REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 232 OF 2000

IN THE MATTER OF THE ESTATE OF KOMU MUTHIGANI ALIAS SAMSON KOMU MUTHIGANI (DECEASED)

CATHERINE WANJIRU KOMU.....APPLICANT

-VERSUS-

PRISCILLA NYAMBURA KOMU.....RESPONDENT

R U L I N G

There are two issues for determination before me:

1. Whether the firm of Gathiga Mwangi should be allowed to cease acting for the Respondent.

2. Whether the Summons General dated 08th May 2017 should allowed without hearing the respondent.

The background to these issues is that in a ruling dated the 26th July 2016, following summons for revocation by Catherine Wanjiru Komu, the Hon Mativo J revoked the grant that had been issued to Priscilla Nyambura Komu on the 27th May 2014.

Thereafter Catherine filed the summons general dated 8th May 2017 seeking orders:

1. THAT pending the proper distribution of the deceased's property, this honourable court be pleased to appoint the applicant CATHERINE WANJIRU KOMU as a joint administratix to the deceased's estate.

2. THAT the costs of this application be in cause.

Mr. Gathiga Mwangi appears for the respondent while Mr. Nga'ng'a Munene is for the applicant. When the application came for hearing on the 19th February 2018, Mr Gathiga Mwangi could not proceed as he had not responded to the said application. He sought for time to do so. The application again came up for hearing on 22nd May 2018. The court was informed that the respondent was unwell and produced a Medical Report dated 14th February 2018 from Outspan Hospital indicating that the Respondent was in poor medical. Counsel submitted that he could not respond to the application without his client's instructions. He stated that he was considering ceasing acting for the Respondent.

In Response the Applicant's counsel submitted that according his client, the Respondent was discharged on 14th February 2018. The application was served on Gathiga Mwangi on 16th August 2017 and there was no indication of what had transpired between then and the 22nd May 2018. That the purpose of the application was simply intended to preserve the estate, an order that the court could make *suo motu* under rule 73 of the P&A rules. He urged the court to grant the orders sought.

In response counsel for the respondent confirmed that he was yet to know the then current status of his client; that an order was made as way back as 2010 to preserve the estate. He also submitted that it was necessary for the respondent to be heard.

In a brief ruling allowing the application for adjournment, I noted that the medical report indicated that the respondent was discharged ***'on palliative cancer care with gastronomy feeding'***, that the application before me was not ex parte, that there were orders issued in 2010 for the preservation of the estate and it would not be fair to proceed as though the respondent had no say, yet it was clear she was unwell. I also allowed Mr. Gathiga Mwangi 30 days to file an application to cease acting if he so desired.

The matter came for hearing on 16th October 2018. Mr. Gathiga Mwangi had not filed his application to cease for the respondent. He now made an oral application to cease acting on the ground that his client was in a bad state, they could not communicate, and he had no substitution. That if he was allowed to cease acting, the respondent would be served directly and may be they would then respond or

substitute.

Mr. Nga'ng'a response was that Mr. Mwangi ought to have filed his application to cease acting. He still urged the court to allow the Summons general of 8th May 2017 as it was not prejudicial to anyone for it was only intended to preserve the estate.

So, should the firm of Gathiga Mwangi be allowed to cease acting for the Respondent?

Order 9, rule 13 of the Civil Procedure Rules, 2010 provides as follows: -

> ***"13. (1) Where an advocate who has acted for a party in a cause or matter has ceased so to act and the party has not given notice of change in accordance with this Order, the advocate may on notice to be served on the party personally or by prepaid post letter addressed to his last-known place of address, unless the court otherwise directs, apply to the court by summons in chambers for an order to the effect that the advocate has ceased to be the advocate acting for the party in the cause or matter, and the court may make an order accordingly:***

Provided that, unless and until the advocate has —

> ***(a) served on every party to the cause or matter (not being a party in default as to entry of appearance) or served on such parties as the court may direct a copy of the said order; and***
>
> ***(b) procured the order to be entered in the appropriate court; and***
>
> ***(c) left at the said court a certificate signed by him that the order has been duly served as aforesaid, he shall (subject to this Order) be considered the advocate of the party to the final conclusion of the cause or matter including any review or appeal."***

In ***Eunice Wairimu Muturi & Another ~v~ Ruth Nyambura Chuchu & 2 Others (2013)eKLR***, it was held that the only requirement for an Advocate wishing to withdraw from acting in the provisions is to give notice to all affected parties and that once the court is satisfied that this requirement has been met, it has no reason not to grant leave.

