REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 469 OF 2009

IN THE MATTER OF THE ESTATE OF THE LATE MIRIAM WANGARE NJAU – DECEASED

GERALD MWANGI NJAU & OTHERS.....APPLICANTS/PROTESTORS

VERSUS

JOHN NJAU GATEHI.....RESPONDENT

RULING

1. The rival parties in these proceedings are siblings who are engaged in a bitter feud for the distribution of property owned by their Deceased mother. On the one side is the 1st Administrator to the estate and the Applicant in the present Application. On the other side are all his other siblings (including his two Co-Administrators). The main issue in the Succession matter is, of course, the distribution of the assets of the estate: the Deceased having died intestate, the ten Protesters insist certain properties must be included as part of the estate and be available for distribution; the Applicant insists that those properties in contention were gifted to him *inter vivos* and are not available for distribution. The issue awaits hearing and determination by this Court.

2. Before this succession cause came to be, the parties were already engaged in legal tussles. The first tussle took place when the Deceased herein (the mother to all the protagonists here) was still alive. That suit is Civil Case No. 2193 of 2007 (OS): *John Njau Gatehi v Miriam Wangari Njau*. The Applicant herein was the Plaintiff. He sought the maintenance of a caveat on one of the properties registered in the name of the Deceased to wit Land parcel no. LR No. 209/90/13. His claim was that he had proprietary interest in the property.

3. The Applicant was unsuccessful in that suit. Justice Angawa, in dismissing the Originating Summons ruled that:

The impression the Applicant gave was that he had a beneficial interest. This interest can only arise where the Respondent has passed away. She is still alive and is the sole proprietor of the property. There has never been any contractual relationship with his mother. He pays no rent for staying on the premises and running his business.

I would agree with the arguments put forward by the Respondent that there is no grounds (sic) to extend the caveat herein. The Applicant's Application was cleverly framed to give the impression that he had a registrable interest. From the Replying Affidavit, it has been established he has none.

4. The Replying Affidavit the Learned Judge was referring to was one dated 28/04/2008 sworn in response to the Originating Summons taken by the Applicant herein that case. That Replying Affidavit was drafted and filed by the firm of Gathumbi & Co. Advocates who was representing the Deceased in the matter. This same firm -- Gathumbi & Co. Advocates – is now representing the ten Protesters in the present matter.

5. The Applicant is now opposed to the idea that Gathumbi & Co. Advocates is representing his ten siblings as against him in the present suit. Although the matter has been in Court for a while – it was filed in 2009 and there have been several rounds of contentious applications – the Applicant has now brought the present Application dated 04/12/2018. It seeks two prayers as follows:

1) That this Honourable Court be pleased to order by way of injunction that the firm of Gathumbi & Co. Advocates be disallowed from representing the respondents or any party in the matter claiming beneficial interest in property L.R. No.209/90/13 situated at Parklands Nairobi Wambugu Grove Hotel and property Nakuru-Njoro/Ngata Block 1/259.

2) That this Honourable Court be pleased to give further orders and directions as it deems fit with regard to the probative value and effect of the Affidavit dated 28th April, 2008 allegedly sworn by the deceased herein.

3) *That costs for this application be provided for.*

6. The Application is opposed. The Respondents (the ten siblings/protesters) have filed a Replying Affidavit deponed by one of them – Esther Nyambura Njau – on behalf of all the others, and Grounds of Opposition.

7. The Application was canvassed by way of written submissions. Neither parties highlighted their submissions.

8. Both parties have included a great deal of details in their affidavits and submissions. The details are a reflection of the contentious nature of these proceedings and the animosity they engender amongst the protagonists rather than the complexity of the matter at hand. The matter at hand is simple enough:

a. Is the firm of Gathumbi & Company Advocates debarred by the rules from representing the Respondents in this matter?

b. What directions should the Court give regarding the Affidavit deponed by the Deceased on 28/04/2008?

