



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**PROBATE AND ADMINISTRATION DIVISION**

**SUCCESSION CAUSE NO. 1239 OF 2008**

**IN THE MATTER OF THE ESTATE OF JAMES KANYOTU (DECEASED)**

**JANE GATHONI MURAYA KANYOTU....PETITIONER/RESPONDENT**

**VERSUS**

**MARY WANJIKU KANYOTU.....1<sup>ST</sup> RESPONDENT**

**CHRISTOPHER NGATA KANYOTU.....2<sup>ND</sup> RESPONDENT**

**ANDREW PETER NGIRICI.....3<sup>RD</sup> RESPONDENT**

**JOHN KARIUKI KANYOTU.....4<sup>TH</sup> RESPONDENT**

**SANDRA NJAU KANYOTU.....5<sup>TH</sup> RESPONDENT**

**RULING**

**PLEADINGS:**

On 29.6.2018 during the hearing of the determination of beneficiaries of the deceased's estate specifically with regard to the claimants who were objected to namely:

- a. Willy Kihara**
- b. Mercy Mumbi**
- c. Clint Mathenge**

Counsel for the Applicant, Mr. Munge now representing Mrs. Mary Kanyotu informed Court that;

**a. By an application filed on 29.6.2018, it was incumbent for this court to halt the ongoing proceedings midstream, and stand down PW III Margaret Nyakinyua because;**

- i. The Applicant Mrs. Mary Kanyotu was formerly represented by another law firm which also represented the objectors whose hearing is ongoing.**
- ii. The Applicant did not file any affidavit with regard to ongoing proceedings.**
- iii. The Applicant's various affidavits already filed were used in the proceedings to protect objectors' interests to the prejudice of applicant's interests**
- iv. The Applicant disputes the authenticity and rationale behind filing of the affidavits.**
- v. The Applicant wants to withdraw the summons for Confirmation dated for hearing on 29.6.2018 and the disputed**

affidavits which should all be expunged from the record so as to allow for hearing of the Applicant.

vi. There is now contest of the appointment by Consent of Margaret Nyakinyua Murugu as administrator as she was married to the deceased's Cousin and she cannot benefit from 2 estates.

vii. The Applicant did not give express instructions to her previous advocate to accept admission of Margaret Murugu as beneficiary of the deceased's estate.

viii. The Applicant released title documents to her previous advocate's on record and require the same to enable her file an appropriate witness statement.

The list of the relevant affidavits up for expunging from the Court record are housed in paragraph 2 of the Summons brought under Rule **44, 49 and 73 Probate and Administration Section/Rules 47, 76, 82 and 83 of Law of Succession Act.**

There is revocation/annulment of grant with regard to Margaret Nyakinyua Murugu (PW III) in terms of Paragraph 4, 5, 6, and 7 of the summons.

The application is supported by affidavit of Mary Wanjiku Kanyotu filed on 27.6.2018 and annexed thereof.

**Issue:**

The question to be determined at this stage of the proceedings is whether the instant application under Certificate of Urgency ought to be heard first and the proceedings halted or not.

**RESPONSES:**

**Mr. Nyiha:** for the children of Mary Kanyotu Applicant, he concurred that proceedings halt and the instant application is heard.

**Mrs. Njiru:** for George Irungu also concurred with halting hearing of the instant application first. She filed an application that is pending for hearing to date

**Mrs. Thongori for Jane Kanyotu:** also concurred that the instant application be heard first.

**Mrs. Wahome for Mercy Mumbi and Margaret Nyakinyua;**

Objected to halting the proceedings and hearing the instant application because;

It is another ploy to halt/delay the hearing of the matter and an attempt to sabotage and prevent trial. If it is the issue of legal representation then the same should be left to parties determine their representative Counsel. If the application is heard first, then it will mean that response to the application will be filed and submissions. The affidavits to be expunged have been relied on during trial. The issue of beneficiaries is largely agreed upon except for the 3 interested parties/beneficiaries whose trial is ongoing. The affidavits form part of the proceedings and evidence and ought not to be expunged as they have been relied on in trial. It is the rug being pulled down from under the feet of the Court.

**Mr. Nyangena:** for Willy Kihara I have just been served with the application and had not obtained instructions. The application is not urgent. There are Previous application filed, the Court declined to hear them and ordered the issue of beneficiaries be determined first. The matter to proceed for hearing. My Client's application for medical expenses still pending.

**Mr. H. Kinyanjui with Mrs. Wahome for Mercy Mumbi and Margaret Nyakinyua:**

Counsel are shipwrecking the process.

Court, Parties and Counsel should be guided by Section 1A and 1B of the Civil Procedure Act.

On the issue of conflict of interest, raised that the Petitioner and Objectors being represented by same advocate, yet Mr. Munge is now representing mother and son.

This is a ploy to remove PW III Margaret Nyakinyua as Administrator because in **HCCC 46 of 2012** pending for Ruling on **9.7.2018** before the Civil Division of the High Court there is suit property for sale worth 3 billion and she objected to the sale. The applicant agreed to the Deceased's estate property about to be sold and PW III herein has refused. It is contrary to Court Orders of 8.11.2013 by Hon. Justice L. Kimaru that no sale or disposal of any properties of the estate should be done until confirmation of the grant.

The application is to derail hearing of the matter in this Court.

**Mr. Odawa for Clint Mathenge:** Objected to stopping ongoing proceedings because;

Directions were obtained in the matter. No application to be heard until determination of the question of the beneficiaries on the deceased estate is determined. I have filed 2 applications still pending.

Mary Kanyotu was in Court throughout the proceedings and at no time did she raise any objection. She is learned and even addresses the Court and she never said she does not agree to beneficiaries or was not aware of the affidavits.

