REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO. 469 OF 2009

IN THE MATTER OF THE ESTATE OF MIRIAM WANGARE NJAU (DECEASED)

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

VERSUS

JOHN NJAU GATEHI.....RESPONDENT

RULING

1. The singular substantive question for determination in the Application at hand is whether the Court should exercise its inherent jurisdiction and set aside or review its ruling dated 08/02/2017 refusing an application for an adjournment; dismissing the Applicants'/Protestors' Protests in the Succession Cause for non-attendance and, consequently, confirming the Summons for Confirmation by the 1st Administrator. The effect of the ruling was to order a distribution of the estate of the Deceased according to the proposals made by the 1st Administrator. This distribution had been opposed by all the other ten siblings (beneficiaries of the estate).

2. As is symptomatic of the present proceedings and bitterly fought succession proceedings generally, this Application has spawn voluminous affidavits; further affidavits; submissions and further submissions by both sides. For all the fecund literature filed, the basic issue for determination remains unchanged; the rules and principles applicable timeless and vintage in ancestry.

3. In brief, this is what happened. The Deceased herein died intestate in 2009. She was survived by eleven children. The 1st Administrator/Respondent is the first born child. Letters of Administration were granted to the 1st Administrator and three of his siblings. Controversy soon emerged, however. When the 1st Administrator applied for confirmation of the Letters of Administration, all his siblings rose up in opposition. They filed an Affidavit of Protest deponed on 18/11/2010 and a Further Affidavit of Protests deponed on 19/03/2015. It was determined that in the face of the Proposed mode of distribution by the 1st Administrator and the two Affidavits of Protests filed by and on behalf of all the other ten siblings, the matter would be resolved by viva voce evidence.

4. It is fair to say that the matter delayed for a bit. Eventually, the 1st Administrator's advocate was able to secure a hearing date for the Succession Cause. That date was 08/02/2017. The Advocate duly served the Applicants' advocates.

5. The hearing did not take off on 08/02/2017. Mr. Gathumbi, counsel for the Applicants'/Protestors was not present in Court that day. Instead, he had sent another lawyer, Mr. Onyancha, to request for the adjournment of the case. Mr. Onyancha informed the Court that Mr. Gathumbi was bereaved; that he had lost a close relative and sought the indulgence of the other side and the Court to get an adjournment. Mr. Onyancha informed the Court that Mr. Gathumbi had sent an email to Mr. Mwangi, Counsel for the 1st Administrator.

6. When Mr. Mwangi rose to speak, he vehemently objected to the sought adjournment. He told the Court that the application for adjournment was not merited; that it seemed clear that Mr. Gathumbi's clients had taken some of the property by force and that they were keen to ensure that the matter would not proceed since the status quo favoured them. Mr. Gathumbi complained to the Court that he had received an email only the previous day at 5:10pm to inform him about Mr. Gathumbi's bereavement; yet the email claimed that the relative had died on 01/02/2017. Mr. Mwangi wondered why Mr. Gathumbi had not informed him of his unavailability sooner if the story was true. In short, Mr. Mwangi doubted the bona fides of the grounds for seeking the adjournment and sought the Court's ruling that the matter proceeds to hearing on that day. Mr. Mwangi pointed out to the Court that Mr. Gathumbi's communication had not even named the relative who had died.

7. Mr. Onyancha gave a brief response in which he informed the Court that the relative who had died was Esther Waweru; and that he had just received a text to that effect from Mr. Gathumbi. He told the Court that Mr. Gathumbi could be ordered to produce the funeral programme later.

8. In an extempore ruling given shortly thereafter, the Learned Judge was not persuaded that there were good grounds to grant the sought adjournment. In material part, the Learned Judge said:

I have considered the Application for adjournment and the opposition thereto. I have had recourse to the record herein. I have noted with concern the continued dithering on the part of the Protestors in moving this matter forward. Specifically, I take note of the delay exhibited in the filing of statements and documents. Court business is serious business. The Actors i.e. to say the Judicial Officer and Support Staff, the officers of the Court (advocates) and the general public must demonstrate seriousness in approach to matters before the Court. The fixing of matters for hearing in sequential diaries is never done in vain. The same is done to ensure that there is order and accommodation of all parties on the day set aside for hearing.

