



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

P&A CAUSE NO. 199 OF 1995

IN THE MATTER OF THE ESTATE OF CHARLES C. MURGOR (DECEASED)

GILBERT KIPTO MURGOR.....APPLICANT

-VERSUS-

PETER KIPLAGAT MURGOR.....1ST RESPONDENT

HENRY K. MURGOR.....2ND RESPONDENT

AUSTINE K. MURGOR.....3RD RESPONDENT

GEORGE K. MURGOR.....4TH RESPONDENT

RULING

[1] This Ruling is in respect of three separate applications filed herein by the parties. The first application is the Notice of Motion dated **28 October 2016**. It was filed by the Applicant, **Mr. Gilbert Kipto Murgor** against the four Administrators of the Estate of the deceased herein, **Charles C. Murgor**. The second application is the Notice of Motion dated **19 July 2018**. It was filed by the Administrators against **Mr. Gilbert K. Murgor** for orders that **Mr. Philip Murgor** and the law firm of **Murgor & Murgor Advocates**, be disqualified or restrained from acting as Counsel in this matter; and that **Mr. Philip Murgor** be restrained from threatening the Petitioners/Applicants or in any way interfering with the Petitioners/applicants' peaceful occupation of the property known as **Kaptebee Farm**. The third application was filed by **Mr. Gilbert K. Murgor**, and is dated **8 August 2018**. It seeks orders *inter alia*, that **Mr. Eric Gumbo, Advocate**, and **Mr. Henry Kenei, Advocate**, be prohibited and restrained from acting as Counsel in this matter, and in matters relating to this Estate. I propose to deal with them in that order.

The Application dated 28 October 2016

[2] The Notice of Motion dated **28 October 2016** was filed by the Applicant herein, **Gilbert Kipto Murgor**, pursuant to **Section 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**; **Order 51 Rules 1, 3 and 14(1)(b)**, and **Order 19 Rules 3 and 9** of the **Civil Procedure Rules, 2010**; **Sections 5, 8 and 11** of the **Oaths and Statutory Declarations Act**; **Rule 7** of the **Oaths and Statutory Declaration Rules**, and **Section 73** of the **Law of Succession Act**. He prayed for orders that:

[a] The Court be pleased to order the removal of **L.R. No. 8912** and **L.R. No. 8566/1** belonging to the Estate of the late **Christine Chebor** from the list of assets of the Deceased, **Charles C. Murgor**, filed herein;

[b] The Court be pleased to award costs to the Applicant, and that such costs incurred by the Applicant as a result of the fraudulent inclusion of **L.R. No. 8912** and **L.R. 8566/1** as part of the Estate of **Charles Murgor**, be borne by the firm of **Gumbo & Associates**;

[c] The Court do make such further orders as may be expedient in the circumstances.

[3] The application was based on the grounds that there is no legal basis for the inclusion of **L.R. No. 8912** and **L.R. No. 8566/1**, also known as **Kalyet Farm** (hereinafter, "**the Suit Property**") and which, in the Applicant's contention, belongs to the Estate of the late **Christine Chebor**) to the list of assets of the Deceased herein; that the Suit Property is therefore not available for distribution to the beneficiaries of instant estate as its ownership and distribution had been settled in **Nairobi High Court Succession Cause No. 2349 of 1996**, in respect of the Estate of the late **Christine Chebor**; and that the inclusion of the Suit Property herein is a criminal conspiracy between the Respondents herein and their advocates on record, **M/s Gumbo & Associates**. It was further asserted that, as a result, criminal investigations were

initiated and charges filed against the 4th Respondent in **Eldoret Chief Magistrates' Criminal Case No. 1007 of 2015: Republic vs. George Kipkorir Murgor**. It was thus the contention of the Applicant that the orders sought are therefore necessary to forestall abuse of the process of the Court.

[4] The application was supported by the affidavit of **Gilbert Kipto Murgor** annexed thereto wherein details of the alleged conspiracy and fraud were supplied along with supporting documents, including statements made by some of the witnesses in the Criminal Case aforementioned. In addition, the Applicant filed a further Affidavit on **4 September 2017** to apprise the Court of certain crucial facts that had since come to light in **Criminal Case No. 1007 of 2015: Republic vs. George K. Murgor**. He averred that **George K. Murgor** has since abandoned his claim to **L.R. No. 8566/1 and L.R. No. 8912** and that it would therefore only be in the interests of justice for the orders sought to be granted. In particular, it was averred by the Applicant that **George K. Murgor** has since admitted vide his affidavit sworn on **27 July 2017** that:

[a] The original title for **L.R. No.8566/1** is held by the Land Registry in Nairobi and **Mr. Philip Murgor**, being the Administrator of the Estate of **Christine Chebor**;

[b] That he has no claim on **L.R. No. 8566/1** and that he is not a party to any case in respect of **L.R. No. 8566/1**.

