REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISC. CIVIL APPLICATION NO. 148 OF 2018

SAMUEL NYAGA KAMARU.....APPLICANT

VERSUS

1. JANET NYAGUTHI NJOROGE

2. CHARLES KAMAU KAMARU

3. HANNA WANJIKU KAMARU.....RESPONDENTS

R U L I N G

1. The succession cause which is the subject of the summons filed on 26th July 2018 **is Kikuyu Succession Cause No.216 of 2016**, **In the matter of the estate of Michael Njuguna Kamau (deceased).** The deceased was a brother to **Samuel Nyaga Kamaru**, the Applicant herein, and to **Charles Kamau Kamaru and Hannah Wanjiku Kamau,** being the 2nd and 3rd Respondents, among other siblings. The 1st Respondent is a wife to a deceased brother of the Applicant by the name **John Njoroge Kamaru.** The three Respondents successfully applied for a grant in respect of the estate of **Michael Njuguna Kamau**.

2. However, before the summons for confirmation of grant could be heard, the present Applicant and other siblings who include **David Njenga Kamaru, Jane Njoki Kamaru, Monica Wambui Kamaru** filed affidavits in protest claiming *inter alia* that the Petition for grant was filed surreptiously, without notice or their consent being obtained, and further that the Petitioners had concealed the existence of a widow to the deceased, one **Nancy Wakiuru Nyambura** and a minor daughter **GW** who allegedly survived the deceased. The said widow also filed an affidavit of protest.

3. Before directions were given on 22.3.18 to proceed by way of *via voce* evidence a hearing date had been set for 13.2.18 but the court adjourned the hearing directing the protestors to avail the alleged widow on 20.3.18 during a mention. The mention took place on 22.3.18. Counsel addressed the court and thereafter directions were given and further hearing set for 15.5.18. On 15.5.18, counsel again addressed the court. No hearing took place. At the end of the proceedings the court stated that the **"only issue to be decided here is whether Nancy Wakiuru Nyambura is the wife of the deceased according to Kikuyu customary law."** Clarifying further that, the issue would take priority as against the issue relating to the confirmation of the grant. The court also directed that parties file witness statements in readiness for the next hearing on 31st July 2018.

4. Subsequently, counsel for the Protestors filed the present application expressed to be brought *inter alia* under Order 52 Rule 1 Civil Procedure Rules, Section 3A of the Civil Procedure Act and Article 165(6) and 53(2) of the Constitution. The Applicant prayed that this court calls for and examines the records of the Succession Cause, stays further proceedings herein and causes the transfer of the cause to a different court. Some of the grounds go to the merit of the pending protest and have no place in this application. However grounds (b) and (d) allege lethargy and bias on the part of the court, and that the lower court had ignored the affidavits of protest and denied the protestors concerned, some of whom had travelled from the U.S.A, an opportunity to be heard on 13.2.18, thereby prejudicing them.

5. These grounds are repeated in the supporting affidavit of the Applicant which also reiterates the material contained in the various affidavits. The Respondents filed an affidavit in reply. They view the application as an attempt by the Applicant to defeat the impending scheduled hearing date of 31st July 2018. They complain that the application was not served on their counsel by the Applicant's counsel. Denying the allegations of bias, the Respondents confirm that there had been over 10 mentions in the suit. Despite directions given by this court on 29.11.18 for the disposal of the application through written submissions, only the Applicant filed written submissions. The submissions merely repeat the matters contained in the affidavits of protests and the affidavit supporting the instant motion.

6. I have considered the material canvassed before me. It is important to state from the outset that this court is not concerned at this stage with the merits of the protests before the lower court. In a proper case, especially where the rights of a child are involved or threatened, this court may allow itself in the interests of justice to be moved under its supervisory jurisdiction under Article 165 (6) of the Constitution. More so where there are serious lapses in procedures intended to ensure a fair outcome.