If such a date is fixed initially by all the parties has to be changed, then the player so desirous of doing must ensure adequate notice to other parties. Most important, there must be concrete reason for such an eventuality. Death knocks without notice. However, every case will be looked at on its merit. When counsel merely sends a counsel (an email) to merely say that he lost a relative this leaves the Court unsatisfied with that assertion.

People are known by names and relatives. This Court takes judicial notice of the fact that not all deaths involve an individual at the same level. That is why it is important to indicate the degree of consanguinity.

9. Having declined to grant the adjournment, the Court ordered that the matter to proceed to hearing. A short while later, Mr. Onyancha, who was holding Mr. Gathumbi's brief, was not in the Court room (the Applicants claim that he had walked out to brief Mr. Gathumbi on the ruling). Mr. Mwangi applied that the Protests filed in the matter be dismissed with costs to the 1st Administrator and the grant issued be confirmed in the terms proposed by the 1st Administrator.

10. Mr. Mwangi's prayer was granted. The Protests were dismissed for non-attendance, and the grant was confirmed in the terms proposed by the 1st Administrator.

11. This set the stage for the present Application.

12. The Application is dated 15/02/2017. It seeks the following prayers:

***1. That** the Application herein be certified as urgent and he heard forthwith on account of its urgency.*

***2. That** service be dispensed with owing to the urgency of the matter.*

***3. That** this Honourable Court be pleased to grant stay of distribution of the deceased's estate pending the inter parties hearing and determination of this Application for review of the orders delivered on 8th February, 2017 by Hon. Justice A. K. Ndungu.*

***4. That** this Honourable Court be pleased to review, vacate and/or set aside the orders and/or judgment issued on 8th February, 2017 by Hon Justice A. K. Ndungu in respect of dismissing the Applicants' protests dated 18th November 2010 and filed on 22nd November, 2010 pending the hearing and determination of this application.*

***5. That** this Honourable Court be pleased to review, vacate and/or set aside the orders and the Ruling issued on 8th February, 2017 by Hon Justice A. K. Ndungu in respect of distribution of the deceased's estate pending the hearing and determination of his Application.*

***6. That** this Honourable Court be pleased to reinstate the Applicants'/Protestors protests dated 18th November, 2010 and filed on 22nd November, 2010 and the Further Affidavit of protest sworn on 19th March 2015 and filed on 23rd March 2015.*

***7. That** this Honourable Court be pleased to grant as such further directions and orders as it may deem necessary.*

***8. That** the cost of this Application be in the cause.*

13. The Application is opposed by the 1st Administrator. It was argued through written submissions.

14. The Applicants' argument is simply that the interests of substantive justice militate in favour of setting aside the decision to decline an adjournment then dismiss the Protests filed by the Applicants in this Cause. They base their arguments on the following:

a. First, that the reasons to seek an adjournment on 08/02/2015 were genuine as Mr. Gathumbi was truly bereaved of the wife of a first, close cousin who is also his close mentor and spiritual confidant. To demonstrate this, Mr. Gathumbi has exhibited a copy of his baptismal card (showing the husband of the Deceased as his godfather) and the Funeral Programme.

b. Second, Mr. Gathumbi sought to demonstrate that he did everything possible in the circumstances to alert Mr. Mwangi about his predicament through his mobile phone; through a call made by Mr. Gathumbi's secretary; and through an email. Mr. Gathumbi's argument in this regard was that he did all that was reasonable in the circumstances.

c. Third, that Mr. Mwangi had promised when called by Mr. Gathumbi's secretary that he would not oppose an adjournment which ostensibly led by Mr. Gathumbi to believe that he could attend the burial without endangering his clients' case. The Applicants' argue that they expected Mr. Mwangi to demonstrate professional courtesy by sticking to his word.

d. Fourth, the Applicants deny that they have in any way dithered in having the case heard on its merits and point to the Court record as evidence.

e. Fifth, the Applicants argue that the justice of the case strongly favours that the case be heard on its merits. In particular, they point out that the effect of the grant of the 1st Administrator's prayers was that the 1st Administrator ended up with a vast percentage of the estate on his own while his ten siblings (Applicants) are left to share peripheral properties which had been gifted to them by the Deceased during their lifetime anyway.

f. Sixth, that at the very worst, the mistake of the Counsel not to be in Court on 08/02/2017 should not be visited on the innocent clients who have a very good case and who will be disentitled in the event the Court's ruling stands.

