



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Arvind Kanji Premji Patel (Deceased) (Succession Cause
336 of 2013) [2023] KEHC 26862 (KLR) (24 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 26862 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 336 OF 2013
G MUTAI, J
NOVEMBER 24, 2023**

BETWEEN

MOZA ABDILLAHI MOHAMED 1ST APPLICANT

KHALID ARVIND KANJI PATEL 2ND APPLICANT

KHALIDA ARVIND KANJI PATEL 3RD APPLICANT

AND

HASMUKH KANJI PREMJI PATEL RESPONDENT

RULING

1. Before the Court is a Notice of Motion dated 21st August 2023. The said application is brought under Rules 63(1) and 73 of the *Probate and Administration Rules*, Order 19, Rules 1 and 2 of the *Civil Procedure Rules* and Articles 25(c), 50 and 159 of the *Constitution* of Kenya, 2010. *Vide* the said application, the Respondent/Applicant seeks four orders to wit that: -
 1. The Respondent/Applicant be granted leave to file the further evidence and documents referred to in this application;
 2. The Respondent be granted leave to recall Moza Abdillahi Mohamed, the 1st Applicant, to be cross-examined on the said further evidence and documents;
 3. This Honourable Court be pleased to stay further proceedings in this succession cause pending the hearing and determination of this application; and
 4. Costs of the application be in the cause.
2. The application is grounded on the affidavits of Irfan Jafarali Kassam and the Respondent and the grounds set out in the body of the Motion. The grounds, in brief, are that the Applicants alleged that the Respondent forged the Will of his brother, Arvind Kanji Premji Patel (the deceased herein).



During the course of the hearing, an article was published in the Star Newspaper to that effect. Being aggrieved by the said action, the Respondent/Applicant instructed the firm of Jafarali & Co. Advocates to lodge a complaint with the Directorate of Criminal Investigations. Upon doing so, the said firm of advocates was informed that there had been previous complaints regarding the same matter. On requesting details of the earlier complaint, the Directorate of Criminal Investigations released a certified copy of documents relating to that previous complaint, among which was a letter dated 20th May 2015 written by Kiarie Kariuki & Co. Advocates, who were then acting for the 1st Applicant. In the said letter, Kiarie Kariuki & Co. Advocates requested for forensic examination of the will of the deceased herein to determine its authenticity.

3. The Respondent/Applicant stated that the 1st Applicant had in her previous affidavit of 13th February 2023, in paragraphs 17-19 thereof, stated that she was unaware that the deceased had left a will until her advocate, Mr Richard Ngari, searched the Kenya Gazette in November 2022 and found the Gazette Notice No 15555 dated 22nd October 2013 whereupon he located the impugned will in the Court file. It was averred that the assertions were repeated in the 1st Applicant's Supplementary Affidavit sworn on 13th March 2023 and during her testimony in Court on 19th April 2023.
4. The Respondent argued that the evidence sought to be admitted is fundamental to the propriety of these proceedings and to a fair trial as it brings into question the veracity of the evidence given by the 1st Applicant/Respondent on oath for it tends to show that the 1st Applicant/Respondent willfully lied under oath in her depositions and also during her oral testimony regarding the state of her knowledge of the existence of the said will. It was thus urged that it would be in the interest of justice to grant leave to the Respondent to adduce further evidence, for the same to be admitted, and for the 1st Applicant to be cross-examined. In the interim, further proceedings be stayed.
5. The affidavits had various documents, among which is the letter dated 20th May 2015, written by Kiarie Kariuki & Co Advocates to the Director, CID Headquarters, Nairobi and addressed to Mr Alex Mwongera. In the said letter, the writer stated in paragraph 1 that "we act for Moza Abdillahi Mohamed, who was the wife of the later Arvind Kanji Premji Patel". It is evident from the letter that the writer was aware of the will and also knew that the same had been presented in Court.
6. The application is opposed. The 1st Applicant/Respondent filed a Replying Affidavit sworn on 29th September, 2023. In the affidavit, she deposed that the application was filed to "waste precious judicial time, frustrate me and my co-applicants..." She stated that she had called four witnesses while the Respondent had called 8 out of the ten witnesses he had indicated that he would call. The matter was, therefore, at an advanced stage, "introduction of new evidence at this stage and recall of 1 witness only would be prejudicial to the entire proceedings so far and highly prejudicial to me and my co-applicants". The 1st Applicant/Respondent wondered why the Respondent was unhappy with the allegation of forgery, yet he had had an opportunity to call two expert witnesses. In any case, she argued, if the Respondent/Applicant was aggrieved by the newspaper reports, her remedy lay against the media houses involved, and not with her. She saw the application as being intended to allow the Respondent/Applicant to produce a new forensic document examiner report. That being so, it would be prejudicial to her if the said evidence was allowed. If the said evidence was allowed, it would be necessary to recall all witnesses who had testified.
7. She deposed that evidence attributed to Mr Kiarie Kariuki is inadmissible as the Court had already ruled on 22nd September 2023 on the issue of summoning the advocate and that the said decision "is subsisting and is yet to be set aside or appealed from". The Court was thus urged to dismiss the said application with costs.



