



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
FAMILY DIVISION
SUCCESSION CAUSE NO. 158 OF 2005
IN THE MATTER OF THE ESTATE OF DICKSON KIHKA KIMANI (DECEASED)

ERISHIFA WANJIRU KIHKA.....APPLICANT

-VERSUS-

ALICE MUKUHI KIHKA.....1ST RESPONDENT

FLORENCE NDUTA.....2ND RESPONDENT

MARY WANGARI KIHKA.....3RD RESPONDENT

MIRIAMU WARAU KIHKA.....4TH RESPONDENT

RULING

BACKGROUND

1. This is a ruling on application dated **19th April 2021**, the application requires among other prayers that I disqualify myself from presiding over this matter. I directed that parties file written submissions in respect to this prayer before other prayers in the application are considered.
2. The current application was filed by the applicant following a ruling which I delivered on 11th February 2021 in which I dismissed her prayer to substitute **Margaret Wambui Kihika** as the 1st administrator and appointed her sister **Florence Nduta Kihika** to substitute the 1st administrator. In my ruling, I stated that this matter has been in court for a long time and found that **Florence Nduta** a resident of Kenya is the best person to promptly administer the estate.
3. The applicant averred that I ignored the fact that 2nd respondent was not eligible to be appointed as an administratrix; that I acted in excess of my jurisdiction, and I had no jurisdiction to grant a relief that has not been sought by a party.
4. In response **Florence Nduta Kihika** filed replying affidavit opposing the prayer for recusal and stated that the recusal should have been done when the matter was ongoing and not after conclusion; that the applicant has not proved bias, favor, ill- will prejudice, or influence on part of the trial judge.
5. Further that the applicant has not presented reasonable grounds where bias may be inferred and the applicant and his advocate are forum shopping by seeking recusal of the trial judge and that the application lack of merits.
6. The applicant filed a further affidavit sworn by **Tracy Wambui Kungu**. She averred that **she** is the niece of the applicant and the 1st administrator is her grandmother. She is in support of **Erishifa** being a substitute of the 1st administrator as she feels she would properly run the estate as opposed to **Florence**. She averred that she lives with the 1st administrator who is of old age and she takes care of her with the help of her aunt Erishifa who despite being in the USA, is in constant communication with them and she ensures that the needs of the 1st administrator **Margaret Wambui** are meet. Further that she properly organizes the proceeds of the lease in Njoro farm to ensure everything about **Margaret Wambui** is catered for and her view is that **Florence** together with her **son Brian** are self-centered and their only interested in the estate is for their own selfish needs. She further averred that they have misappropriated property belonging to the deceased and they

enjoy huge shares of the estate to the exclusion of other beneficiaries.

APPLICANT'S SUBMISSIONS

7. The applicant submitted that the actions of the judge are biased and she acted without jurisdiction on two issues: -

a. Justice Ndungu previously declined the 2nd respondent application to be appointed as an administrator and there was an appeal on the same.

b. The 2nd respondent had not made an application for substitution when the judge appointed her as a substitute and thus the Court lacked the jurisdiction to grant relief that hasn't been sought.

8. The applicant seeks to access justice on the virtue of being a member of the 1st house, and secondly as a beneficiary who is affected by the delay in the distribution of the estate.

9. The judge exhibited bias when she appointed the 2nd respondent as the administratrix of the estate yet her application had been refused by **Justice Ndungu** on 24th January 2019, the appeal was still pending and she had not made any other application in Court for substitution. And thus, the Court was *functus official*

10. The apprehension is the departure by the Court will be exhibited when the other prayers in the summons are heard and submitted that the test applied is that which a reasonable person would infer that it is unlikely the 1st house will have a fair hearing before Judge, and cited the case of **South African Defence Force and others vs Manning and others (1993) 3 SA 482 where** the decision was identical to **Shilenje v Republic (1980) KLR 134.**

11. The applicant submitted that the 2nd respondent has breached the fiduciary duties owed to the estate of the deceased as she has sold most of the property and having occupied the largest share of the estate is frustrating the distribution of the estate by enjoying the status quo and has ignored the Court Order requiring the sale of the Pagane plot so as to enable a valuation of the remaining estate of the deceased to ascertain the portion each family is to acquire. The applicant further submitted that the 1st house has the longest history in the family which the administratrix will need before distributing the estate.

12. The applicant submitted that a different Court ought to hear the matter as the 1st and 2nd respondent will pursue their own goals rather than administer the estate as required by the will.

