



REPUBLIC OF KENYA



**In re Estate of Samuel Kananda Manene (Deceased) (Succession Cause E022 of 2021) [2024] KEHC 13097 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13097 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
SUCCESSION CAUSE E022 OF 2021  
EM MURIITHI, J  
OCTOBER 31, 2024**

**IN THE MATTER OF THE ESTATE OF SAMUEL KANANDA MANENE (DECEASED)**

**BETWEEN**

**FAITH KAGWIRIA KIOGORA ..... 1<sup>ST</sup> PETITIONER**

**FLORENCE KANJA M'RINGERA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**PURITY KANINI INOTI ..... OBJECTOR**

**RULING**

1. By a Notice of Motion under certificate of urgency dated September 11, 2023 pursuant to section 47 of the *Law of Succession Act*, Article 50 (2) of *the Constitution*, sections 106 A and B of the *Evidence Act* and all enabling provisions of the law, the petitioners/applicants seek:
  1. Spent
  2. That the Honorable Court be pleased to expunge from the record the photos mentioned in the affidavit of Purity Kanini Inoti sworn on the 29<sup>th</sup> November 2022 (referred to in paragraphs 5 & 8 of the Objector/respondent affidavit in support summons for revocation of grant filed herein and also attached to affidavit of Martin Murithi Kirimi sworn on the 24<sup>th</sup> of November 2022.
  3. That the costs of this application be borne by the Claimant.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Florence Kanja M'Ringera, the 2<sup>nd</sup> petitioner/applicant herein and the wife to the deceased, sworn on even date. She denies being married to Martin Murithi Kirimi as alleged in his affidavit sworn on 24/11/2022 and the photos annexed therein are photoshop of a marriage ceremony which did not happen. Sections 106A and B of the *Evidence Act* provide for the conditions



for admissibility of electronic records and that a certificate of electronic records is mandatory for the photos attached. The authenticity, reliability and credibility of the photos attached to the summons for revocation of grant dated 29/11/2022 cannot be ascertained as no certificate has been attached and therefore they are inadmissible and they are ought to be expunged.

3. The 2<sup>nd</sup> applicant swore a supplementary affidavit on 12/10/2023 in support of the application.
4. The objector/respondent opposed the application vide her replying affidavit sworn on 29/9/2023. She avers that the impugned photographs are properly and lawfully on record, and therefore admissible in evidence, converse to the wild allegations set forth by the applicants. Martin Murithi Kirimi wedded the 2<sup>nd</sup> applicant on 16/9/2000 when the impugned photographs were taken. The photographs show herself, her late husband, their first born Lewis Kirimi, his sister Daphin Kairuthi and their cousins. The 1<sup>st</sup> photograph was taken in 1999 when Lewis and Daphin were about 7 years and 1 year old respectively, having been born on 12/7/1992 and 20/8/1998. The other photographs were taken in 1995 when Lewis was about 3 years and Daphin was not yet born. She has been believably informed by her advocate that the amendment to the Evidence Act to introduce sections 106 A and B thereof were effected on 2/1/2009, long after the photographs had been taken, so the same do apply here as the law does not apply retrospectively. The admission in evidence of the aforementioned photographs will not prejudice the applicants or any other heir in any way. The sought certificate is not and cannot be availed since the persons who took and/or processed them in 2000, 1999 and 1995 cannot be traced. She will suffer profound and irredeemable prejudice and injustice if the said photographs are expunged from the record, since their evidential value in this cause is cogent and overwhelming, no wonder the 2<sup>nd</sup> applicant wants them expunged so that she can steal a judicial match from her.

### Submissions

5. In her submissions filed on 7/6/2024, the 2<sup>nd</sup> applicant urges that the photographs, whose source is unknown, are photo shopped to hoodwink the court to believe that the objector and the deceased were married, and cites *MNN v ENK (2017) eKLR* and *Kazungu Kambi v Nelly Hongo & 2 others (2017) eKLR*. She invites the court to find that the photographs do not meet the conditions set out under section 106 B with regard to electronic evidence and expunge them from the record.
6. The respondent maintains that the photographs were taken long before the amendments to the Evidence Act and thus the provisions of sections 106 A and B are inapplicable here, and cites *Commissioner of Income Tax v Pan African Paper Mills (E.A) Limited (2018) eKLR*. She urges that the person who took and/or processed the photographs 24 years ago cannot be traced due to passage of time. She urges that it is not permissible in the Law of Succession Act and the Rules made thereunder to move a succession court vide a notice of motion, and thus the application is legally incompetent, fatally defective and ipso facto which should be dismissed on that ground alone. She urges that the admission of the photographs will not occasion even a scintilla of prejudice or injustice to the petitioners because they will be allowed to cross examine her and her witnesses. She urges that the cases cited by the 2<sup>nd</sup> applicant are distinguishable from the facts of this case, as the photographs herein were taken before the amendment of the Evidence Act to introduce sections 106 A and B. She urges that the 2<sup>nd</sup> applicant bears the burden of proving that the alleged photographs are photoshop, and prays for the dismissal of the application.

### Analysis and determination

7. There is no doubt that the impugned photographs are electronic records within the meaning of Section 2 of the Kenya Information and Communications Act.



