REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO 920 OF 2009

IN THE MATTER OF THE ESTATE OF DAVID MUGO IKOROI alias

MUGO IKOROI alias IKOROI MUGENYO (DECEASED)

AGNES MUTHONI NYANJUI & 2 OTHERS……APPLICANTS

VERSUS

ANNAH NYAMBURA KIOI & 3 OTHERS……..…RESPONDENTS

RULING

The issue for determination before me is whether or not succession causes numbers 920 of 2009 and 607 of 2014 relate to the estate of the same deceased person and if so which of the two causes ought to proceed and which of the two ought to be terminated. In so finding it will be necessary to establish whether there I abuse of court process.

Abuse of process arises when a party makes a malicious and deliberate misuse or perversion of regularly issued court process (civil or criminal) not justified by the underlying legal action. The action must be intentional.

The elements of abuse of process in most common law jurisdictions are as follows: **(1)** the existence of an ulterior purpose or motive underlying the use of process, and **(2)** some act in the use of the legal process not proper in the regular prosecution of the proceedings. Abuse of process can be distinguished from malicious prosecution, in that abuse of process typically does not require proof of malice, lack of probable cause in procuring issuance of the process, or a termination favorable to the plaintiff, all of which are essential to a claim of malicious prosecution. "Process," as used in this context, includes not only the "service of process," i.e. an official summons or other notice issued from a court, but means any method used to acquire jurisdiction over a person or specific property that is issued under the official seal of a court. Typically, the person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process and that offends justice.

Turning to these two cases, to make a determination on the question before me, it is necessary to examine the two files in detail. I will commence with Succession cause number **920** of **2009.**

On 12th November 2009 **Agnes Muthoni Nyanjui, Miriam Muthoni Ndungu** and **Raphael Mutharu Munyori** petitioned to this honoursble court for a grant of letters of administration to the estate of the late **David Mugo Ikoroi** alias **Mugo Ikoroi alias Ikoroi Mugenyo** (hereinafter referred to as the deceased). In their Petition and in the affidavit in support of the petition they described themselves as co-wives and co-petitioner respectively. They listed the following persons as surviving the deceased, namely:-

i. *Agnes Muuthoni Nyanjui—Wife then aged 43 years*
ii. *Joseph Ikoroi Mugo-Son then aged 26 years*
iii. *Cecilia Njeri Mugo-Dughter then aged 25 years*
iv. *P N-S- son then aged 14 years*
v. *Miriam Muthoni Ndungu-Wife then aged 37 years*
vi. *J I M-Son then aged13 years*
vii. *C N M-Daughter then aged 7 year*

The deceased properties were listed as **L.R. No. [particulars withheld]** and Share of 4.5 acres out of L.R.No. **[particulars withheld].** A copy of Transfer of Land in Settlement Scheme for title L.R. No. **L.R. No. [particulars withheld] .** and a copy of a certificate of official search for L.R. No. **[particulars withheld]** have been attached to the said affidavits.

In a letter dated 24.9.2009 the area chief confirmed the deceased hailed from his area of jurisdiction and that the above named persons survived the deceased. The chief certified the death certificate C No. 145118 dated 17.9.2009 annexed to the said petition. The deceased's name is shown as **David Mugo Ikoroi** and date of death is shown as 26th August 1997. Also annexed to the said Petition is consent to making of a grant of administration signed by **Joseph Ikoroi Mugo** and **Cecilia Njeri Mugo.**

It's also important to mention that the Petition was filed by the Petitioners in person but on 9.12.2009 the firm of Gathiga Mwangi & Co advocates filed a notice of appointment for **Annah Nyambura**. She also filed an objection to making of a grant on 1.3.2010 claiming interest as a sister to the deceased. On 5.5.2010 the said objector filed a cross-petition in these proceedings.

The Petition herein was gazetted on 9th April 2010. On 17.9.2010 the firm of **Patrick Maina & Co** advocates came on record for the Petitioners.