RESPONDENT'S SUBMISSIONS

13. The respondent submitted that the application has failed to meet the threshold as provided in paragraph **5 (6) of the judicial code of conduct** and an objective onlooker would not have a reasonable apprehension of bias. Further that under **section 47 of the law of succession** this court is clothed with the jurisdiction to entertain the application and determine any dispute and make any orders as such.

14. The respondent submitted that the Court had given the parties enough time to agree on a suitable substitute but they failed to do so and the applicant has adduced new evidence before the Court which was not adduced at the hearing of the case; that the fresh evidence is misconceived and urged this Court to dismiss the application.

ANALYSIS AND DETERMINATION

15. The main issue for determine is whether the applicant has demonstrated reason for me to disqualify myself from presiding over this matter.

16. The principles governing recusal by judicial officer were laid down in the case of Jan **Bonde Nielson v Herman Philipus Steyn & 2 others HC Comm No. 332 of 2010 [2014] eKLR** where the Court stated as follows: -

“The appropriate test to be applied in determining an application for disqualification of a Judge from presiding over a suit was laid down by the Court of Appeal in R v David Makali and others C. A Criminal Application No. NAI 4 and 5 of 1995 (Unreported), and reinforced in subsequent cases. See R v Jackson Mwalulu & others C.A. Civil Application No. NAI 310 of 2004 (Unreported) where the Court of Appeal stated that: -

“...When courts are faced with such proceedings for disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established...”

9. **The Judicial Service (code of conduct and ethics) Regulations, 2020 Regulation 21 part 1** give circumstances under which a judge is to recuse himself or herself in any proceedings as hereunder: -

21. (1) A judge may recuse himself or herself in any proceedings in which his or her impartiality might reasonably be questioned where the judge—

- a. is a party to the proceedings;
- b. was, or is a material witness in the matter in controversy;
- c. has personal knowledge of disputed evidentiary facts concerning the proceedings;
- d. has actual bias or prejudice concerning a party;
- e. has a personal interest or is in a relationship with a person who has a personal interest in the outcome of the matter;
- f. had previously acted as a counsel for a party in the same matter;
- g. is precluded from hearing the matter on account of any other sufficient reason; or
- h. or a member of the judge's family has economic or other interest in the outcome of the matter in question.

17. From the averments herein the reason advanced for my recusal is the fact that I delivered a ruling dismissing the prayer by **Erishifa Wanjiru to be appointed to substitute 1st administrator Margaret Wambui Kihika** and appointed her sister **Florence Nduta Kihika** to substitute her. I indicated in my ruling that the applicant **Erishifa Wanjiru** is a resident in the USA and thus not in a position to efficiently administer the estate and in the alternative appointed her daughter who is a resident in Kenya to substitute the first administrator.

18. The applicant argued that I did not have jurisdiction to appoint **Florence Nduta Kihika** as administrator to substitute her mother the 1st administrator. In respect to jurisdiction of the **High Court, Section 47 of the Succession Act Cap 160 Laws of Kenya** provide as follows: -

“47. Jurisdiction of High Court

The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient: Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”

19. From the above provision, this Court has jurisdiction to determine any dispute and make such orders as may be expedient.

20. The applicant further argue that **Justice Ndungu** had found the applicant unsuitable to substitute the 1st administrator. I have perused the ruling delivered by **Justice Ndungu** on 24th January 2019 and note that under paragraph 7 of the ruling, he captured the 1st administrators' statement that **Florence Nduta** is unsuitable to administer the estate. The finding of the Court was that the applicants failed to prove that the administrators were unable to administer the estate. I note that the Court did not make a finding that **Florence Kihika** who wanted to substitute the 1st administrator was unsuitable. The allegations of unsuitability were captured from response by 1st administrator but the Court did not make a finding on it. From the foregoing, it is clear therefore that my ruling did not contradict findings by **Justice Ndungu**.

21. In my view the applicant being aggrieved by my orders, she should have filed an appeal rather than file the current application which has failed to demonstrate bias on my part. I remain true to my oath of office and will always be impartial while determining matters before me.

22. I see no reason to recuse myself from presiding over this matter and proceed to dismiss this application.

23. FINAL ORDERS

1. Prayer 1 and 2 in application dated 19th of April 2021 is hereby dismissed.

2. Costs to the respondents.

RULING DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 7TH DAY OF OCTOBER, 2021

.....

RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Dr. Kamau Kuria for Applicant

Mutonyi for 1st respondent

Mr. Charles Kimathi for 2nd respondent Florence Nduta Kihika

Ms. Cherono holding brief for Ndeda for beneficiary Peris Kihika Njoki