Musimbi and it is therefore not subject of this, succession cause as it automatically passed on to the deceased's wife Esther Musimbi upon his death. The same was raised as an objection by the Objectors.

4. The Objectors were surprised, to receive Summons from their Area Chief in Kemeloi Location Eldai Sub-County, Nandi County. They were informed that they were required in Court and dutifully appeared on the date indicated on the summons. Unknown to them their Advocate on Record had absconded yet they expected counsel to take directions on the hearing of their matter. Further, in the absence of their Advocate they reasonably expected to be afforded time to secure new representation from a different firm of advocates or at least find out what exactly had happened, to their advocate since he was no show. The Hon. Justice; R. Nyakundi declined to afford the Objectors a chance to seek alternative counsel and he interrogated them in the absence of their Advocate which was in violation of their right under Article 50 of *the Constitution* of Kenya 2010. Mr. Odhiambo for the Petitioner then cross-examined the Objectors. The very act of the Hon. Judge conducting Examination-in-Chief well knowing that the Objectors were all along represented and deserved a chance to, hire proper legal counsel was greatly prejudicial to them and watered down the purpose of the entire Objection as filed. When the matter came up for hearing on 30th January 2024 the Court was sitting in Lodwar. Directions were issued that the matter was to be taken out of the Eldoret Cause list and new dates, were to be issued. New Counsel on Record for the Objector had technical, challenges at the time they were waiting for their rime to address court. Simultaneous to this, Mr. Orlando for the. Objectors was equally addressing another court. A Hearing date was taken ex-parte for 15th February 2024. The applicant stated that the date taken in the absence of the Objectors' Advocate wasn't convenient to the objector's advocates. They subsequently addressed Court on the issue and the judge instructed them to reach out to opposing counsel and agree on a date that was convenient for the both of parties-. Whereas the Petitioners' Counsel was sought (i.e. via call, texts and email), informed and fully aware on the inconvenience the date possess to the Objectors; he refused to co-operate in assisting gel a mutually acceptable date.

5. On 15th February. 2024 the Hon. Judge proceeded with the Hearing of this matter and he did not take quorum of the Advocates in the matter;. The matter was merely called out and despite Ms. D. Rotich addressing court she was ignored by the Court which immediately proceeded to yet again examine an unknown and/or unidentified witness in open court (i.e. yet the hearing was all along virtual). No directions for an open court session bad been taken. The series of overlooking and/or ignoring the Objectors concerns and presence in court demonstrate bias and ill will. There is a perception of biasness as the Hon. Judge proceeded to personally interrogate witnesses Le, the Land Registrar who was there physically in Court yet the Objectors advocate was on the Virtual session. This repeat act has made the Objectors lose faith in the Hon. Justice R, Nyakundi being a neutral and; impartial-arbiter. Further, there is a perception of biasness as the Honourable judge after interrogating the witnesses asked the Advocate for the Opposing Counsel if he wanted to cross -examine the Witness .The Opposing Counsel said that he had no questions for the witness:, that, his submissions were ready and that he prays for a Judgment date. This was suspicious as the witness had just been interrogated. The Learned

Judge and opposing counsel seem: in the eyes of any reasonable by stander to speak a unique, and coded 'language' only known to them.

6. The applicant stated that the Objectors Advocate had to take over from Ms. D. Rotich who was holding brief He had to persist in haying to get the attention of the Court. The Hon. Judge only responded after a persistent quest for the Court's attention and merely brushed off the concerns raised, on how the said witness had been handled. There is: no telling what that particular witness said since he could not be heard. The Hon. Judge circumvented, the issues raised' and directed that parties appear before him on Wednesday 13th March 2024 for Status Conference. This is not the proper structure of conducting a hearing as Status Conference should ideally be done before the Hearing starts proper and not after the witness has testified ex parte and only after the Objectors' counsel, raised major' concerns

7. Additionally, the applicant stated that on account of the above reasons the Objector Applicant believes that there was reasonable apprehension that justice will not be dispensed in the matter. It is in, the best interest of justice that Hon. Justice R. Nyakundi do recuse himself in this matter so that parties do obtain fair and an impartial hearing in this matter. It would also be in the interest of justice to grant the Objectors Applicants leave to file a further list of witnesses and witness Statements. The Witnesses to he introduced would be the brother of the deceased who would be able to speak to the history of the suit properties and the Vendor who actually sold the land to the Objectors' mother.

8. The applicant stated that since the other witnesses have not been properly handled it is in the interest of justice that the whole matter begins de novo before a neutral and impartial Judge who is not tainted with the perception of bias.