8. On 22nd September 2023, upon reading my previous ruling, I issued direction in regard to the instant application. I directed parties to file and serve written submissions, which would then be highlighted on 26th October 2023.
9. In compliance with my directions, parties filed detailed written submissions, which I shall refer to below. The said submissions were highlighted on 26th October 2023.
10. The Respondent/Applicant submissions are dated 7th October 2023. In the submissions, the Respondent/Applicant stated that new documents sought to be adduced were unavailable to him before the date his advocates received the response of the Directorate of Criminal Investigations. Counsel for the Respondent/Applicant submitted that the documents sought to be produced were material and relevant to his case and had been deliberately withheld by the opponent. Their production could not, therefore, be said to be time-wasting.
11. The Respondent/Applicant relied on Section 146(4) of the *Evidence Act* to support his proposition that a Court may permit a witness to be recalled for further examination in chief or for cross-examination. The Court was referred to the decision of the Court of Appeal in *Wadhwa (as legal Representative of the Estate of Deshpal Omprakash Wadhwa v Mohamed & others*; CACA No. 33 & 148 of 2019 and also the decisions of the courts in *Re Estate of Pietro Rossini (deceased)* [2020]eKLR, *Pinnacle Project Ltd v Presbyterian Church of East Africa & Another* [2019]eKLR. Thus, I was urged to allow the application as the evidence sought to be introduced is material.
12. The submissions of the Applicants/Respondents are dated 13th October, 2023. Vide the said submissions; they submitted that the Notice of Motion dated 21st August 2023 be dismissed in its entirety. The Applicants/Respondent counsel gave the history of the matter. it was urged that on 24th May 2023, the Respondent filed two additional lists of documents without leave of Court, which were admitted. In admitting the two lists, the Court ordered “no further lists of documents or affidavit to be filed without leave of the Court”.
13. The Applicants/Respondents counsel identified four issues as coming up for determination to wit:
 1. Whether the Respondent/Applicant is entitled to discretionary leave to file the further evidence and documents introduced;
 2. Whether the Respondent/Applicant is entitled to a discretionary order to recall the 1st Applicant/Respondent to be cross-examined on the said further evidence and documents introduced;
 3. Whether the applicant is entitled to stay of proceedings of this succession cause; and
 4. How should this Court exercise its discretion?
14. Counsel for the Applicants/Respondents referred me to the Supreme Court decision in *Mohamed Abdi Mohamed v Ahmed Abdullahi Mohamed & 3 others* [2018]eKLR, where the applicable test to be applied by the Court when determining whether to permit the adduction of additional evidence was pronounced. Counsel submitted that the test hadn’t been met in this matter. He also relied on the case of *Raila Odinga & 5 others v IEBC & others* [2013]eKLR, wherein it was stated in the context of presidential petitions that:-

“the other issue the court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small and limited so that the other party is able to respond to it, then the



Court ought to be considerate, taking into account all aspects of the matter. However, if the evidence is such as to make it difficult or impossible for the party to respond effectively, the Court must act with abundant caution and care.”

15. On whether there should be a cross-examination of the 1st Applicant/Respondent, the Applicants/ Respondent’s counsel urged me to disallow the said prayer. I was referred to the decision of the High Court in *Nyoro Construction Co. Ltd v Prashant Projects Limited and Kenya Pipeline Ltd* [2015]eKLR, where the Court stated that

“accordingly, cross-examination should only be ordered on matters which are deposed and not others, and the Court should take firm control of the proceedings to ensure these boundaries are not exceeded”.