The Advocate's reason to cease acting is that his client cannot speak and hence has no instructions. In ***Patrick Wamukota ~v~ John Tulula & 3 Other (2015) eKLR*** it was held: -

> ***"Instructions are what creates the agency relationship between an advocate and his client. It is that agency that enables an advocate to conduct the suit on behalf of his client and even compromise the suit on behalf of his/her client. That is why it is imperative for an advocate to file a notice of appointment when instructed and when the advocate has no instruction in a continuing suit, before judgment, that is why he should file an application for leave to cease acting on the case. The application must always be served on the client so that the client is aware that the advocate no longer acts for him. The application to cease acting is always supported by an affidavit sworn on oath to affirm the veracity of the truth of the motion to cease acting." (emphasis)***

Order 9 Rule 13 requires that the Advocate makes the application by summons in chambers on notice to the client personally. In ***Bayusuf Brothers & Another ~v~ Mathew Mureithi (2005) eKLR*** Justice Dulu held that rules of procedure are meant to serve specific purpose and should be followed.

Mr. Gathiga Mwangi's oral application made does not comply with the provisions of Order 9 Rule 13 stated above which clearly stipulates for requisite procedure. Mr. Mwangi did not provide any evidence that his client was not talking and they could not communicate. The same way he expects Mr. Nga'ng'a Munene to serve personally on the respondent should he be allowed to with draw is the same way he could serve his client with the application to cease acting and provide proof of that service. Courts have found service necessary. In ***John Nahashon Mwangi ~v~ Kenya Finance Bank Ltd (In Liquidation) (2015) eKLR*** the Court emphasized on the need for a formal application in compliance with Order 9 Rule 13 thus:-

> ***"The firm of Kaplan & Stratton indicated they had ceased acting for the Plaintiff and that was reflected in the affidavit of service filed. Mr Thiga argued and rightly so, that as long as Kaplan & Stratton had not filed an application to cease acting under Order 9 rule 13 of the CPR, they were the advocates on record for purposes of these proceedings. I agree and there are good reasons why the law is so tailored. The process in Order 9 rule 13 of the CPR serves a bigger constitutional objective; as the enabler of right to and effective legal representation of the litigant concerned and service of process of court. Doubtless, the other party should know the person it ought to serve with court process lest its rights will be impeded if they are left to ad hoc arrangement between advocates and their clients as it will be borne out shortly. Similarly, the right to legal counsel of choice becomes endangered where an advocate decides to cease acting without informing the client and taking appropriate legal steps to cease acting."***

It is clear from the foregoing that Mr. Gathiga Mwangi's application would deny his client her right to representation at the hour of her need, leaving her exposed to the legal machinations of the other side, without her being aware of the same. That is neither just nor fair. He ought to have filed the formal application and served it upon his client. **Should the Summons general dated 8th May 2017 be allowed in the absence of the respondent's reply?**

Mr. Nga'ng'a for the applicant has consistently argued that the purpose for the application to preserve the estate pending the distribution of the estate.

The record will show that on the applicant herein, vide a summons general dated 6th August 2011 sought and was granted orders maintain the status quo of the estate pending the hearing and determination of the Summons for revocation of the grant. Those orders were granted. The grant was revoked. So how would appointing her a co administrator lead to the preservation of the estate? For some reason the judge who heard and determined the summons for revocation of the grant did not give orders as to whether a fresh one would issue and to whom. As it is now, there is nothing on the face of the application that the estate is at risk of being wasted to warrant the orders sought ex parte. The petitioner is unwell and is not in a position to waste the estate. In the upshot, the application for counsel for respondent to cease acting is denied. He ought to file the application and serve on his client

The application to allow the orders sought in the summons general of 8th May 2017 without hearing the respondent is denied.

No orders as to costs.

Dated, delivered and signed at Nyeri this 16th day of November 2018

Mumbua T Matheka

Judge

In the presence of:

Ms. Macharia Holding brief for Mr. Ng'ang'a for applicant

Mr. Okinda holding brief for Gathiga Mwangi