



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**FAMILY DIVISION**  
**SUCCESSION CAUSE NO. 2361 OF 2014**

**IN THE MATTER OF THE ESTATE OF KARANJA KAGO (DECEASED)**

MARY WANJIKU KARANJA.....PETITIONER/ADMINISTRATOR

VERSUS

GEORGE KAGO KARANJA.....1<sup>ST</sup> OBJECTOR/RESPONDENT

DUNCAN MWEBIA ARIMI.....2<sup>ND</sup> OBJECTOR/RESPONDENT

AND

CHARLES KIHAGI THUAH.....1<sup>ST</sup> CAVEATOR

OMEGA COMMERCIAL SERVICES LTD.....2<sup>ND</sup> CAVEATOR

**RULING**

1. Before this Court for determination is the Chamber summons dated **19<sup>th</sup> July 2021** by which **MARY WANJIKU KARANJA** the Petitioner/Administrator seeks orders that-

**“1. The orders made and/or directions by the Honourable court be vacated and in lieu thereof. The summons for confirmation of Grant be dispensed with by way of viva voce evidence with parties at liberty to call witnesses.**

**2. The costs of this Application be provided for.**

**3. Such further and other reliefs be granted to the applicant as the court deems fit and expedient in the circumstances.”**

2. The Application which was premised upon **Article 50 (1)** of the **Constitution of Kenya 2010**, **Rule 49** and **Rule 73** of the **Probate and Administration Rules** was supported by the Affidavit of even date and Further Affidavit dated **1<sup>st</sup> September 2021** sworn by the Petitioner.

3. The 1<sup>st</sup> Objector/Respondent **GEORGE KAGO KARANJA** opposed the Application through the Replying Affidavit dated **10<sup>th</sup> August 2021** sworn by **MUKAYA KIMANI** an Advocate of the High Court of Kenya. **DUNCAN MWEBIA ARIIMI** the 2<sup>nd</sup> Objector swore the Replying Affidavit dated **10<sup>th</sup> August 2021** opposing the Application.

4. **CHARLES KIHAGI THUAH**, the 1<sup>st</sup> Caveator and **OMEGA COMMERCIAL SERVICES** the 2<sup>nd</sup> Caveator also opposed the Application through the Replying Affidavit dated **6<sup>th</sup> August 2021** sworn by **JOSEPH KARANJA WAMBUGI**, the Managing Director of the 2<sup>nd</sup> Caveator.

5. The Application was canvassed by way of written submissions. The Applicant filed the written submissions dated **1<sup>st</sup> September 2021**. The 1<sup>st</sup> Objector filed written submissions dated **21<sup>st</sup> October 2021**, whilst the 2<sup>nd</sup> Objector filed submissions dated **6<sup>th</sup> September 2021**. The 2<sup>nd</sup> Caveator filed submissions dated **6<sup>th</sup> September 2021**.

## **BACKGROUND**

6. The Succession Cause relates to the estate of **KARANJA KAGO** (hereinafter 'the **Deceased**) who died intestate on **25<sup>th</sup> June 2014**. Grant of letters of Administration were made to the Administrator **Mary Wanjiku Karanja** on **7<sup>th</sup> January 2015**. The Petitioner then filed a summons for confirmation of Grant dated **25<sup>th</sup> September 2019**. The schedule of distribution excluded the 1<sup>st</sup> and 2<sup>nd</sup> Caveators who alleged that they had purchased **four (4)** acres of land from the Deceased. They filed an Affidavit of Protest dated **16<sup>th</sup> December 2019**. One **Duncan Mwebia Arimi** who also claimed to have purchased land from the Deceased filed a Protest **dated 10<sup>th</sup> December 2019**.

7. On **17<sup>th</sup> December 2019**, **Hon Lady Justice Ali-Aroni** directed that the protests would be argued by way of Affidavits. She directed the parties to file and exchange written submissions. However, the Petitioner/Administrator then filed the present application seeking to have the protests heard by way of *viva voce* evidence.

8. The Petitioner submits that in consultation with her Advocate, she has identified issues, which will require cross-examination of the Protestors. That the matter is very complex and contentious in nature that it is only just and prudent that the protests be argued by way of oral evidence as opposed to written submission where parties would have no opportunity to cross-examine.

