REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CAUSE NO. 63 OF 2016

IN THE MATTER OF THE ESTATE OF GICHUIYA KAHORA alias JAMES KAHORA WAINAINA alias WAINAINA KAHORA (*DECEASED*)

JEREMIAH MWAURA...1ST APPLICANT

KAHORA WAINAINA ....2ND APPLICANT

JOSEPH NJIHIA MWANIKI..3RD APPLICANT

VERSUS

JEREMIAH MWAURA GICHUIYA..1ST RESPONDENT

MICHAEL MNDIRANGU WAINAINA...................................2ND RESPONDENT

RULING

1. The deceased herein, **Gichuiya Kahora** alias **James Wainaina Kahora** alias **Wainaina Kahora**, died intestate on 1st December 1991. In 1996, his sons, **Jeremiah Mwaura Gichuiya** and **Samuel Ndung'u Wainaina** filed Succession Cause No. 40 of 1996 in the SPM's Court, Thika. After the usual preliminaries, a grant was issued to Jeremiah Mwaura Gichuiya and Samuel Ndung'u Wainaina on 13/03/2001 and after the hearing of objections, it was on 20/02/2004 confirmed to Samuel Ndungu Wainaina and Jeremiah Mwaura Gichuiya, the latter who passed away in 2006 but an application for his substitution with Joseph Kahora Wainaina was never heard.

2. The original record of the Lower Court which is before me appears to be in disarray as the filing of the record is haphazard. Be that as it may, it is apparent on perusal thereof that in 2009, a different son, **Michael Ndirangu Wainaina** had surreptitiously and irregularly obtained a grant in his name and had it confirmed on 16th September,2009. By a ruling delivered on 10/03/2010 the court set aside the latter grant. The matter did not end there, as the said Michael Ndirangu Wainaina continued to hold himself out as an administrator of the estate.

3. In a ruling delivered on 13/07/2011 regarding an application dated 26/04/2011 and seeking to cite the said beneficiary for contempt of court, the court stated that:

> **"The Respondent (Michael Ndirangu Wainaina) on his part appears to have been unhappy with the mode of distribution of the estate approved by the court. His argument is that the estate was not distributed equitably …. It is however clear that the respondent, Michael Ndirangu Wainaina has never been an administrator in the estate. He therefore has no mandate to purport to preside over the distribution of the estate. As stated earlier, the Respondent appears to have been dissatisfied with the court's decision on distribution. The right and proper manner to proceed would be to ask for revocation of the confirmed grant in the High Court. The Respondent has opted to take shortcuts and has created a lot of confusion perhaps out of misinformation... On the other hand, it is utterly absurd that the distribution in this case has not been finalized to date. The confirmed grant was obtained in 2004 and the administrators have failed to pursue their duties. This has only but further created disharmony among the beneficiaries, and some have died in the process."**

4. The court then proceeded to consider and dismiss the application for contempt but restrained the Respondent from further intermeddling with the estate. The court directed the administrators to finalize the distribution of the estate within a *"reasonable time"* and advised any party aggrieved by the mode of distribution to appeal to the High Court. Thereafter, there was an application, allowed by consent, regarding the execution of necessary forms to facilitate the transmission of the estate by the surviving sole administrator. The consent, adopted by the court on the 1st February, 2012 marked the final proceeding before the lower court.

5. There followed a hiatus of 3 years. On 31st December, 2015, a summons for revocation of grant was filed in this Court by Jeremiah Mwaura, Kahora Wainaina, and Joseph Njihia Mwaniki, described as the 1st to 3rd Objector/Applicants against Jeremiah Mwaura Gichuiya

(deceased in 2006) and Michael Ndirangu Wainaina (who was never an administrator in the estate as per the ruling of the lower court of 13th July, 2011) both who were named as Respondents. The application sought the revocation of the grant issued by the lower court in Succession Cause no. 40 of 1996. On grounds that the Respondents had fraudulently obtained the grant by concealing of material facts including the full list of the beneficiaries of the deceased and forgery of beneficiaries' signatures.

