



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 243 OF 2017

ESTATE OF WASHINGTON ELIAKIM OLWENY *alias* WASHINGTON OLWENY ELIAKIM *alias* WASHINGTON OLWENY  
ODAWA (DECEASED)

PHELESIA AKOTH OLWENY.....1<sup>ST</sup> PETITIONER

EDWIN OTIENO OLWENY.....2<sup>ND</sup> PETITIONER

TIMOTHY OCHIENG OLWENY.....3<sup>RD</sup> PETITIONER

VERSUS

NORAH ATIENO OLWENY.....1<sup>ST</sup> OBJECTOR

ANN WANJIRU.....2<sup>ND</sup> OBJECTOR

ALLAN ONYANGO OLWENY.....INTERESTED PARTY

RULING

1. In the course of cross examination of the first objector herein by Mrs. Gichuru, counsel for the petitioner, issues have arisen as to the contents of the certificates of birth of her children, and related documents including those marked as T005 and T006. There are issues as to whether there were notifications of birth, who gave the primary information that was entered into those documents, what are the correct dates of birth and the entries of names of parents entered therein among others.

2. As a result counsel for the petitioner and for the interested party Prof. Wabwile, have made the application that the Registrar of Births and Deaths be summoned to appear and produce the primary documents and related evidence with regard to the contents of these documents. Mrs. Gichuru has relied on **Sections 34, 38, 80(2) of the Evidence Act Cap 80 Laws of Kenya**.

3. This application is opposed by counsel for the 1<sup>st</sup> objector Mr. Aim, on the ground that no basis has been laid for calling the Registrar. That they prepared their case on the basis of the material placed before court by the two parties and the evidence of the Registrar of Births and Deaths was not one of them. That any document produced by the Registrar would be prejudicial to their client's case.

4. That this is an effort to fill in gaps of the evidence that is lacking on their part because pleadings were closed on 25<sup>th</sup> September 2019 when parties took directions.

5. That the petitioner had these documents but chose not to produce them, and 1<sup>st</sup> objector ought not to suffer because their design on ignorance.

6. Counsel for petitioner in rejoinder submitted that it is the Registrar who holds custody of documentation related to certificates of birth, as per **Section 80(2) of the Evidence Act**, and the petitioner could not have produced them. In any event the court has the power to summon the Registrar to produce the said documents.

7. It was submitted that the issues relating to the certificates of birth were also issues in a ***Petition No. 14 of 2020***, and ***Nakuru Chief Magistrate's Criminal Case Number 1284 of 2019***. However no proceedings, charge sheet was placed before me to produce sufficient detail for reference. Neither was the issue of the jurisdiction of this court raised with regard to the determination of the issue as raised before me in view of those two matters.

8. I requested parties to supply me with relevant authorities and skeletal submissions on the issue. Counsel for the petitioner has filed list of authorities and case digest on 27<sup>th</sup> May 2021, she cited two (2) cases;

**i. Parikien Ole Naikuni Oseur vs Agricultural Finance Corporation & Another [2019] eKLR** where the court citing Section 22(b) of the Civil Procedure Act and Section 38 of the Evidence Act summoned the Land Registrar, as the custodian of all land documents in a given locality, to appear and produce documents. This, on the basis that an entry in a public/other official book, register or record, stating a fact in issue/relevant fact, made by a public servant in the discharge of his official duty, it itself admissible.

**ii. BKN & Another vs JMK [2019] eKLR** where the Registrar of Births and Deaths was summoned to produce primary (foundational documents) for the certificates of birth produced by one of the claimants to the estate of the deceased in that case.

9. Counsel for the 1<sup>st</sup> objector chose to rely on their submissions.

10. I have carefully considered the rival submissions, and the only issue is whether it would be prejudicial and unfair to summon the Registrar of Births and Deaths to produce the foundational documents in relation to the certificates of birth of the four children of the 1<sup>st</sup> objector.