9. The Applicant says that Gathumbi & Company Advocates should be debarred from appearing in the matter because it drew the affidavit in question yet the affidavit is "contentious". As such, Mr. Gathumbi who ostensibly drew the affidavit might be called as a witness in these proceedings. The Applicant says that great prejudice will be occasioned on him if the firm of Gathumbi & Company Advocates is allowed to continue in representation in the matter.

10. The Applicant obliquely intimates, without categorically stating, that he intends to call Mr. Gathumbi as a witness in the matter. He implies that the subject matter of his testimony, if called, would be to impugn the authenticity of the affidavit deponed by the Deceased on 28/04/2008. I say "obliquely intimates" because there has been no formal application by the Applicant to have Mr. Gathumbi appear as a witness in the matter (though the matter has been in Court for close to ten years) – and the Applicant has not included Mr. Gathumbi in his list of witnesses. Curiously, neither has the Applicant included the impugned affidavit of 28/04/2008 in his list of documents.

11. Primarily, the Applicant relies on Regulation 8 of the Advocates (Practice) Rules, 1996. It states as follows:

No advocate may appear as such before any Court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear.

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.

12. Did Mr. Gathumbi have any reason to believe that he may be required to appear as a witness in this case? There is no foreseeable reason short of clairvoyance which would have led Mr. Gathumbi to have any such inkling. Mr. Gathumbi litigated the earlier suit (***Civil Suit No. 2193 of 2007***) and drew the affidavit in question as part of that suit. The affidavit was filed in Court. The Court found it credible and authentic and relied on it in making its findings. Mr. Gathumbi was not the deponent of that affidavit. The Deceased was. She was alive at the time. She had mental and verbal capacity. The Applicant did not impugn the authenticity of the affidavit in those proceedings.

13. Consequently, it appears odd in the very least for the Applicant to seek to impugn the authenticity of the affidavit of 28/04/2008 by calling – not the deponent of the affidavit (who is deceased) – but the person who drafted the affidavit. There is an un-appealed decision of the High Court which made a finding that the affidavit in question was authentic. It did so by relying on it in its ruling and using it to make a finding, based on that affidavit, that the Deceased was the sole proprietor of the property in question. If the Applicant was aggrieved by the findings of the Learned Judge in that matter, the course of action would have been to appeal against the findings. If the Applicant doubted the authenticity of the affidavit deponed on 28/04/2008, the course of action would have been to raise it in the litigation in question. He did not. That ship sailed. He cannot now seek to indirectly question the authenticity of the affidavit by threatening to call for cross-examination – not the deponent of the affidavit - but the person who drew it.

14. I think this would amount to an impermissible attempt to deny the Respondents a legal representative of their choice as guaranteed by the Constitution. It is not each time that a party says that an advocate on the other side is a potential witness that a Court would grant a disqualification. An exceedingly plastic application of that rule would greatly prejudice parties and impinge on their rights to engage advocates of their choice in litigation.

15. What, then, is the fate of the affidavit of 28/04/2008? The Applicant would like this Court to determine its probative value. The Respondents say that the matter is *res judicata* since it was directly at issue in ***Civil Suit No. 2193 of 2007*** which was finally determined.

16. On my part, I think the question is premature. It will be incumbent upon the Court that ultimately hears the controversy entailed in the Succession Cause to consider all the evidence tendered in support of the rival positions by the parties, consider all of them in context and make a determination of what probative value to assign to the affidavit of 28/04/2008. This would necessarily depend on what other pieces of evidence are available and what specific kinds of questions are up for determination. I therefore decline to engage with this question now.

17. **The upshot is that the Application dated 04/12/2018 is dismissed with costs**.

18. Orders accordingly.

Dated at Nakuru this 8th day of November, 2019

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JOEL NGUGI

JUDGE

Delivered at Nakuru this 11th day of November, 2019

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J. N. MULWA

JUDGE