



**In re Estate of Alphonicis Muhati Likabo (Deceased) (Succession Cause 36 of 2012) [2023] KEHC 21066 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21066 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 36 OF 2012**

**SC CHIRCHIR, J**

**JULY 28, 2023**

**IN THE MATTER OF ESTATE OF ALPHONCIS MUHATI LIKABO  
DECEASED**

**BETWEEN**

**GLADYS ISANGILI MUHATI & ANOTHER ..... PETITIONER**

**AND**

**TERESA MUHATI & OTHERS ..... OBJECTOR**

**RULING**

1. On May 24, 2019, the 2<sup>nd</sup> administrator, Gladys Isangili Muhati filed an application for confirmation of grant in respect of the estate of Alphonse Muhati Likabo alias Alfonsi Muhati Likabbo (deceased) in which she proposed a particular mode of distribution of the assets of the estate.
2. The 1<sup>st</sup> and 3<sup>rd</sup> administrators filed a protest to the mode of distribution. There were other protests by some of the dependants of the deceased.
3. On October 19, 2020, the court ( Njagi J) gave directions that the hearing of the summons/protest would proceed by way of *viva voce* evidence. The 1<sup>st</sup> and 3<sup>rd</sup> administrators presented their oral testimonies in respect of each of their protests. When the 2<sup>nd</sup> administrator/ applicant was due to present her evidence, her counsel informed the court that she was too sick to testify and made an application to proceed by way of affidavit evidence.
4. The other parties objected, and insisted on cross examining the applicant on her affidavit.
5. This ruling is in respect to the said objection.
6. Mr Onsango, for the applicant submitted that the applicant is too weak to appear in court. He placed before court a discharge summary from Shieywe Community Hospital Limited and St Elizabeth



Mission Hospital. The counsel further points out that the applicant has proposed a mode of distribution, to which the other parties have responded to, and therefore the court has enough material to make a determination. He further submits that the rules of evidence allow a party to rely on affidavit evidence when a party is unable to attend court.

7. Ms Andia for the 1<sup>st</sup> administrator/protestor submits that the medical reports submitted, indicate that the applicant is capable of attending court.
8. Mr Getanda for the 3<sup>rd</sup> petitioner pointed out that the applicant is conscious, and to that extent, she is capable of coming to court to testify. Counsel further submitted that the relevant sections of the Evidence Act cited by the applicant, are only applicable where a witness is completely incapable of attending court.
9. He further submits that the applicant is using the alleged sickness to deliberately delay the distribution of the assets of the estate. Mr Getanda further argues that if indeed the applicant is incapable of attending court, then it means she is incapable of administering the estate and she should therefore be removed as an administrator.
10. Mr Onsango, in response, submitted that sickness is not a ground for removing an administrator of the estate and that in any event, the issue before court is one of distribution, not administration, of the estate

### **Determination**

11. I have considered the submissions of the parties and perused the previous proceedings on this matter. On June 14, 2022, counsel for the applicant, made an application for the applicant to be exempted from attending court. This was the time the said prayer was being made before court. The grounds were the same as of now, that the applicant was unwell.
12. The court (Musyoka J) made a ruling, directing that the applicant be availed for cross examination, and the hearing of the cause was then adjourned to allow the applicant to attend court. Considering that this application had been made before court and the court had rejected it, what the applicant should have been doing therefore was to ask the court to review the orders of June 14, 2022 and demonstrate to the court why that said order should be reviewed.
13. The next schedule hearing was on 27.3.2023. Mr Onsango told the court that his client had lost her eye-sight and hence was unable to proceed. On that ground he sought for an adjournment, which was granted. The court also directed him to avail a medical report to back up these claims. The medical reports were availed on July 5, 2023.
14. The law on affidavit evidence is contained in order 19 rule 1 and 2 of the Civil Procedure Rules. It provides as follows; -
  - "1. Any court may at any time for sufficient reasons order that any particular fact may be proved by affidavit or that the affidavit of any witness may be read at the hearing on such conditions as the courts think reasonable; provided that, where it appears to the court that either party the bonafide desires the production of a witness for cross examination and that such witness can be produced, an order shall not be made authorizing the evidence of such witnesses to be given by affidavit.

2.



- (i) Upon any application, evidence may be given by affidavit, upon such terms, at the instance of either parties, order the attendance for cross examination of the deponent.
- (ii) such attendance shall be in court, unless the deponent is exempted from personal appearance in court or the court otherwise directs.”

15. The applicant has applied that her affidavit be adopted as evidence. The record shows that the applicant made a similar application on June 14, 2022 before Musyoka J but the court ordered that the witness be produced for cross examination.
16. When counsel for the applicant made the application on July 5, 2023 he was revisiting a matter that the court had already dealt with. Be that as it may, am mindful of the fact I did ask the applicant’s Advocate to avail further medical records to show the current medical condition of the applicant, after he had informed the court that his client had gone blind
17. The records submitted include a discharge summary from St Elizabeth Mission Hospital. It is dated June 9, 2023. it shows that the applicant was admitted between June 9, 2023 and June 15, 2023 she was diagnosed with malaria and gastritis. There is also an entry showing that she suffers diabetic and hypertension. She also had blurred vision.
18. The other document was issued by Sheywe Community hospital. The summary indicates that the applicant was suffering from H Phylori infection. Again the hospital confirms her diabetic condition and hypertension. She was admitted on May 31, 2023 and discharged on June 3, 2023.
19. The document is also another discharge summary from Sheywe Community Hospital. Again, the diagnosis is gastritis, diabetes and high blood pressure. The last document is a discharge summary showing the applicant was admitted on March 2, 2023 to March 7, 2023. the diagnosis is the same diabetes, gastritis and high blood pressure.
20. Having perused the documents none of the medical record shows that the applicant is blind. Blurred vision, which may be indicative of uncontrolled blood sugar in a diabetic is not the same as blindness. [\*Mirriam Webster Dictionary\*](#) defines it as “lacking clarity or sharpness”. Consequently, the applicant’s submission that his client has gone blind is not supported by the medical records availed.
21. On October 19, 2020, this court (Njagi J) had given directions that this case will proceed by way of *viva voce* evidence. According to order 19(1) in the [\*Civil Procedure Rules\*](#) aforesaid, where a party wishes to cross examine a witness then the court may decline the adoption of a witness affidavit.
22. The reasons for not attending court are not plausible. There is nothing to show that the applicant is bed- ridden, immobile, blind or suffering from any severe incapacitation that would render her incapable of coming to court and testifying. Consequently, the applicant’s application to have her affidavit adopted as her evidence is hereby denied.
23. The applicant is ordered to appear on court on a date to be given on the date of this ruling.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 28TH DAY OF JULY, 2023**

**S. CHIRCHIR**

**JUDGE**

In the presence of:-



Eric- Court Assistant

No appearance by the parties.