[5] These assertions were however refuted by the 4th Respondent in his subsequent affidavit. I have carefully perused the file and it would appear that, as pointed out by Counsel for the Applicant, no response was filed in respect of the application dated **28 October 2016**. The record further shows that the issue raised herein in connection with the **Kalyet Farm** was one of the issues that fell for determination in the Ruling dated **29 October 2015**. That Ruling was in respect of the application dated **16 December 2013**, which was also filed by the Applicant, **Gilbert Kipto Murgor**. One of his complaints was that his mother's house, the house of **Christine Chebor**, had been left out in the list of beneficiaries of the estate of the Deceased, **Charles C. Murgor**. It is similarly manifest that, in its Ruling, the Court (**Hon. Githua, J.**) found merit in the Applicant's assertion in this respect. Here is how the Court reasoned on the issue:

"I now wish to turn to the applicant's complaint that the administrators deliberately omitted him, his siblings and his late mother from the list of beneficiaries when applying for grant of representation to the deceased's Estate. As noted earlier, this claim was not disputed by the respondents. The respondents claimed that the household of the late Christine Chebor was omitted from the list of beneficiaries because at the time of the deceased's death, he had been separated from Christine Chebor and further that in his life time, he had already provided for her by settling her and her children in Kalyet farm. The applicant denied this claim by asserting that his mother individually bought the land known as Kalyet farm with her own savings and funds borrowed from financial institutions and that it did not form part of the deceased's Estate. The explanation by the respondents concerning why the applicant and members of his household were excluded from the list of beneficiaries in the petition is legally untenable because Section 51 of the Act requires that applicants for grant of letters of administration must include in their petition inter alia, the names and addresses of all surviving spouses and children of the deceased irrespective of whether or not they had previously benefitted from the Estate. In this case, it is not disputed that the late Christine Chebor was one of the wives of the deceased and that the applicant and his siblings were children of the deceased..."

[6] Accordingly the Court ordered the administrators to compile and file an amended Form P&A 5 listing all the spouses and children who survived the deceased including the applicant and his siblings; the liabilities accruing to the Estate and a true inventory of all the undistributed assets of the Estate attaching copies of their title documents; and the record confirms that this order was partially complied with. That being the case, the best course of action ought to have been by way of an application for confirmation as ordered by the Court, noting that a ruling has already been made that the dispute over **Kalyet Farm** be canvassed in the application for confirmation. At paragraph 34 of the Ruling dated **29 October 2015**, the Court held that:

"...whether Kalyet farm forms part of the deceased's Estate as contended by the respondents or was the late Christine Chebor's personal property as alleged by the applicant is a matter which can only be determined at the confirmation stage where the parties shall be at liberty to adduce evidence in that regard..."

[7] In addition, substantial effort was expended to demonstrate that the 4th Respondent, **George K. Murgor**, committed fraud in collusion with his Advocate, **Mr. Eric Gumbo** and **Mr. Henry Kenei** of **M/s Gumbo & Associates**. I have given the same due attention and my considered view is that, since those allegations are the subject of a pending criminal case, it would be inappropriate for the Court to be required to make findings of fact in connection therewith by way of affidavit evidence. Indeed, in **Central Bank of Kenya Ltd v Trust Bank Ltd & 4 Others NAI Civil Appeal No. 215 of 1996**, the Court of Appeal held that:

"...Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary Civil Case..."

Likewise, in **Rosemary Wanjiku Murithi vs. George Maina Ndinwa [2014] eKLR**, the Court of Appeal expressed the view that:

"...Proof of fraud involves questions of fact. Simply raising the issue of fraud in a statement of defence and counterclaim is not proof of fraud.

[8] In the premises, and there being no particular reason given as to why I should depart from the position taken by **Hon. Githua, J.** as set out hereinabove, it is my view that this application is premature and is hereby struck out with an order that the costs thereof be in the cause.

The Application dated 19 July 2018

[9] The Notice of Motion dated **19 July 2018** was filed by the four Petitioners/Administrators, namely: **Peter Kiplagat Murgor, Henry K.**

Murgor, Austin K. Murgor and George K. Murgor for orders that **Mr. Philip Murgor, Advocate**, and his firm, being **M/s Murgor & Murgor Advocates** be disqualified or restrained from acting as Counsel in this matter; and that **Mr. Philip Murgor** be restrained from threatening the Petitioners/Applicants or in any way interfering with the Petitioners'/applicants' peaceful occupation of the property known as **Kaptebee Farm**. They also prayed that they be awarded costs of the application.