9. The Petitioner further claims that the Objector **George Kago Karanja** has sold various pieces of land and is facing charges in court a matter which the Petitioner would seek to cross-examine him on in open court.

10. Finally, the Petitioner submits that she will be greatly prejudiced if the matter proceeds by way of written submissions as she will be denied an opportunity to cross-examine the Caveators and Objectors on the authenticity of the documents they have produced in court. For the above reason the Petitioner prays that the matter be heard by way of oral evidence.

11. The Respondents in opposing the application submit that directions on filing of written submissions were made way back in **August 2020**. That the parties have all complied and have filed their written submissions, all that remains is highlighting of said submissions.

12. They argue that the Petitioner has not previously challenged the authenticity of the documents which have been produced in court and that this is just a ploy by the Petitioner who is the Administrator of the estate to delay the matter, which has already dragged in court for over **seven (7)** years. Lastly, the Respondents argue that in light of the prevailing **Covid-19** Pandemic it would be safer to have the matter canvassed by way of written submissions.

13. Finally the Objectors/Caveators all urge the court to dismiss this application and to determine their Protests/Objections on the basis of the written submissions already filed in court.

## **Analysis and Determination**

14. I have carefully considered the application before court, the Replies filed thereto as well as the written submissions filed by the parties.

15. **Section 47** of the **Law of Succession Act** provides as follows:-

**“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient...”**

16. Similarly **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”.**

17. It is a fact that the Judge who previously had conduct of this matter gave directions that the Protests/Objections would be argued by way of written submissions. However, upon taking over the matter, I have perused the file and I note that there are several Protest/Objections to the confirmation of Grant. Critical issues emerge for determination such as whether payment was made to the Deceased for the land allegedly purchased from him. Such issues would require cross-examination of the witness claiming to have made such payment.

18. I am guided by the decision in the case of **GERALD MACHARIA NJOGU vs SAMUEL MACHARIA MURIMI [2016] eKLR**, where in allowing a similar application **Hon Justice Mativo** held as follows: -

**“The law of evidence encompasses the rules and legal principles that govern proof of facts in a legal proceeding. These rules determine what evidence must or must not be considered by the court in reaching its decision, and sometimes, the weight that may be given to that evidence. The law of evidence is also concerned with the quantum, quality and type of proof needed to prevail in litigation.**

**The quantum of evidence is the amount of evidence needed; the quality of proof is how reliable such evidence should be considered. This includes such concepts as hearsay, authentication, admissibility, reasonable doubt, and clear convincing evidence.**

**When a dispute reaches court, there will always be a number of issues which one party will have to prove in order to**

persuade the court to find in his or her favour. The law must ensure certain guidelines are set out in order to ensure that evidence presented to the court can be regarded as trustworthy.

**I am fully aware that affidavits are an alternative to oral evidence and are often used particularly in applications. However, the law provides that a deponent in an affidavit can be cross-examined on oath. Further, if credibility is at issue, or if crucial information is not obtainable through the affidavit evidence, then oral evidence will be required as may be necessary. However, where the facts are uncontroversial, an oral hearing is not necessary...The advantage of oral evidence is that the witness is available for cross-examination, and thus the strength of evidence may be tested. That is why reliable viva voce evidence is sometimes given more weight". (own emphasis)**

19. I do agree with the Petitioner that there are weighty issues in this matter, which would require examination by way of oral evidence. The purpose of any court hearing is to get to the truth of the matter. At times this will require that deponents of Affidavits be cross-examined in order to test their evidence.

20. I am not persuaded that this application is accentuated by malice or by a desire to delay the determination of this succession cause. The Respondents will not suffer any prejudice as they too will be allowed to call their own witnesses and will have an opportunity to cross-examine the Petitioner and any witnesses she may call.

21. Accordingly I do allow this application and make the following orders.

(i) The direction/orders made on **17<sup>th</sup> December 2019** to the effect that the Protest to the summons for confirmation of Grant be determined by way of written submissions is hereby set aside.

(2) The Protests will be determined by way of *viva voce* evidence through a hearing in open court at which all parties shall be at liberty to call witnesses.

(3) A hearing date will be allocated on **Priority basis**.

**DATED IN NAIROBI THIS 11<sup>TH</sup> DAY OF MARCH 2022.**

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**MAUREEN A. ODERO**

**JUDGE**