7. In **Duncan Nduracha v Fuad Mahmoud Mohamed & 2 Others [2015] e KLR** the Court of Appeal affirmed this jurisdiction by stating that:

> **"That High Court has the jurisdiction to invoke supervisory jurisdiction to review decisions and proceedings of subordinate courts. Such supervisory jurisdiction can be invoked by the court of its own motion. (see *Twaher Abdulkarim Mohamed V IEBC & 2 others [2014] e KLR. S*ee also *Law Society of Kenya v Centre for Human Rights and Democracy and 13 Others [2013] e KLR* where this could differently constituted stated that it would uphold the supervisory jurisdiction of the High Court, in cases where there has been blatant abuse of the rules of natural justice".**

8. The rules of natural justice include the basic right to a hearing – *audi alteram partem* - which is a fundamental principle of justice entrenched in Article 50(1) of the Constitution which states:

> **"Every person has the right to have any dispute that can be revolved by the application of law decided in a fair and public hearing before a court ..."**

9. The crux of the Applicant's complaint is that the court below is biased and has denied a hearing to the Applicant and by extension, other protestors and the minor child of one of them.

10. In the case of ***Patrick Ndegwa Warungu Vs. Republic in the High Court at Milimani Criminal Application No. 440 Of 2003*** Ombija J. in rejecting an application for the transfer of the matter from one judicial officer to another in the Magistrate's Court had this to say:

> **"The principles upon which transfer may be granted has been crystallized in several authorities the leading one being SHILENJE v THE REPUBLIC [1980] KLR 132 which lays down the law that for the High Court to order a transfer there must be reasonable apprehension in the applicant's or any right thinking person's mind that a fair and impartial trial might not be had before the magistrate whether one takes the incidencesindividually or collectively. Concomitantly there must be something before the court to make it appear that it is expedient for the ends of justice that an order for transfer ought to be made.**

11. *In the case of* ***Republic v Mwalulu & 8 Others [2005] eKLR , In the Court of Appeal Civil Application No. Nai 310 of 2004 (159/2004 UR) the Court of Appeal observed that:***

> ***"The principles on which a judge would disqualify himself or herself are well known... The Court itself has applied them in various cases such as REPUBLIC Vs. DAVID MAKALI & 3 OTHERS , Criminal Application Nos. NAI 4 & 5 of 1994 (unreported) and in KIMANI Vs. KIMANI reported in the [1995 – 1998] 1* EA 134. In the MAKALI case TUNOI JA who dealt with the issue of disqualification in his judgment, having cited the well-known proposition of LORD DENNING, M.R in the English case of METROPOLITAN PROPERTIES CO. (FG.C) LTD. Vs. LANNON & OTHERS (1969) 1 Q.B. 577, proceeded to summarize the legal position in Kenya as follows: -**
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> ***"That being the position as I see it when the courts, in this country are faced with such proceedings as these, [i.e. proceedings for the 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. It is my view that where any such allegation is made, the court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their cases before a court or quasi - judicial tribunal, they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to a bias in the mind of the Judge, Magistrate or Tribunal."***

12. In a recent decision in **Lubna Ali Sheikh Abdalla Bajaber and Another v Chief Magistrate's Court, Mombasa and 2 Others [2018] e KLR,** the Court of Appeal delivered itself as follows:

> **"What is bias? An apt definition of 'bias' can be deciphered from the following passage from the judgment of the Court of Appeal in England in *Medicament and related Classes of Goods (2001) 1WLR 700* where the court expressed:**
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> "***Bias is an attitude of mind which prevents the Judge from making an objective determination of the issues that he has to resolve. A Judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to favour one party rather than another. He may be biased not in favour of one outcome of the dispute but because of the prejudice in favour of or against a particular witness, which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a judge towards a particular view of the evidence or issues before him."***

Nearer home in *Attorney-General v. Anyang' Nyong'o & Others [2007]1E.A. 12*, the court set the test for bias as follows:

> ***"The objective test of 'reasonable apprehension of bias' is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the view of a reasonable, fair-minded and informed member of the public that a Judge did not (will not) apply his mind to the case impartially["] Needless to say, a litigant who seeks [the]***

disqualification of a Judge comes to Court because of his own perception that there is appearance of bias on the part of the Judge. The Court, however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair-minded and informed about all the circumstances of the case..."