6. The same was supported by the affidavit of Jeremiah Mwaura, stated to be a son of the deceased. Therein he claimed inter alia that the delay in making the application was out of ignorance and that he had no knowledge of the institution of the succession cause until he received a report from his nephew **Joseph Njihia Mwaniki** the 3rd Applicant that he was on the verge of eviction from land parcel no. **Loc.16/MWAGU/676** hence conducting a search which revealed a transmission of the parcel to **Michael Ndirangu Wainaina** (2nd respondent). There followed several mentions in the matter. On 9/03/2017, the court granted the Applicants leave to amend the summons as sought and set the hearing for 15/06/2017.

7. Four months later, on 6/07/2017 an amended summons for revocation was filed. The title thereof is expressed to be "AMENDED SUMMONS FOR COFIRMATION OF GRANT" (sic). However, the substance of the summons is similar to the first one except that the deceased Jeremiah Mwaura Gichuiya was removed as 1st Respondent and replaced by Samuel Ndungu Wainaina while retaining Michael Ndirangu Wainaina as the 2nd respondent. During the mention on 18/05/2017, directions were given for the filing of witness statements. The parties having earlier indicated to proceed by way of viva voce evidence.

8. Come the hearing date on 15th June, 2017, the Applicants sought adjournment on the basis, evidently incorrect, that an unnamed party held a second grant to the estate. This matter was not adverted to in the subsequent mention on 5/10/2017. The next mention was on 25/01/2018, and as the court was not sitting, a further mention was set for 19/04/2018 when counsel for the Respondent fixed the matter for mention on 26/07/2018, exparte. On the 26/07/2018 it was stated that more affidavits needed to be filed. The court gave directions in that regard and set down the matter for hearing on 28/11/2018. The Applicants were directed to serve the day's directions and date on **Samuel Ndung'u Wainaina** , the new 1st Respondent in the amended summons.

9. There is no evidence on record of compliance with the instructions directed to the Applicants to serve the 1st Respondent and on the 28th November, 2018, the scheduled hearing date, the Applicants and the 1st Respondent were absent. Only the 2nd Respondent was represented. The court therefore dismissed the amended summons. This order provoked the "*notice of motion*" as the application is entituled, filed on 6/12/2018 and purported to be brought under Order 12 Rule 7 of the Civil Procedure Rules inter alia and which is the subject of this ruling. Seeking that the dismissal orders be set aside, and the *"summons dated 23rd November, 2015"* be reinstated.

10. This summons was filed by the Applicant's new advocates vide notice of change of advocates filed on 6/12/2018, Messrs **Kimiti and Associates**. The said application is based on grounds inter alia that the Applicants' advocate failed to attend court on 28th November, 2018, as he had promised; that the court clerk informed the Applicants that their summons had been dismissed; that the error of their advocate ought not to be visited upon them as innocent litigants who have been keen to prosecute the summons "*dated 23rd November, 2015"*. These grounds are further expanded in the supporting affidavit sworn by Joseph Mwaniki Njihia (the 3rd Applicant) even though he erroneously states that the hearing date of the dismissed summons was 23rd November, 2018 .

11. While the application was pending hearing the Applicants' new advocates filed on 28/03/2019 a consent dated 3rd December, 2018 allowing the firm of **Kimiti & Associates** to come on record for the Applicants in place of the firm of **Ishmael & Co. Advocates**. The consent was executed by the said firms of advocates.

12. The 1st Respondent though served with the application for reinstatement and hearing date did not participate in the application. On his part, the 2nd Respondent filed a notice of preliminary objection to the effect that:

a. The application is incompetent and fatally defective having been filed by an advocate not on record;

b. The application is based on inapplicable provisions of the law; and

c. The application violates Rules 63 and 49 of the Probate and Administration Rules and is an abuse of the process of the court.

13. By his replying affidavit, the 2nd Respondent asserts that he attended court on the hearing date but disputed the assertions by the Applicants that they attended the court on the 28th November, 2018. He and his advocate, by a further affidavit state that the instant application was only served upon them on 3rd April, 2019. The advocates asserts that later on 5th July, 2019, they were served with the consent to come on record and notice of change of advocate dated 4th and 3rd December, 2018, respectively.