[10] The application was filed in contemplation of the hearing of the application dated **28 October 2016** which had been fixed for hearing on **23 July 2018**. The said application had been filed by the firm of **M/s Murgor & Murgor Advocates** and the Applicants were apprehensive that **Mr. Philip Murgor** would abuse his privileged position as Counsel to their detriment, being a beneficiary of the contentious parcels of land comprising **Kalyet Farm**. Accordingly, it was averred that **Mr. Philip Murgor**, being a potential witness in this dispute, is so conflicted that he cannot fairly and objectively discharge his responsibility in this matter as Counsel. In the supporting affidavit sworn by the 4th Applicant, it was also asserted that **Mr. Philip Murgor** has been visiting **Kaptebee Farm** without disclosing the purpose of his visits; and that since he is a licensed firearm holder, they were apprehensive that their lives were now in danger.

[11] The application was opposed by the Respondent, **Gilbert K. Murgor** and Replying Affidavits filed in that regard by the Respondent as well as **Philip Murgor**. However, **Mr. Philip Murgor** subsequently withdrew from the conduct of the case of his brother, **Gilbert Murgor**, his contention being that, as a beneficiary of the deceased's Estate, he has every right to represent himself and participate in these proceedings. In the premises, the application has been overtaken by events. As for the firm of **M/s Murgor & Murgor Advocates**, it is noteworthy that **Mr. Ouma** has since taken over the conduct of the matter on behalf of **Mr. Gilbert Murgor**. It is not the case that **Mr. Ouma** is also conflicted in connection with the subject matter.

[12] It is also instructive that **Section 9** of the **Advocates Act** is in connection with individual advocates and not entire firms. It is to be appreciated too that parties have a right to representation by advocates of their own choice. It should suffice therefore that **Mr. Murgor** has opted out. I therefore find no justifiable cause for banning the firm of **M/s Murgor & Murgor Advocates** through **Mr. Ouma**, from the conduct of the case of **Gilbert K. Murgor** herein. In the same vein, there was no proof that **Mr. Philip Murgor** is a firearms holder as alleged or that he might misuse the same. Hence, for the reasons aforementioned, I would dismiss the application dated **19 July 2018** with costs.

The Application dated 8 August 2018

[13] The last application, dated **8 August 2018**, was filed **Gilbert Kipto Murgor** under **Section 1A and 1B, 3 and 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya** and **Order 51 Rules 1 and 3** and **Order 19 Rules 3 and 9** of the **Civil Procedure Rules** for orders that:

[a] Spent

[b] The Court be pleased to direct the Hon. Deputy Registrar to forward/report the gross misconduct on the part of **Mr. Eric Gumbo, Advocate**, and **Mr. Henry Kenei, Advocate**, to the Disciplinary Committee of the Law Society of Kenya for investigation and appropriate action, including suspension or string off from the Roll of Advocates;

[c] That the Court be pleased to direct the Hon. Deputy Registrar to forward/report the suspected criminal involvement on the part of **Mr. Eric Gumbo, Advocate**, and **Mr. Henry Kenei, Advocate**, to the Directorate of Criminal Investigations, Land Fraud Department for investigation of their involvement in forgery, falsification of titles and related documentation and perjury;

[d] That **Mr. Eric Gumbo, Advocate**, and **Mr. Henry Kenei, Advocate**, be prohibited and restrained from acting as Counsel in this matter, and matters relating to this Estate;

[e] That the Replying Affidavit dated **13 November 2014** filed herein by the firm of **Gumbo & Associates** be expunged from the court record;

[f] That the costs of the application be awarded to the applicant.

[14] The application was similarly opposed by the Respondents and a Replying Affidavit sworn in that regard by **George K. Murgor** on **22 August 2018**. According to them, the application is a panic reaction by the Applicant following the Respondent's application for the disqualification of **Mr. Philip Murgor**; and that neither **Mr. Eric Gumbo** nor **Mr. Henry Kenei** are interested in the estate of the deceased. The averments majorly went off on a tangent, covering peripheral matters that do not appear to be directly relevant to the application at hand.

[15] Having considered all the averments in the pertinent affidavits, including the Supplementary Affidavits sworn by **Mr. Gilbert Kipto Murgor** and **Mr. Philip K. Murgor**, whose view was that the Replying Affidavit was in its entirety focused on insulting and maliciously maligning him, I find it unnecessary to go into the merits of this application either. This is because, first and foremost, I have found, as indicated hereinabove, that the allegations of fraud are the subject of an ongoing criminal case, being **Chief Magistrate's Criminal Case No. 1007 of 2015**; and secondly, that it would be inappropriate for this court to try these serious allegations by way of affidavit evidence.

[16] In the premises, I would find and hold that the application dated **8 August 2018** is also premature and is accordingly struck out with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 7TH DAY OF DECEMBER 2018

OLGA SEWE

JUDGE