15. On the other hand, the 1st Administrator is unmoved by these arguments. The 1st Administrator's Counsel raised the following arguments in opposition:

a. First, that the Application is unmerited as it does not meet the threshold stipulated in Order 45 Rule 1 of the Civil Procedure Rules.

b. Second, that the Applicants' advocates' allegations of prior communication with the 1st Administrator's advocates has been refuted.

c. Third, that the claim that the person whose burial Mr. Gathumbi was allegedly attending was related to Mr. Gathumbi had not been substantiated.

d. Fourth, that the Applicants have not put enough material on the table to persuade the Court to exercise its discretion to review its decision as a matter of furthering justice which is the proper standard to be used.

16. The 1st Administrator believes that the Applicants' advocates did not furnish the Court with a plausible reason for their absence in Court on 08/02/2017 – and that it was, therefore, proper to decline the application for adjournment.

17. I will begin by pointing out that the provisions for setting aside or reviewing a decision, judgment, order or decree of a Court in Order 45 are applicable in appropriate cases in Succession cases. Alternatively, Rule 73 of P&A Rules which gives the Court inherent power to make such orders as may be necessary for the end of justice can be the source of the Court's authority to set aside a decision to dismiss a Protest for non-attendance. See, for example, ***In re Estate of Karori Kihagi (Deceased) [2018] eKLR (Kiambu High Court Succession Cause No. 76 of 2016***); ***Mary Gathoni Wachira & Another v Jane Wairimu Thagana & Another [2014] eKLR (Nyeri Succ. Cause No. 336 of 2008); Joseph Mwangi Mutero & Another v Rachel Wagithi Mutero (Succession Cause No. 76 of 2005)***; and ***In the Matter of Ernest Kilonzo Kiluu (Machakos Succ. Cause No. 342 of 2001).***

18. In the ***Joseph Mwangi Mutero Case***, Justice Mativo stated as follows:

Counsel for the applicants strongly argued that the application before the court is premised on "sufficient reason." The reason offered for the delay is that the applicants previous advocates are to blame for failing to take the necessary steps until the present advocates came on record. The crucial question to resolve is whether indeed the alleged failure on the part of the advocates constitutes sufficient reason. Discussing what constitutes "sufficient reason" in an application for review, the Supreme Court of India in the above cited case of ***Ajit Kumar Rath vs State of Orisa& Others*** *stated "any other sufficient reason" ..... means a reason sufficiently analogous to those specified in the rule"*

Shah, Owuor *and* ***Waki JJA*** *in the case of* ***Zacharia Ogomba Omari and Another vs Otundo Mochache*** *held that "An application for review based on any other sufficient reason which is not analogous to or ejusdem generis with the first two circumstances in Order 44 (Now O. 45) is not available where the reason given is that their advocate was not available at the hearing when his absence amounted to taking the Court for granted."*

A similar view was held in the case of ***Sadar Mohamed vs Charan Signh and Another*** *where it was held that "Any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter)."*

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Mulla *in the Code of Civil Procedure (writing on Order* ***47*** *Rule* ***1*** *of the Civil Procedure Code of India), (the equivalent of our Order* ***45*** *Rule* ***1****), states that 'the expression sufficient reason' is wide enough to include misconception of fact or law by a Court or even by an advocate." This definition only covers misconception of facts of law but not negligence or conduct of an advocate*.