14. On the hearing date of the instant application, parties agreed to canvass both the application and Preliminary Objection by way of written submissions. The court had earlier directed that the preliminary objection and the application be argued together. These directions notwithstanding, the Applicants' submissions are confined to the preliminary objection even though the introduction therein had referred to both.

15. The 2nd Respondent's submissions however deal with both. In urging his first ground of the preliminary objection the 2nd Respondent citing Order 9 Rule 9 of the Civil Procedure Rules pointed out that the Applicants' advocate failed to comply therewith at the time of filing the application. And that the subsequent consent to come on record filed on 28th March, 2019 was not adopted by the court as an order and therefore the application filed 3 months earlier was irregularly filed. The 2nd Respondent asserts that the requirements of Order 9 Rule 9 Civil Procedure Rules are not mere technicalities, but that they go to the root of representation. The Respondent relied on the cases of **S.K.**

Tarwadi v Veronica Muehlemann [2019] eKLR and **In the matter of the Estate of Kiiru Wanjohi Nairobi Succession Cause No. 3032 and 2445 of 2001.**

16. The 2nd Respondent views the consent dated 3rd December, 2018 but filed on 28th March, 2019 as backdated to smooth over the question of representation. On the second ground, the 2nd Respondent asserted that the provisions of law invoked in the application, namely Order 12 Rule 7 and Order 51 of the Civil Procedure Rules do not apply to succession proceedings by dint of the provisions of Rule 63 of the Probate and Administration Rules.

17. Moreover, concerning the third ground of the preliminary objection, the Respondent argued that the application is incompetent as it is purported to be a *notice of motion* whereas Rule 49 of the Probate and Administration Rules provides for the filing of summons relating to applications for which no provision exists in the said Rules. It is the 2nd Respondent's further submission that Article 159(2)(d) of the Constitution cannot offer succour to the Applicants who had demonstrated indolence in prosecuting an application filed in 2015. Finally, on the last ground, the 2nd Respondent takes issue with the prayer for reinstatement which refers not to the amended summons dated 15th June, 2017 but rather to the initial summons dated 23rd December, 2015 which had been replaced by amended summons.

18. Relying on the case of **Abok James Odera t/a A. J. Odera & Associates v. Patrick Machira & Co. Advocates, Civil Appeal No. 161 of 1999** as cited in **Ndathi Mwangi & 3 others v. Benson Lumumba Ndivo [2017] eKLR,** the 2nd Respondent stated that the Applicants could not find refuge in the overriding objective principle. The court was urged to find the Applicant's so-called motion incompetent.

19. On the merits, the 2nd Respondent contended that the application is based on a falsehood, namely, that the Applicants did attend the court on the hearing date but were failed by their advocate who did not attend. The 2nd Respondent highlights the alleged discrepancies on this point as reflected in ground C on the face of the motion and paragraph 6 & 9 of the supporting affidavit and asserts that the Applicants could not have been in court when the matter was called out, and that besides, they had not controverted the deposition by the 2nd Respondent that he never saw them in court on that date. Counsel argued that the Applicants themselves having failed to attend the court session on 28th November, 2018 to give evidence cannot be heard to plead that the fault lay with their advocates and that therefore they should not be penalized.

20. Pointing to the age of the dispute, the 2nd Respondent urged the court not to allow the Applicants to litigate in perpetuity and to bring the litigation to an end by dismissing their application.

21. The Applicants for their part defended the notice of change of advocate and consent filed as being adequate compliance with Order 9 Rule 9 of the Civil Procedure Rules but also invoked the provisions of Order 9 Rule 7 of the Civil Procedure Rules to their aid, citing the decision in **K-Rep Bank Ltd v. Segment Distributors Ltd [2017] eKLR** . Concerning service of the instant application, they referred to the process server's affidavit filed on 20th March, 2019 indicating service upon the 2nd Respondent on 19th February, 2019.

22. I am unable to follow the Applicants' argument concerning Rule 49 of the Probate and Administration Rules, as it seems to suggest that the Rule provides for applications related to *locus standi* which the Applicants herein possessed by virtue of the application filed on 23rd December, 2015. Regarding the provisions of Rule 63 of the Probate and Administration Rules, the Applicants again submitted that they had complied with the "*specific civil procedure rules more so order by ensuring effective service of process*".