11. The **Births and Deaths Registration Act Cap 149** makes the following relevant provisions:

It defines the **“registrar”** to mean a **registrar appointed to register births and deaths in any area or to register births and deaths occurring outside Kenya, and includes a deputy registrar;**

It also states at **Section 7** what the duty of that Registrar shall be :

**“(I) It shall be the duty of every registrar to keep a register of births and a register of deaths and to enter therein, respectively, the prescribed particulars of every birth and death notified to him.”**

The Act defines the **“prescribed particulars”** with regard to registration of any birth to mean **any birth, the name, sex, date and place of birth, and the names, residence, occupations and nationality of the parent**

12. The Mode of Registration of Births is set out at **Section 10** of the Act:

**“Every person notifying the birth of a child shall, to the best of his knowledge and ability, give the prescribed particulars, which shall be entered forthwith by the registrar in the register, and the person notifying the birth shall certify to the correctness of the entry by signing or, if he is illiterate, by fixing his mark to the register.”**

13. Before **Section 12** of the Act was declared unconstitutional in **NSA & another v Cabinet Secretary for, Ministry of Interior and Coordination of National Government & Another [2019] eKLR**. It provided as follows: *Entry of father in register*

**“No person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or, in accordance with some recognized custom.”**

14. Further **Rules 9 and 10 under the Act** provide for form of the register book and the duty of the registrar to ensure that an entry made in the register book is complete in every respect before it is signed by the informant.

15. The submissions by counsel are considered in the light of the above legal provisions.

16. Evidently the issue of the other proceedings going on with regard to different aspects of the Certificates of Births for these four children have not been said to impact on my determination of the issues before me. And as pointed out herein above it has not been submitted that by virtue of the existence of those matters this court has no jurisdiction to determine this issue.

17. In any event the evidence of certificates of birth is at the heart of the claim by the 1<sup>st</sup> objector in establishing her objection in these proceedings that some of her children were sired by the deceased and for others the deceased personally applied to amend their Certificates of Birth. In addition she has also testified that that the 1<sup>st</sup> petitioner gave some of the information that went to the issue of the Certificates of Birth, and the deceased personally submitted changes to some of the certificates of birth. Counsel for the objector has submitted that calling the Registrar to testify would be prejudicial to the 1<sup>st</sup> objector and especially so because the petitioner appears to have had certain documents in this regard which she kept to herself. It is the Petitioner’s position that she does not have any such documents as only the Registrar of Births and Deaths would have them and that is why it is only that office that can come to testify on the matter.

18. **Section 80 of the Evidence Act** lays the basis for the calling of the Registrar to come and testify. It provides that ;

**“(1) Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and**

subscribed by such officer with his name and his official title, and shall be sealed whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

(2) Any officer who by the ordinary course of official duty is authorized to deliver copies of public documents shall be deemed to have the custody of such documents within the meaning of this section.”

19. Further **Section 38 of the Act** provides that this information is a public record. It states;

**“An entry in any public or other official book, register or record, stating a fact in issue or a relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself admissible.”**

20. Clearly the Registrar is required by law to maintain a register of births in the prescribed manner. The information to be entered in the register is also prescribed. It is also the Registrar who issues abstracts from the register in the form of certificates of birth and if any dispute arises as to the contents of that those certificates and or related documents bearing information on birth registration, it is the Registrar who can clarify that issue. The Registrar would have the information and foundational documents relating to the entries in the register.

21. Hence, it would not only be prudent and but also in the interests of justice to call upon the Registrar of Births and Deaths, to appear before the court and produce that evidence.

22. The 1<sup>st</sup> objector will have the opportunity to cross examine the witness.

23. I find, for the foregoing reasons therefore, that it would not be unfair or prejudicial to the 1<sup>st</sup> Objector for the Registrar of Births and Death to appear in court and produce the evidence in his custody with regard to the registration of the births of the 1<sup>st</sup> objector’s four children.

24. The application is allowed and the following orders issue:

**a. Summons to issue to the Principal Registrar of Births and Deaths to produce the evidence in his custody with regard to the registration of the births of the four children of the 1<sup>st</sup> Objector.**

**b. To enable (a) the Principal Registrar of Births and Deaths be supplied with copies of the relevant Certificates of Birth in the court file.**

**c. Upon receipt of the documents stated in (b) the Principal Registrar of Births and Deaths to supply the copies of the said documentary evidence in his custody to court within thirty (30) days hereof.**

**d. The parties to obtain the copies of the documentary evidence above from the court.**

**e. This order be served on the Principal Registrar of Births and Deaths.**

**f. Orders accordingly.**

**DATED AND DELIVERED VIA ZOOM THIS 31<sup>ST</sup> DAY OF MAY 2021**

**MUMBUA T. MATHEKA**

**JUDGE**

**In the online presence of:**

Edna Court Assistant

Mr. Aim and Mr. Biko 1<sup>st</sup> Objector

Ms Kinuthia for 2<sup>nd</sup> Objector

Mrs. Gichuru for the Petitioner

Prof. Wabwile for 1<sup>st</sup> Interested Party