19. Justice Mativo cites with approval ***Evan Bwire v Andrew Nginda*** where the Court remarked as follows: "*an application for review will only be allowed on very strong grounds' particularly if its effect will amount to re-opening the application or case a fresh."*

20. Are there "very strong grounds" to review the Court's orders of 08/02/2017 I have considered the following factors in coming to a decision on the matter:

a. *First*, I am persuaded on the basis of the new material placed before the Court which the Court did not have when it made its

decision on 08/02/2017, that Mr. Gathumbi, Learned Counsel for the Applicants made serious and genuine attempts to reach to Mr. Mwangi, Learned Counsel for the 1st Administrator to inform him of his predicament. I find, on a balance of probabilities, that his assertions in his affidavit in this regard are truthful based on their specificity. The credence of these assertions are buoyed, in my view, by the Invoice attached to the Supplementary Affidavit by Mr. Gathumbi deponed on 02/04/2017 (Annexture "MWN 2"). This is an invoice to Mr. Gathumbi's Telkom Kenya Office Number. It shows that on 07/02/2017, a call was placed to Tel. Number 0721872528. Mr. Gathumbi deponed that this is the known mobile number for Mr. Mwangi and these assertions went unrebutted. The invoice shows that a telephone conversation of over two minutes took place. Mr. Gathumbi deponed that this was a conversation between his secretary and Mr. Mwangi in which Mr. Mwangi indicated that he would not be opposed to the adjournment. I note that Mr. Mwangi did not bring this fact to the attention of the Court; he only referred to the email sent by Mr. Gathumbi. These new facts, in my view, accentuates the *bona fides* of the application for adjournment by Mr. Gathumbi.

b. *Second*, while it is conceded that in his initial communications Mr. Gathumbi did not provide the name of the person who had died and his relationship to him, this information has now been supplied with sufficient details to the Court. The question becomes whether the failure to provide that information initially is an excusable mistake. I have come to the conclusion that it is. It would have been prudent for Mr. Gathumbi to give the full information to Mr. Mwangi in his communications with him; and even more prudent to have furnished Mr. Onyancha who was holding his brief with all these details. This failure certainly deserves admonition by the Court because it depicts a Counsel who is less than meticulous in the handling of his client's business. However, it does not rise to the level of negligence that would warrant the Court, if full facts are known, to visit that mistake on the client by way of refusal to hear the dispute and determine it on its merits. Rather, this professional slip should be penalized by imposing costs on the Counsel. With the new information now on record – including the baptismal card and the funeral programme - it is not possible to say that the degree of consanguinity or relations to the Advocate is one such that he did not have to attend the burial at the expense of missing a fixed hearing date.

c. *Third*, the record strongly indicates that there are serious questions to be determined in this case and that the resolution of the case one way or the other has serious distributive impacts on the two sides – which by rough estimates could turn on as much as Kshs. 300 Million. The substantive impact of shutting out a party from a hearing of a matter on its merits is one of the factors that a Court considers in making a determination whether to exercise its discretion. As the Court of Appeal noted in in ***Phillip Keipto Chemwolo & another V Augustine Kibende [1986] KLR 495***:

Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of having his case determined on its merits.

d. *Fourth*, the Application to set aside the decision of the Court was made without any delay.

21. In my view, therefore, all considered, I am of the opinion that the Applicants have placed enough material before the Court to persuade the Court to exercise its discretion to set aside the two consequential orders/decisions made on 08/02/2017 whose effect was to dismiss the Protests by the Applicants and grant the 1st Administrator's wishes regarding the distribution of the estate of the Deceased herein. As variously stated by our Courts, in exercising its discretion, the Court should always opt for the lower rather than the higher risk of injustice. See ***Suleiman V Ambrose Resort Limited [2004] 2 KLR 589.*** **Here, the trade-off is between shutting off ten siblings from the seat of justice and prolonging the dispute between the ten siblings on the one hand and their estranged brother on the other a little longer. The former option cannot be mitigated while the latter can be managed through proper docket management and strict timelines on hearing. The choice is, therefore, clear that in the specific circumstances of this case, equity militates in favour of allowing the Application dated 15/02/2017.**

22**. I will, therefore, make the following orders:**

a. Prayers 4, 5 and 6 in the Application dated 15/02/2017 are allowed.

b. The parties shall take a date for directions on hearing of the matter within thirty days from the date hereof.

c. In view of the age of the matter, the Succession Cause shall be heard on a priority basis.

d. **Costs of this Application shall be in the Cause.**

23. Orders accordingly.

Dated and delivered at Nakuru this 18th day of October, 2018

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JOEL NGUGI

JUDGE