On 14th October **Agnes Kirigo, Susan Wambui & Eunice Nyaguthii**, the deceased's sisters filed a Petition for letters of administration in this cause and an answer to petition of grant through the firm of **Gathiga Mwangi & Co** advocates.

From the court record, on 13.4.2011, the **Hon. Judge Sergon** made an order that **Agnes Muthoni Nyanjui, Miriam Muthoni Ndungu** and **Raphael Mutharu Munyori** be appointed joint administrators to the estate and indeed the Grant of letters of administration was issued dated the said date. The Judge also directed that the trio may apply jointly or separately for confirmation of the said grant.

On 14.11.2012 **Ndata Mugo & Co advocates** came on record for the petitioners and filed an application seeking orders that the grant had become inoperative owing to subsequent circumstances and the deceased's wives were best suited to be appointed as administrators. On 21.2.2014 a consent order was recorded in court the terms of which were **Agnes Muthoni Nyanjui, Miriam Muthoni Ndungu** and **Eunice Nyaguthi** were appointed as the administrators.

On 18.12.2014 the parties got directions before the **Hon. Justice Ngaah** that this case be determined by way of oral evidence and when the matter came up before me the hearing of the protest, counsels brought to the courts attention the existence of Succession file no. **607** of **2014** which was said to relate to the same estate. Parties invited the court to look at the two files and make a determination on which file ought to proceed.

I have carefully examined the file relating to Succession cause number No. **607** of **2014.** The following are the key findings:-

i. The Petitioners are **Agnes Muthoni Nyanjui** and **Miriam Muthoni Ndungu** who are also the Petitioners in Succession cause number **920** of **2009.**

ii. The deceased is a one **David Mugo Ikoroi alias Mugo Ikoroi alias Ikoroi Mugenyo** who is also the named as the deceased in Succession cause **No. 920** of **2009.**

iii. Date of death is shown as **26th August 1997** and death certificate number **C No. 145118** dated 17th September **2009** showing the name of deceased as **David Mugo Ikoroi** has been annexed. An exactly similar death certificate has been used in Succession cause No. **920** of **2009.**

iv. The beneficiaries of the deceased in the second case are listed as:-

Agnes Muuthoni Nyanjui—Wife then aged 47 years

Joseph Ikoroi Mugo-Son then aged 30 years

Cecilia Njeri Mugo-Dughter then aged 30 years

Peter Nyanjui-Son- son then aged 18 years

Miriam Muthoni Ndungu-Wife then aged 42 years

J I M-Son then aged 17years

C N M-Daughter then aged 12 year

A similar list with identical names also appears in Succession cause No. **920** of **2009**. The only difference is the age of the persons named which has understand **[particulars withheld]** dably gone up.

v. The deceased properties shown as:- **L.R. Number** & registered in the**[particulars withheld]** deceased's name jointly with Gideon Theuri Ikoroi (19.5 acres) and Mugo Ikoroi (16.5 acres). Certificates of official search for both properties have been attached. To me these are also similar as in the first case except the above details on acreage.

vi. The letter from the chief bears exactly the same names as the letter from the chief used in **920** of **2009**.

vii. There is consent to making of the grant signed by **Joseph Ikoroi Mugo, Cecilia Njeri Mugo** and **Peter Nyanjui Mugo.**

viii. There is also consent and a renunciation signed by a one **Gideon Theuri Ikoroi.**

ix. The Grant was issued on 23.9.2014.

x. An application for confirmation of the grant was filed on 18.3.2015.

xi. There is a further affidavit signed by the petitioners dated 19th August 2015 purporting to explain that the estate petitioned in succession cause number **920** of **2009** does not belong to the same deceased person but to a one **Ikoroi Mugenyu,** the father of the deceased in Succession cause number 920 of 2009.

In have carefully examined the two files and I have identified striking similarities which leave no doubt that the two causes refer to one and the same deceased person. The death certificate used in both files is the same. It bears the same name of the deceased, same number, identical entry number, place of death, identical age of the deceased, identical date of death, identical residence of the deceased, same informant, same registering officer and virtually all the entries /details are the same. One is a copy of the other or both were photocopied from the same original. No convincing explanation can be offered to rebut the above similarities.