23. Finally, the Applicants submitted that:

> **"In light of the foregoing, the objectors/Applicants therefore submit that they should be given the opportunity to present their case against the Respondents and that it would be prejudicial to dismiss the objector's case. We therefore pray that the objectors' applications dated 5th December, 2018 be heard on a priority basis." sic.**

24. The court having considered the material canvassed in respect of the application filed on 6th December, 2018, the preliminary objection, and having taken time to peruse the original record in Thika SPM's Succession Cause No. 40 of 1996, takes the following view of the matter.

25. First, proceedings in succession causes are governed by the Law of Succession Act and the Probate and Administration Rules made thereunder. Rule 63 of the Probate and Administration Rules provides as follows: -

> **"1. Save as in the Act or in these Rules otherwise provided and subject to any order of the court or a Registrar in any particular case for reasons to be recorded, the following provision of the Civil Procedure Rules, namely Order 5 Rule 2 to 34 and orders 11, 16, 19, 26, 40, 45 and 5o together with the High Court (Practice and Procedure) Rules shall apply so far as relevant to proceedings under these Rules…**

2………"

26. From the forgoing, it is clear that the above Rule does not apply either Orders 9, 12 and 51 to succession proceedings. The Applicants have evidently no satisfactory answer or justification for invoking Order 12 and 51 of the Civil Procedure Rule in their so-called notice of motion. The Law of Succession Act and Rules made thereunder do not envisage the filing of notices of motion in succession matters. Rule 59 of the Probate and Administration Rules makes that clear. Sub-rule 1 provides that save where otherwise provided in the Rules, every application to the court **"shall be brought in the form of a petition, caveat or summons, as may be appropriate."**

27. Admittedly, there is no provision in the Rules for the making of an application for the reinstatement of a summons dismissed for non-attendances. However, Rule 49 provides for such situations, by stating that:

"A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary, by affidavit."

28. Rather than admit the erroneous invocation of the Civil Procedure Rules in their so-called motion, the Applicants sought to canvass the untenable position that Rule 49 relates to applications by parties who otherwise have no *locus standi*, to participate in succession proceedings and that the Applicants herein already "*had the required locus standi*" to participate in these proceedings. The provisions of Rule 49 are patently clear, and it is therefore difficult to follow the Applicant's line of argument. That said, the erroneous invocation of a legal provision, as offensive as it might be would not automatically defeat an otherwise merited application or render it incompetent. In this case, it is a matter of form, rather than substance. That is not to say that parties can cast aside the rules of procedure requiring that applications take certain forms. In some instances, deviation from the prescribed forms may be fatal for the offending application.

29. Concerning compliance with Order 9 Rule 9 of the Civil Procedure Rules by the Applicants, it is evident that the rule and indeed the entire Order 9 of the Civil Procedure Rules does not apply to succession proceedings save where applied by the court for a stated reason or reasons. However, in the instant case, a further reason for non-application of Order 9 Rule 9 Civil Procedure Rules is that no judgment as such was passed by the court at the time of dismissal of the summons for revocation. The subject order was a dismissal order. A judgment proper concerning the estate had been delivered in 2004 in the lower court.

30. It appears however that there is a lacuna in the Probate and Administration Rules as far as the regulation representation of parties by counsel in succession causes is concerned. The Law of Succession Act and the Rules however anticipate, and it is a fact that parties in succession causes are often represented by counsel of their choice. Thus, for purposes of notices to the court and parties concerning such representation, it is necessary to prescribe the requisite process of appointment and change advocates.

31. In the circumstances, the court can apply Order 9 Rule 5 of the Civil Procedure Rules to the instant case rather than Order 9 Rule 9 of the Civil Procedure Rules. Order 9 Rule 7 of the Civil Procedure Rules which the Applicants urge cannot apply as it envisages notice by a party appointing an advocate not of change of advocate, elsewhere provided for in the Rules. Therefore, in my considered view, it was sufficient for the purposes of this case, that a notice of change of advocate had been filed alongside the dismissed application.

