



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 284 OF 1996

IN THE MATTER OF THE ESTATE OF SAMUEL WAHOME GATHERU (DECEASED)

FESTUS GATHERU WAHOME

WACHIURI WAHOME

JACKSON KINYORI WAHOME

PATRICK MBOGO WAHOME.....APPLICANTS/PETITIONERS

VERSUS

ALICE WANJIRA NJOROGE

REGINA WANJA WAHOME

GLADYS WANGUI WAHOME

JOHN NDURA WAHOME.....RESPONDENTS

RULING

1. This ruling arises out of an application filed by one of the Petitioners herein; the application is a Notice of Motion and is dated the 30/04/2019 and is filed under no provisions of the law; the applicant seeks the following orders;

i) That the application be certified as urgent.

ii) That this Honorable Court be pleased to vacate the proceedings of 13th March, 2019 and order for a re-hearing to give the applicant an opportunity to be heard for the ends of justice and to safeguard the integrity of the court;

iii) That a further hearing be re-scheduled and the 2nd and 3rd respondents be accorded an equitable amount of time to respond by way of oral evidence;

iv) That the order for the filing of written submissions within 14 days be stayed pending the hearing and determination of this application;

v) That there be audio recording of the proceedings during further hearings;

vi) That the Hon. Lady Justice A. Mshila, be pleased to transfer the matter;

vii) That the costs of this application be costs in the cause.

2. The application was supported by the Affidavit of the Applicant sworn on 22nd March, 2019, and predicated on the grounds on face of the application; the gist of the averments in the affidavit was that the trial judge herein was not impartial to the applicant at the hearing on the 13/03/2019 and did not accord the applicant a fair hearing; and he cited the provisions of Article 50(1) of the Constitution 2010; and he urged the court to grant the orders prayed for a re-hearing of his side of the case for a longer period of time and a transfer of the matter for hearing before another judge because there was a perception of bias on the part of the trial judge;

3. The application was strongly opposed by both counsel acting for the respondents herein; they correctly pointed out that at the hearing of 13/03/2019 the applicant had been granted great leverage by the trial court and he had cross-examined the respondent Alice at length and for a long duration of time; and that the instant application was an attempt by the applicant to delay and to scuttle the final determination of the matter so as to bring the court into disrepute;

4. Both counsel prayed that the application be dismissed with costs;

ISSUES FOR DETERMINATION

5. The applicant appeared in person whereas the respondents were represented by learned counsel Mr. Mshila and Mrs. Githaiga; after considering the Notice of Motion and hearing the rival presentations the sole issue found for determination is whether this court should recuse itself from handling this matter;

ANALYSIS

6. The manner in which this instant application was brought, the numerous complaints lodged from the inception of the cause to date and in the language and temperament particularly of the applicant at the hearings on the 13/03/2019 and the 3/07/2019 and in his letters of complaint; a reasonable person observing and following the events of the 13th March, 2019 and the 3rd July, 2019 and the reading of the letters would not be wrong in presuming a sense of entitlement, intimidation and premeditation;

7. The reasons proffered by the applicant are not likely to lead any reasonable observer who followed the proceedings on 3/03/2019 to presume that the impartiality and independence of the court to have been imperiled or irredeemably compromised solely for the reasons advanced by the applicant in his instant application;

8. This court states emphatically that it has a duty to determine matters placed before it and the parties herein are not at liberty to choose the judge who will hear their succession matters; and also requesting for the disqualification of a judge should not be taken lightly particularly in instances where a party only wants the matter to start *de novo* so as to cause a delay in its just determination; and a delay in disposition of cases does not augur well with the public and it also erodes public confidence in the courts.

9. Recusal is a matter for the court to exercise its discretion; the applicant herein has filed a litany of complaint letters wherein he has used intemperate language; and at the hearing of the instant application the applicant stated in no uncertain terms that ***'the trial judge was a gender activist fighting for the rights of women'***;

10. In conclusion and after having considered all the facts this court states that it is able to determine this matter objectively while maintaining impartiality, transparency and fair-mindedness; but for the reasons stated above it will never-the less exercise its discretion and recuse itself;

11. The matter will be placed before the Deputy Registrar for directions at the instance of the Applicants within 30 days;

12. The applicant is hereby condemned to pay the respondents in this instance costs of this application.

It is so ordered.

Dated, Signed and Delivered at Nyeri this 7th day of November, 2019.

HON. A. MSHILA

JUDGE