It is prejudicial to start the matter afresh as the Court will come down to ground zero.

Even if affidavits are expunged there are consents filed and not set aside.

The affidavit is mischievously filed with view to derail hearing of the matter.

**Mr. Munge for John and Sandra Kanyotu:** I reiterated grounds of the application and emphasized, there is valid issue here. How did the said affidavits find their way to Court? There is an issue of conflict as **per Rule 8 of Advocates Practice Rules L. N. 2231 of 1998**—where an advocate cannot act for a party whose interest is different from the other party or advocates report there is conflict of interest. There are valid Q of the law if heard will enable the Court to appreciate the matter in reality.

### **DETERMINATION**

This Court has considered the merits of whether to halt the proceedings and hear the instant application first or not and finds as follows;

1. Court, Counsel and Parties are guided by **Section 1A of Civil Procedure Act which provides;**

#### **1A. Objective of Act**

**1. The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.**

**2. The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).**

**3. A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.**

### **COURT PROCESS**

**The Court record confirms;**

(1) The parties begun by demanding exhumation of deceased's body for DNA testing, this Court declined.

(2) Court ordered DNA Sibling testing to confirm the paternity of the contested beneficiaries. Both the process and outcome of DNA were challenged by parties and parties declined a repeat 2<sup>nd</sup> DNA testing.

(3) Family meetings were held to determine the beneficiaries of the estate. There was consensus to some beneficiaries and others were objected to as follows;

(4) Contested members/parties are:

**a. Willy Kihara**

**b. Mercy Mumbi**

**c. Clint Mathenge and now**

**d. Margaret Nyakinyua as beneficiary/administrator**

To facilitate distribution of the deceased's estate; confirmation of grant Under Section 71 Law Succession Act Cap 160; the Court ought/shall be satisfied as to the identities of beneficiaries and actual beneficial share. To do this, the Court has first to determine list of beneficiaries.

Hearing commenced and the Court heard;

**a. Willy Kihara – Cross examination not completed**

**b. Mercy Mumbi –testified and cross examined**

**c. Clint Mathenge- waived right to testify in Court**

**d. Margaret Nyakinyua - testified but pending completion**

The outline above confirms that this matter has been protracted and in fact has been pending since 2008. The Applicant is advanced in age and would benefit from expeditious disposal of the matter and all parties therefore all must comply with **Section 1A of CPA** while at the same time maintain right to fair trial to any /all parties as envisaged under **Article 50 COK 2010**.

Having considered the Applicant's submission by Counsel and taking into account length of time of the matter and pending hearing I order as follows;

**1. Conflict of Interest/Legal Representation;**

The Petitioner was represented by Counsel for objectors and their interests are not identical/similar. The Applicants can be represented by Counsel of choice.

2. Expunging affidavits filed by Applicant as listed in the application is based on the following grounds;

**a. The Affidavits filed by Petitioner on record have been used to support the objectors interests**

**b. It is alleged that the applicant did not consent/was not aware of the contents of affidavits and did not depose and/or sign the said affidavits.**

**c. The Petitioner had no opportunity to question the objectors on the evidence adduced as she was represented by the same advocate who conducted the objectors' case.**

**d. The Petitioner/Applicant did not file any affidavit to support or deny the appointment of any person as beneficiary/administrator.**

*Order 19 Rule 1of Civil Procedure Rules 2010 provides;*

**Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable:**

**Provided that, where it appears to the court that either party bona fide desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.**

*[Order 19, rule 3.] Matters to which affidavits shall be confined.*

**3(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:**

**Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.**

*[Order 19, rule 6.] Striking out matter.*

**The Court may order to be struck out from any affidavit any matter that is scandalous irrelevant or oppressive.**

To expunge all the affidavits listed wholesale, affidavits that were filed from the inception of this matter 10 years ago, affidavits that were referred to and were subject to and informed Court proceedings by previous judges who handled this matter and informed the Court Rulings, judgments and orders that remain valid, regular and legal orders of the Court would amount to this Court without jurisdiction sitting on appeal over these decisions without a review process and would set aside all resulting Court proceedings, orders and decisions. I am not competent to carry out such an exercise.

On the other hand to ensure that the Petitioner's Applicant's rights are not vitiated in line with **Order 19 Rule 3 of CPR 2010** the Applicant shall identify any part of the listed affidavits that she deposed not of her knowledge and belief and /or is scandalous oppressive or irrelevant and bring to the attention of this Court to consider to be struck out.

The Applicant shall file and serve her written statement with regard to her testimony in the ongoing proceedings of determination of beneficiaries of the estate within 14 days

The Applicant shall testify on the identification of beneficiaries and appointment of administrators and the same opportunity is extended to Jane Kanyotu to file witness statement and serve within 14 days and also testify to confirm their view on the matter in question.

All applications remain pending the outcome of present proceeding to determine beneficiaries of the estate of the deceased.

The estate of deceased is preserved under **Section 45 Law Succession Act CAP 160**.

Willy Kihara shall be recalled for pending conclusion of cross examination.

Hearing to proceed from where we stopped on a date to be agreed on by parties.

**DELIVERED DATED & SIGNED IN OPEN COURT ON 11<sup>th</sup> JULY 2018**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF :**

**MRS. NJIRU FOR GEORGE IRUNGU**

**MS. JUDY THONGORI FOR JANE KANYOTU**

**MRS. WAHOME FOR MARGARET NYAKINYUA AND 2 TWO CHILDREN**

**MR. MUNGE FOR MARY KANYOTU AND JOHN KANYOTU**

**MR. NYANGENA FOR WILLY KIHARA**

**MR NYIHA FOR CHRISTOPHER AND SANDRA KANYOTU**

**MR. ODAWA FOR CLINT MATHENGE**