9. The Respondents opposed the application vide a Replying affidavit sworn by John Misoga Lwangu. He acknowledged that at the time of the suit the property was in Nandi County however, at the time the matter was filed there was no High Court in Kapsabet. He stated that it is too late to transfer the matter without unnecessary delay.. He maintained that the property was never jointly owned by the deceased and his 3rd wife, Esther Musembi since the deceased intended to settle all his children on the land.

10. The respondent laid out the chronology of events in the mater including several court attendances and mentions where the objector failed to attend court on 30th January 2024, 15th February 2024. The deponent maintained that the application was in bad faith and should not be allowed as it will prejudice the respondent.

Analysis and Determination

11. Upon considering the application, the following issues arise for determination;

    a. Whether this court has jurisdiction to entertain this cause

    b. Whether the court can transfer the suit

    c. Whether the judge should recuse himself

Whether this court has jurisdiction to entertain this cause

12. It is worth noting that jurisdiction is everything, without which the court downs its tools. This position was pronounced in the locus classicus case of; Owners of The Motor Vessel "Lillian S" Vs. Caltex Oil (Kenya) Ltd [1989] Klr 1 where the court held that: -

> " Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs it tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

13. Jurisdiction of a Probate court is provided for Under Rule 7 of the Probate and Administration rules which provides as follows;

> (3) The petition may be filed in the principal registry or a High Court district registry or, in the case of a deceased the gross value of whose estate does not exceed one hundred thousand shillings, in a resident magistrate's registry or, in the case of an application to the Resident Magistrate's Court under section 49 of the Act, in a resident magistrate's registry within the area of that court in which the deceased had his last known place of residence; and upon its being so filed and until it has been considered and determined, the court may, upon request and payment of the prescribed fee, afford inspection of the will or copy will to any person having an interest in the estate; and any such inspection shall take place during office hours in the registry in the presence of an officer of the registry.

14. In *Gesura & another v Ondara (Miscellaneous Succession Application 1 of 2023)* [2023] KEHC 25800 (KLR) (30 November 2023) the court, faced with a similar predicament, held as follows;

> " A holistic reading of Sections 48 and 49 of the *Law of Succession Act* lead to the inevitable conclusion that the place of instituting a succession matter is a deceased's the last known place residence. The exception to the foregoing general position is, where there is proof that the greater part of the deceased's estate is situated within the area of that other magistrate or that there is other good reason for the transfer."

15. From the record of the court, the estate of the deceased comprises of the land parcel known as Nandi/ Koibarak'B'/No. 496 which is situate in Nandi County. It is also apparent that the said property was registered in the name of the deceased and the 1st objector. I note that the objectors have raised this issue 21 years after the petition for grant was filed which is quite a long period to suddenly realize that the cause was instituted in the wrong court. That notwithstanding, this court takes cognizance of the fact that the estate is in Nandi County and therefore it is within the precincts of Kapsabet High Court and not Eldoret High Court. However, at the time of instituting the cause, there was no High Court at Kapsabet and therefore, the correct forum was Eldoret High Court. It follows that at the time of filing this court had jurisdiction to entertain the cause.

Whether the court can transfer the suit

16. The next bone of contention is whether the court can transfer the suit to the correct court. In the case of Wamathu Gichoya v Mary Wainoi Magu [2015] eKLR the Court held that:-

> " Furthermore, according to Kagenyi v Musiramo and Another, supra, the power to transfer a case to the High Court for hearing may only be exercised if the court before which it is

filed is a court vested with competent jurisdiction to try and dispose of the matter. In other words, if the suit filed is incompetent, the High Court lacks jurisdiction to effect a transfer."

17. Whereas at the time of filing this cause, there was no High Court in Kapsabet and therefore this court had the competent jurisdiction to try the matter. However, as there is now a court at Kapsabet, this court has the jurisdiction to transfer this cause to the High Court at Kapsabet. It is my considered view that this court can transfer the suit as prayed. However, the court must ensure that any decision it makes is in the interest of justice. Given the years the matter has been before this court, to transfer the suit to start de novo would be an affront to justice and cause an unnecessary delay. Further, in the LMT meetings in the curt, an administrative decision was made to have all pending matters that are at an advanced stage proceed to their logical conclusion despite the presence of a new High Court at Kapsabet.

18. In the premises, I find that transferring the matter would not be in the interest of justice and I therefore decline to grant the order to transfer the suit.

Whether the learned judge should recuse himself

19. In Philip K. Tunoi & another v Judicial Service Commission & Another CA Civil Application NAI No. 6 of 2016 [2016] eKLR the Court of Appeal adopted the test for recusal propounded by the House of Lords in Porter v Magill [2002] 1 All ER 465, where it stated that,

> " The question is whether the fair minded and informed observer, having considered the facts, would conclude that was a real possibility that the tribunal was biased." The same position was taken by the Supreme Court (per Ibrahim J.)