32. The foregoing disposes of the first, second and third ground urged by the Respondents in support of the preliminary objection in their submissions. The final technical objection relates to the key prayer in the application. The key prayers in the application are prayers 3 and 4 which are to the effect that:

"3. THAT upon hearing this application inter-partes, this Honorable Court be and is hereby pleased to review, set aside, vary and/or discharge the ruling on record dated 28th November 2018 and all the consequential orders flowing therefrom.

4. THAT the Honourable court be and is hereby pleased to set aside the orders issued on 28th November 2018 and reinstate the Objectors/Applicants' summons for revocation of grant dated 23rd December, 2015 which was dismissed for non-attendance on 28th November, 2018." (sic.Emphasis added**)**

33. First, there is no ruling on record dated 28th November, 2018, in the same way there was no judgment passed as had been asserted by the 2nd Respondent. What there is an order dismissing the Applicant's summons. Secondly, the said order expressly refers to the dismissed application to be the amended summons filed on 6/07/2017 and dated 15th June, 2017. The summons for revocation dated 23rd December, 2015 lapsed as soon as the amended summons was filed. It does not exist and cannot be reinstated as sought by the Applicants. This blunder is not isolated but serves as demonstration of the slovenly manner in which applications herein were drafted. And I dare say this slovenliness and tardiness characterize the Applicants' conduct of these proceedings.

34. The initial summons for revocation was filed in December, 2015, naming Jeremiah Mwaura Gichuiya alongside Michael Ndirangu Wainaina as Respondents. From the record of the Lower Court, the said Jeremiah Mwaura Gichuiya had died 11 years before, in 2006. This fact should have been known to the Applicants who are related to the said deceased. Besides, this fact could have been established from a perusal of the original record of the Lower Court. It took the Applicants another two years since filing the original summons for revocation to apply to amend the summons on grounds inter alia that it had come to light, since filing the summons, that the said Jeremiah Mwaura Gichuiya was deceased. Indeed, the only amendments contained in the amended summons filed on 6th July, 20917 was the substitution of the said deceased person with Samuel Ndungu Wainaina as the 1st respondent.

35. Concerning the instant application, it appears that the Applicants never noticed the erroneous references in prayer 4 of their summons as it is not addressed in the submissions. One is tempted to agree with the 2nd Respondent's submissions on this score that the Applicants did not bother to peruse the court file before making the instant application. The third technical objection by the 2nd Respondent is not without merit; prayer 4 of the application refers to a lapsed summons.

36. Moreover, on the merits of the instant application, the supporting affidavit by the 3rd Applicant to the instant motion emphasizes the failure by their erstwhile advocates to attend the court on the day the dismissal order was made. However, at paragraph 6 and 9 the deponent asserts that on *23rd November, 2018* the Applicants attended court for the hearing of their application dated 23rd December, 2015. Further that they were "*shocked to find out that the said application had been dismissed for non-attendance… despite reassurances from the advocates on record that an advocate by the name Mr. Tumu, would be in attendance on behalf of the firm"* (sic)

37. The 2nd Respondent categorically swears in his response that the Applicants were not in court on 28th November, 2018. Going by the depositions of the Applicants, and the record of proceedings on 28th November, 2018, only two possibilities exist. Either the Applicants attended court on the wrong hearing date stated in their affidavit to be 23rd November 2018 or they were not in court on 28th November 2018 when their matter was called out hence the need to *"find out"* the orders made from the court clerk, which necessarily implies they came to

court after the court had dealt with their matter.

38. It is doubtful that the Applicants were in court on 28th November 2018 when the matter was called out. Even in the absence of their counsel, nothing could have stopped them from bringing their presence to the attention of the court upon their matter being called out. Certainly, the record indicates that neither the advocate nor the Applicants were in attendance to lead evidence as earlier directed by the court. But again, rather than admit their default, the Applicants have opted to assert what is a patent falsehood so as to transfer the blame upon their erstwhile advocate. The record of proceedings shows that since the amended summons was filed, Mr. Tumu had not personally attended the proceedings and was represented by a Mr. Njuguna.