16. During the course of the prosecution of the instant application hearing of the main matter stalled. In essence, the prayer for a stay of proceedings became moot. I will therefore not deal with it.

17. Counsel urged me to exercise my discretion judiciously and not allow the application.

18. I have considered the application, the response thereto and the oral and written submissions of the parties hereto.

19. In my view, there are two issues that require my determination. These are: -

1. Whether, in the circumstances of this case, the Court should allow the adduction of additional evidence; and
2. Whether the 1st Applicant/Respondent should be recalled for further cross-examination.

20. It would appear to me that the 1st Applicant made very categorical assertions in her written depositions and oral evidence that she was unaware of the will of the deceased prior to the inquiry made by her advocate in 2022. These explicit assertions are contradicted by what is contained in the letter purported to have been written by Kiarie Kariuki in 2015. If the letter is genuine, then the 1st Applicant/ Respondent would have perjured herself.

21. In deciding whether I should allow additional evidence, the Supreme Court’s decision in *Mohamed Abdi Mohamed v Ahmed Abdillabi Mohamed and 3 others* [2018]eKLR would guide me. The Court stated that: -

“(79) Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by Counsel, our own experience in electoral litigation disputes and the law, We conclude that we can, in exceptional circumstances and on a case by case basis exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:

- (a) The additional evidence must be directly relevant to the matter before the Court and be in the interest of Justice;
- (b) It must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
- (c) It is shown that it could not have been obtained with reasonable diligence for use at the trial, was within the knowledge of, or



could not have been produced at the time of the suit or Petition by the Party seeking to adduce the additional evidence;

- (d) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has direct bearing on the main issue in the suit;
- (e) The evidence must be credible in the sense that it is capable of belief;
- (f) The additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
- (g) Whether a Party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
- (h) Whether the additional evidence discloses a strong prima facie case of willful deception of the Court;
- (i) The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence;
- (j) The Court must find the further evidence needful;
- (k) A Party who has been unsuccessful at the trial must not seek to adduce additional evidence to make a fresh case on appeal, fill up the Omissions or patch up the weak points in his/her case.
- (l) The Court will consider the proportionality and prejudice of allowing the additional evidence. This requires the Court to assess the balance between the significance of the additional evidence, on the one hand and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.

[80] We must stress here that this Court even with the application of the above stated principles will only allow additional evidence on a case by case basis and even then sparingly, with abundant caution.”

- 22. Although the above test is applicable to appeals, the principles, in my view, apply to situations such as this when a trial court is called upon to take additional evidence after a party has testified.
- 23. Applying the above test, has a case been made for the adduction of additional evidence? Prior knowledge of the existence of the will is relevant and in issue in this matter. Also relevant is the propriety of the proceedings. Perjury is a very serious offence as it undermines the administration of justice. In determining this matter, the Court will have to establish whether the witnesses who testified before it did so truthfully or that there was an attempt at deception. The Respondent/Applicant demonstrated that he was only able to access evidence after he made a complaint to the DCI following media reports that cast aspersions against him. This assertion was not controverted. The evidence appears to me to be credible as it has come from the Directorate of Criminal Investigations. It is not voluminous as to prejudice the Applicants/Respondents. In the circumstances, I find and hold that it would be fair and



just for the evidence sought to be adduced by the Respondent/ Applicant to be admitted. The evidence would allow this Court to determine whether its proceedings have been abused.

24. Section 146(4) of the *Evidence Act* provides that: -

“The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination, respectively.”

This provision would appear to me to be permissive, allowing recall of the witnesses so that truth can be established.

25. In this case, recalling the 1st Applicant/Respondent would enable the court reconcile the conflict between her written depositions and oral testimony and the evidence that has just become available.

26. Allowing the said application will serve the interests of justice. The 1st Respondent will also get an opportunity to explain the circumstances under which the letter dated 20th May 2015 was written and won't, therefore, be prejudiced.

27. I thus allow the application and-

- a. Order that the 1st Applicant be recalled;
- b. Leave is granted to the Respondent/Applicant to adduce additional evidence;
- c. I make no orders as to costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED THIS 24TH DAY OF NOVEMBER 2023 AT MOMBASA VIA MICROSOFT TEAMS

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GREGORY MUTAI

JUDGE

In the presence of: -

Ms. Okata for the Respondent/Applicant

Mr. Ngure for the Applicants/Respondents

Arthur – Court Assistant