20. In Jasbir Rai and 3 Others v Tarlochan Singh Rai and 4 Others SCK Petition No. 4 of 2012 [2013] eKLR where he observed that,

> " The Court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable."

21. The applicants' prayer for recusal is premised on the allegations that the judge refused to afford the objectors a chance to seek alternative counsel. Further, that they were interrogated by the Judge in the absence of their advocate and they reasonably expected to be afforded more time to secure new counsel. Further, that the court proceeded to hear the matter without taking quorum of the advocates during the virtual hearing and examined an unknown witness. The applicant stated that the series of overlooking the objectors concerns and presence in court demonstrate bias and ill will. He maintained that the courts 'interrogation' of the witnesses was suspicious and further, that the court circumvented the issues raised by the parties. Counsel questioned the structure of conducting the hearing by the court and as such, if he does not recuse himself, the parties will not obtain a fair and impartial hearing.

22. The jurisdiction of the court flows from Art. 50(1) and the prescriptive fair trial rights may it be in the realm of Civil or Criminal Administration of justice. The question for this court which has got to be answered in the affirmative for recusal to apply depends essentially on what actually was done or might have been done to render the administration of justice in disrepute, on the face or perception by the aggrieved party. The evidence therefore must demonstrate that something was done which creates a suspicion, that in the course of adjudication of the issues the session judge has acted improperly in a manner which interferes with the course of justice. The application for recusal is not essentially

a defence which a session judge must put up against the person aggrieved with the conduct, words, perception of the entire process. It is aimed at preserving the integrity of the court and the overall conceptual framework of the Fair administration of justice. The test is more apt in the words of the persuasive case in Helow v Secretary of state for the Home department and another (2008) 1 WLR 2146 where Lord Hope of Craighead gave clarity to the concept of the fair minded and informed observer in which he stated:

> " the fair-minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair-minded observer is a creature of fiction. Gender-neutral (as this is a case where the complainer and the person complained about are not women, I shall avoid using the word 'he'), she has attributed which many of us might struggle to attain to.

The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in Johnson v Johnson (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The 'real possibility' test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observers unless they can be justified objectively. But she is complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.

Then there is the attribute that the observer is 'informed'. It makes the point that before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."

23. In addition, the leading judgment in Webb versus The Queen (1994) HCA 30 remains relevant in the facts of this case:

> " ... to keep in mind that the appearance as well as the fact of impartiality is necessary to retain the confidence in the administration of justice. Both the parties to the case and the general public must be satisfied that justice has not only been done but it has been seen to be done. Of the various tests used to determined an allegation of bias, the reasonable apprehension test of bias is by far the most appropriate for protecting the appearance of impartiality."

24. There is no provision in law that restricts the court from enquiring information from the witnesses in court. As this is a succession cause, the court is at liberty to seek clarification from the witnesses and even counsel in court. The applicant has grossly misinterpreted the provisions of article 50 of *the Constitution*. The purpose of the court enquiring was in the interest of justice. The material circumstances of this case are that the whole viewpoint of the case had been presented by the witnesses and it was not the court to take the solemn opportunity to pronounce itself correctly on the matter. It was at that moment without the applicant applying for leave of the court to arrest the judgment elected to file a recusal application which I have the duty to address whether there has been any infringement

on the right to a fair hearing as donated by Art. 50 of *the Constitution* to the administration of Civil Law or on the other hand the national values and principles of governance under Art. 10 of the same Constitution have been violated as against the applicant. Unfortunately, I find no evidence on this aspect of the matter of any likelihood bias or perception that in administering justice to all persons alike in the shoes of the applicant, the law has been applied with affection, ill-will, favour, impacting negatively on the integrity of the process. That in the minds of the applicant, this court is no longer capable of pronouncing itself on the matter within the tenets of *the Constitution* and statute law.

25. I have considered the grounds for recusal and it is my considered view that a reasonable man on the Clapham omnibus would not interpret the actions of the court as indicative of bias. The applicant has laid out the allegations in his grounds but has not provided any additional evidence.

26. Additionally, it is clear that the applicant has failed to attend court severally in an attempt to delay the conclusion of this cause. The matter has advanced and is almost at conclusion with the parties filing their submissions on distributions. The present application is an attempt to delay the process and is an abuse of the court. In the premises, I dismiss the application in its entirety.

27. It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 11TH DAY OF OCTOBER, 2024

.....

R. NYAKUNDI

JUDGE