39. The Applicants have not acted with diligence, even in the past. Despite being granted leave to amend on 9/03/2017, no amendment was made until 6/07/2017. Meanwhile the matter had been scheduled since 9/03/2017 to be heard on 15/06/2017. On that date, counsel held brief for Mr. Tumu told the court that:

> "*We request for a mention date (read adjournment). We have learned that another party has a grant to the estate*".

40. By the said date, no amendment had been done but instead the court was misled with a statement, obviously inaccurate, concerning the "*discovery*" of a second grant in the name of another party. This issue was never revisited and on the basis of subsequent proceedings, could only have been raised to buy time to file the amended summons. Even after the amendment and order of the court on 26/07/2018 that the newly substituted respondent**, Samuel Ndungu Wainaina** to be served with the summons, this was never done. There is no affidavit evidencing service of the amended summons or hearing notice in respect of 28th November 2018 upon the said respondent. Thus, it is farcical for the Applicants to assert their alleged readiness and willingness to prosecute the dismissed summons.

41. They only woke up after the dismissal and rushed to serve **Samuel Ndungu Wainaina** with the instant application. The jurisdiction of this court in dealing with an application of this nature is found in Section 47 of the Law of Succession Act as read with Rule 49 of the Rules made thereunder. What the Applicants are invoking is the exercise of the discretionary power of the court to set aside a dismissal order. It behooves such parties to give solid grounds or reasons to persuade the Court to exercise its discretion in their favour. See **Simon Thuo Mwangi v Unga Feeds Ltd Civil Appeal No. 181 of 2003 [2015] eKLR.**

42. The key consideration was laid out in **Kimani v Mc Connell [1966] EA 547 p 555** to be that:

> **"----in light of all facts and circumstances both prior and subsequent and of all the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms imposed."**

See also **Patel V. E. A Cargo Handling Services Ltd. [1974] EA p75** where the court stated that the discretion is:

> **"…is intended to be so exercised to avoid injustice or hardship from accident, in advertence, or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to delay the course of justice".**

43. The Applicants herein filed the first summons for revocation in 2015 and for 3 years never prosecuted it. The deceased in this case died in 1991. The acrimonious Succession Cause No. 40 of 1996 dragged on in the court until 2011, a period of 15 years. Altogether therefore as of 2018, this dispute had been pending for 22 years, yet the Applicants' conduct appears to be casual and slothful. They cannot heap all the blame on their advocate when they took no steps in the period during which no progress was made in prosecuting their application and their failure to attend the court on the hearing date. As shown, the proceedings before this court since inception are characterized by blunders in drafting and inaccuracies arising from failure to peruse the record and general tardiness. Parties are free to appoint the advocates of their choice. It is their right. And while parties can exercise their choice the cases always belong to litigants not their advocates.

44. An eminent Judge said in **Philip Keipto Chemwolo & Anor v. Augustine Kubende [1982 -1988] KAR [1986] eKLR** that **"*blunders will continue to be made from time to time*.** However, when sequential blunders become the *modus operandi* in a matter, the offending party cannot be heard to plead that the sins of his advocates should not be visited upon him. Especially when he has not himself shown his own diligence in his matter.

45. For reasons I have already stated, it is my view that it would be a travesty of justice, given all the circumstances of this matter, to allow the ever-blundering Applicants herein to continue to subject the Respondents to the misadventure of endless litigation. At a time when courts are deluged by heavy workloads, it behooves litigants and their advocates to move with alacrity and to co-operate with the court in furthering the overriding objective in Section 1A of the Civil Procedure Act for the just, expeditious, proportionate, and affordable resolution of disputes. No party ought to be allowed to litigate at leisure, and in a tardy and slovenly fashion at the expense of the adverse party while wasting the court's time resources.

46. I think I have said enough to demonstrate that the application dated 5th December 2018 is without merit and is for dismissal. The application is hereby dismissed with costs to the 2nd Respondent.

Delivered and signed electronically on this 13TH Day of May 2021.

C.MEOLI

JUDGE

In the presence of;

For Applicants: Mr. Thiong'o h/b for Ms. Kimiti

For 2nd Respondent : Mr Kiarie Njuguna

C/A: Kevin Ndege.