13. Having reviewed the proceedings before the lower court, this court noted that some of the orders made, especially during the proceedings on 13/2/18 may raise the reasonable question why the court having sworn the 1st Protestor to testify, abruptly decided to terminate his testimony prematurely, and demand the production of the deceased's "*alleged wife and child before*" proceeding further with the protest. The particular protestor, **David Njenga Kamaru** according to the affidavit of protest filed on 16.1.18 was residing in the U.S.A. at the time. The court ought to have considered this before making a peremptory order to stand him down pending the availability of a third party.

14. Related to this is the fact that from the record, directions in respect of the protests were given in a piece–meal manner to the evident disadvantage of the Protestors. The hearing proceedings of 13.2.18 commenced without the directions envisaged in the Probate and Administration Rules, as the first directions to proceed by *viva voce* evidence were given on 22.3.18. This was during a mention held at the instance of the Protestors, the matter having inexplicably not been mentioned on 20.3.18 as earlier scheduled. At that mention on 22.3.18, counsel for the Protestors indicated that the Protestor based in the U.S.A. and widow of the deceased were present.

15. The second direction on the issue to be determined through evidence was given on 15/5/18. It appears that on that date, the court, contrary to earlier directions allowed counsels to argue the protest rather than adduce evidence. Moreover, it is evident that the protests on record were raising other issues in addition to the existence of a widow, including the existence of a child allegedly born to the deceased and his alleged wife, and secondly, whether the assets of the estate of the deceased included land parcel No. **Dagoretti/Kinoo/1155** and thirdly whether indeed the Petitioners were entitled to the grant. It is not clear from the record why the trial court in its directions only selected one issue as going to trial. The final directions for the filing of witness statements were made on the aborted 3rd hearing on 15.5.18.

16. Rule 40(6) of the Probate and Administration Rules provides that:

> **"Any person wishing to object to the proposed confirmation of the grant shall file in the cause in duplicate at the principal registry an affidavit of protest in Form 10 against such confirmation stating the grounds of his objection Rule 40(8) provides in part that "where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the mater be set down as soon as may be for directions in chambers in Form 74 to the Applicant, the Protestor and to such other person as the court thinks fit".**

17. Rule 41 of the Probate Rules contemplates that after directions, the application for confirmation is heard contemporaneously with the protest filed in the matter.

18. Without saying more, it is clear that the lower court did not follow the procedure set out in the Rules. The procedure is intended not only to give all the parties an opportunity to be heard but also advance notice of the manner in which the hearing will proceed in order to prepare for the hearing, a critical element to a fair trial. Parties cannot be assured of a fair trial when the court repeatedly throws surprises at them and in clear deviation from known procedure.

19. In my considered view, the manner in which the learned magistrate handled the matter before it is unsatisfactory, and while there need not be evidence of actual bias on his part, I think the failure to comply substantially with the laid down procedure and the peremptory manner of handling the serious issues raised in the matter, resulted in the situation which could well give rise to a reasonable apprehension that a fair trial could not be had.

20. In the circumstances, it appears expedient for the ends of justice that the court intervenes in the matter. The orders that commend themselves to me are as follows:

1. Prayer (3) of the motion is allowed and the court directs that the lower court course be transferred to the Chief Magistrate's Court at Kiambu for hearing and disposal. The lower Court file herein to be remitted to the Chief's Magistrate's Court forthwith.

2. Fresh directions in compliance with the Probate and Administration Rules to be given before the court to which the matter is subsequently assigned, in relation to the hearing of the Protests on record.

3. For the above purpose, the lower court file to be listed for mention before the succeeding magistrate at the earliest opportunity.

4. The hearing and disposal be expedited to avoid further unnecessary delay.

The costs of the motion will abide the outcome of the cause.

DELIVERED AND SIGNED THIS 8TH DAY OF FEBRUARY 2019.

C. MEOLI

JUDGE

In the Presence of:

Mr. Tombe for the Protestors/Applicants

No appearance for Petitioners

Court clerk - Kevin