



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

SUCCESSION CAUSE NO. 36 OF 2002

IN THE MATTER OF THE ESTATE OF EVANSON NGUTI KAMANDA

EVANSON NGUTI GITAU1ST APPLICANT

JAMES GITAU NAHASHON2ND APPLICANT

WANJIRU WA MARY3RD APPLICANT

VERSUS

JECINTER WANJIRU NGUTIRESPONDENT

RULING

1. In the Notice of Motion dated 3rd April, 2017, the applicants *Evanson Nguti Gitau*, *James Gitau Nahashon* and *Wanjiru Wa Mary* have requested this court to disqualify itself from further handling this cause due to what they termed as “overfamiliarity with the facts to the cause”.

2. The application is based on grounds inter alia; that the applicants have made three applications under certificate of urgency and none of them had been concluded; that when the third application came up for hearing on 6th March, 2017, the court commented that it knew about the matter; that the court is conflicted and lacks the motivation to dispense justice in this cause expeditiously.

3. The application is opposed by the respondent through grounds of opposition dated 27th April, 2017. In the main, the respondent urges the court to dismiss the application as in her view, it is scandalous, frivolous and vexatious; that it is an attempt at forum shopping and amounts to an abuse of the court process; that the adjournments in the matter have been caused by the applicant’s failure to serve proper and necessary parties with hearing notices and that the court was obviously familiar with the matter having delivered a ruling dated 14th October, 2015.

4. I have considered the application and the grounds of opposition filed in response thereto. I have also perused the court record. The record in so far as it is relevant to the current application makes some interesting reading. It clearly depicts who between the court and the parties was responsible for the delay in the hearing and conclusion of the applications filed by the applicants.

5. The record shows that the applicants were not parties to this succession cause until 10th December, 2015 when they filed a Notice of Motion seeking inter alia conservatory orders against the administratrix of the Estate of the deceased *Evanson Nguti Kamanda* against any kind of dealing with or parting with possession of ½ share of land parcel No. Soy LR 10018 and orders of inhibition restraining the chief

lands registrar by himself or through his servants or agents from making entries or dealings in the aforesaid parcel of land pending determination of the application.

6. The application was scheduled for hearing on 22nd February, 2016 but on the hearing date, it transpired that the applicant's learned counsel *Mr. Angu Kitigin* had not served some interested parties with the application. The court then directed the applicants to serve their application within three days and that matter be mentioned on 21st March, 2015 for directions.

7. It would appear from the record that the file was not produced in court on 21st March, 2015 since no proceedings were recorded. But instead of pursuing the application to have it fixed for hearing, the applicants filed another application titled "Further summons to rectify a grant" dated 16th March, 2016. It is important to note that the summons were not filed under a certificate urgency.

8. The applicants thereafter moved the court on 23rd July, 2016 over four months later to have the summons fixed for mention for directions. It was fixed for mention on 11th July, 2016 when again *Mr. Angu* conceded that he had not served some third parties who would be affected by the outcome of the summons.

9. On 26th September, 2010 when the application was next fixed for mention to confirm the filing of responses and further orders on the mode of its hearing, all the parties including the applicants consented to have the respondents notice of motion dated 24th September, 2016 heard first since its outcome was likely to determine the applicant's application. The motion was by consent fixed for hearing on 11th October, 2016. However, hearing did not proceed on that date for several reasons chief among them being that *Mr. Angu* was indisposed. The application was then adjourned to 16th November, 2016 but hearing did not also take off as *Mr. Angu* had served his replying affidavit a day to the hearing date and the respondents required leave to file a supplementary affidavit.

10. It is also significant to mention that on 11th October, 2016 upon request by the parties, the court gave the parties liberty to file and exchange written submissions on the application dated 24th September, 2016 which they duly filed. And after considering two other certificates of urgency filed by the applicants, the court set down the respondent's application for mention on 10th April, 2017 for the purpose of fixing a ruling date. But prior to that date, the applicants filed the current application.

11. I have taken the trouble to narrate in detail the events that have occurred in this matter since the applicants filed their first application to the date of filing the application now under consideration. I have done so to make the point that contrary to the allegations made in support of the application, the delay in the determination of the applications filed by the applicants has not been caused by lack of this court's motivation to dispense justice expeditiously but mainly by the applicants' learned counsel's failure to serve the applications on the other parties involved in the matter or those that were likely to be affected by their outcome in good time before the hearing dates. The filing of consecutive multiple applications by the parties particularly by the applicant also contributed to the delay.

12. In view of the foregoing, it is clear to me that the allegations made by the applicants in support of their application do not have any factual basis and they appear to have been made in bad faith.

13. The claim that I was conflicted as I was over familiar with the matter given the comment I orally made in court on 20th March, 2017 is to say the least misconceived. As correctly pointed out by the respondent, having delivered a considered ruling on two applications filed by the beneficiaries of the Estate of the late *Evanson Nguti Kamanda* in the main succession cause on 14th October, 2015, it is obvious that I had studied the entire court record before preparing my ruling and I was for that reason familiar with the matters in question.

14. For the record, I wish to state that I have no interest whatsoever in the main succession cause or in the proceedings taken out by the applicants or their outcome. The respondent has alleged that the applicants

are using the application to do forum shopping. Given the manner in which the applicants have conducted themselves in these proceedings as enumerated above, that possibility cannot be overruled.

15. I believe I have now said enough to demonstrate that I am of the view that the applicants have not demonstrated sufficient reason to justify my recusal from further handling this matter.

But having said that, I am also acutely aware that justice is all about perceptions. This is the foundation of the old adage that justice must not only be done but must also be seen to be done. It is not lost on me that this is a highly contested succession cause and that at the heart of the dispute between the parties is a huge parcel of land allegedly measuring about 700 acres. It is my view that in such a dispute, it is imperative that every party feels satisfied that justice has been done at the end of the day irrespective of the outcome of the multiple applications filed by the parties. It is only on account of this reason that I find it prudent to disqualify myself from further handling this matter.

16. In the end, I allow the application dated 3rd April, 2017 for the reason specified above and not because of the allegations made by the applicants. The respondent is awarded costs of the application.

17. Since the applicants have expressed a desire to be heard on their applications expeditiously, instead of fixing the cause for mention before the presiding judge for general directions on the way forward, I direct that the matter be fixed for mention before any other court on a date to be agreed upon by the parties for the purpose of giving directions on the disposal of the Notice of motion dated 24th September, 2016.

It is so ordered.

C.W. GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 19th DAY of July 2017

In the presence of:-

Ms Koech holding brief for Mr. Kibii for the Petitioner/Respondent

Mr. Angu Kitigin for the Applicants.

Mr. Lobolia – Court clerk