Similarly, the names of the Petitioners and beneficiaries are the same. The only thing that has changed in the second file is the ages of the beneficiaries which understandably have gone up on account of their

years advancing years. The only addition in the second file is the introduction of a one **Gideon Theuri Ikoroi** who has signed a renunciation in the second petition.

It's not clear why the same petitioners commenced another cause while they knew there was a pending cause in which they were also petitioners and why they kept quiet about it. If at all the deceased's estate had been distributed as per the grant allegedly issued in succession cause number **32** of **1987**, why then did they file succession cause number **607 o**f **2014 which curiously lists similar properties.**

There appears to be a deliberate misuse and abuse of court processes which should not be condoned at all. The principles which lead to a finding of an abuse of process in the UK were stated in *Johnson v Gore Wood & Co* by Lord Bingham.

> *"The underlying public interest is … that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defense in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defense should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such asa collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not … Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."*

Rule **73** of the Probate and Administration Rules provides that:-

> *"Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court"*

It is trite law that the court has an inherent jurisdiction to protect itself from abuse or to see that its process was not abused. The black law dictionary defines abuse as *"Everything which is contrary to good order established by usage that is a complete departure from reasonable use" An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use.*

The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. Most of its common feature is the improper use of the judicial process by a party in litigation to interfere with the due administration of justice. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents. The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

(a) *Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.*

(b) *Instituting different actions between the same parties simultaneously in different court even though on different grounds.*

(c) *Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.*

(d) *Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.*

(e) *Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.*

(f) *Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.*

(g) *Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.*

(h) *Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.*

The concept of abuse of court/judicial process involves circumstances and situations of infinite variety and conditions. It has one common feature which is the improper use of the judicial process by a party in litigation to interfere with the due administration of justice. It is recognized that the abuse of judicial process may lie in both a proper or improper use of the process in litigation. Note the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the imitation and annoyance of his opponent and the efficient and effective administration of justice. In the words of **Oputa J.SC** (as he then was) in the Nigerian case of *Amaefule & other Vs The State* he defined abuse of judicial process as:

"A term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. In his words abuse of process can also mean abuse of legal procedure or improper use of the legal process."

In yet another Nigerian case of *Agwusin Vv Ojichie*. Justice Niki Tobi JSC observed:-

"that abuse of court process create a factual scenario where appellants are pursuing the same matter by two court process. In other words, the appellants by the two court process were involved in some gamble a game of chance to get the best in the judicial process.''

It's settled law that a litigant has no right to purse *paripasua* two processes which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. In my humble view, the two processes are in law not available to the petitioners simultaneously. The petitioners cannot lawfully file two similar petitions as they have done. The pursuit of the two processes at the same time constitutes and amount to abuse of court/legal process.

Also in the case of *Saraki Vs Kotoye* the court dealt exhaustively with what constitutes abuse of process

of court. In his lead Judgment it was observed:-

> *"That the abuse of process may lie in both a proper or improper use of the judicial process in litigation. But the employment of a judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It can also arise by instituting a multiplicity of actions on the same subject matter against the same opponent on the same issues".*

Thus, the multiplicity of actions on the same matter between the same parties even where there exist a right to bring the action is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right *per se*. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice.

Turning to these two cases, I have carefully considered the striking similarities between the two and I find no difficulty in concluding that the two cases relate to the same estate and that the act of filing the second case amounts to gross abuse of court process. I hold that this is a proper case for the court to invoke the provisions of Rule 73 cited above to make such an order as may be necessary for the ends of justice to me met and in this connection I find that ends of justice do demand that succession cause number 607 of 2014 be struck off and I hereby dismiss the said cause i.e Succession cause **No 607 of 2014** for being an abuse of the court process. No orders as to costs.

Right of appeal 28 days

Dated at Nyeri this **6th** day of **November** 2015

John M. Mativo

Judge