8. The bone of contention is whether the said photographs should be expunged from the record for want of compliance with sections 106A and B of the [Evidence Act](#).
9. The Kenya Communications (Amendment) [Act No. 1 of 2009](#), which came into effect on 2/1/2009 introduced Sections 106A and B of the [Evidence Act](#).
10. Section 106 A of the [Evidence Act](#) provides that;

“The contents of electronic records may be proved in accordance with the provisions of section 106B.”
11. Section 106B of the [Evidence Act](#) provides for admissibility of electronic records as follows:

“(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible. (2) The conditions mentioned in subsection (1), in respect of a computer output, are the following— (a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer; (b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities; (c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and (d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities. (3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of subsection (2) was regularly performed by computers, whether— (a) by combination of computers operating in succession over that period; or (b) by different computers operating in succession over that period; or (c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly. (4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following— (a) identifying the electronic record containing the statement and describing the manner



in which it was produced; (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer; (c) dealing with any matters to which conditions mentioned in subsection (2) relate; and (d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it. (5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment, whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities.”

12. Martin Murithi Kirimi swore a statutory declaration on 24/11/2022 solemnly confirming that the 2<sup>nd</sup> applicant was his wife. He then attached the impugned photographs to show how they celebrated their wedding. The other photographs show the respondent, the deceased herein and their 2 children namely Lewis Kirimi and Daphin Kairuthi. Those are the photographs said to be inadmissible because they have not been accompanied by the certificate envisaged under section 106B (4) of the *Evidence Act*.
13. It is urged that the impugned photographs were taken way back in 1995, 1999 and 2000 long before the amendments to the *Evidence Act* to introduce sections 106A and B were effected. Admittedly, it would be practically impossible to procure either the electronic device that was used for the production of the impugned photographs or the photographer who took them.
14. The question that lingers is whether sections 106A and B of the *Evidence Act* ought to be applied retrospectively.
15. In *Republic v Joe Mucheru, Cabinet Secretary Ministry of Information Communication and Technology & 2 others; Katiba Institute & another (Exparte); Immaculate Kasait, Data Commissioner (Interested Party) (Judicial Review Application E1138 of 2020) [2021] KEHC 122 (KLR) (Judicial Review) (14 October 2021) (Judgment)*, the court (J Ngaah J) observed that;
  - “95. It is therefore beyond doubt that legislation can be retrospective in its application only that such an intention has to be either apparent from the statute in question or can be implied, as a matter of necessity.”
16. The retrospective application of the aforementioned sections of the *Evidence Act* essentially ousts the admissibility of the impugned photographs in evidence for want of an electronic certificate.
17. In *Macharia & another v Kenya Commercial Bank Limited & 2 others (Application 2 of 2011) [2012] KESC 8 (KLR) (23 October 2012) (Ruling)*, the Supreme Court while considering the question whether the retrospective application of a statutory provision is unconstitutional stated as follows:

“As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (Halsbury’s



Laws of England, 4th Edition Vol. 44 at p.570). A retroactive law is not unconstitutional unless it: (i) is in the nature of a bill of attainder; (ii) impairs the obligation under contracts; (iii) divests vested rights; or (iv) is constitutionally forbidden.”

18. The impugned photographs are annexed to the objector’s/respondent’s application for revocation of grant dated 29/11/2022. Whilst the 2<sup>nd</sup> applicant knew of the existence of those photographs as early as November 2022 or thereabouts, she only objected to their production on 18/9/2023 when she filed the instant application. Whether or not the persons depicted in the impugned photographs are who they are said to be can only be ascertained after the matter is fully heard on its merits, and not at this interlocutory stage.
19. It would be a travesty of justice to shut out any evidence, even in form of photographs, which would assist the court in adjudication of the real issues in controversy. Besides, the requirement under section 106B of the *Evidence Act* for the production of an electronic certificate was not intended to occasion any injustice, prejudice or miscarriage of justice.
20. Justice demands that the case is finally determined on its merits where the 2<sup>nd</sup> applicant will test the veracity of the evidence on record on cross examination. It is only then when the authenticity and credibility of the impugned photographs can be reliably substantiated.
21. The contention by the respondent that a succession court cannot be properly moved by a Notice of Motion cannot be countenanced as it places form over substance. As observed by the Court (L.M. Njuguna, J.) in *Johnson M.S. Njoguri v Samuel Makindu Gachegu* [2021] eKLR, the court has wide powers under section 47 of the *Law of Succession Act* which can be used to cure procedural defects so that the Court renders substantial justice as follows:

“...In the instant case, the applicant moved the court by way of a Notice of Motion and citing provisions of law not applicable to succession matters. However, section 47 of the *Law of Succession Act* gives this court powers to entertain any application and to determine any dispute under the *Law of Succession Act*. As such, despite the applicant having approached this court in the wrong method and under the wrong provisions of the law, I will proceed to determine the instant application on the basis of the powers bestowed on this court by virtue of section 47 of the *Law of Succession Act*.”

## Orders

22. Accordingly, for the reasons set out above, the application dated 11/9/2023 is without merit and it is dismissed.
23. There shall be no order as to costs.

Order accordingly.

**DATED AND DELIVERED THIS 31<sup>ST</sup> DAY OF OCTOBER, 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Mr. Otieno Obwanda for the Applicant.

Mr. Mawira for Mr. Carlpeters Mbaabu for the Respondent.

