



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**SUCCESSION CAUSE NO. 4 OF 2019**

**Consolidated with**

**SUCCESSION CAUSE NO. 8 OF 2019**

**GRACE NJERI GICHUHI.....1<sup>ST</sup> APPLICANT**

**GODFREY KIHUHA GICHUHI.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**MOSES MUIRU GICHUHI.....EXECUTOR/1<sup>ST</sup> RESPONDENT**

**JENIFFER MUTHONI GICHUHI.....2<sup>ND</sup> RESPONDENT**

**MICHAEL GICHUHI WANJIKU.....3<sup>RD</sup> RESPONDENT**

**JUDY WANJIKU GICHUHI.....4<sup>TH</sup> RESPONDENT**

**JANE WANYUA GICHUHI.....5<sup>TH</sup> RESPONDENT**

**RULING**

1. This case is part heard and the hearing is ongoing. Accordingly, I shall avoid detailed reference to the contestations of the parties herein in this Ruling. Suffice it to say that there is a Will allegedly of the deceased in this succession cause, **MICHAEL GICHUHI MUIRU deceased**, which is contested by **GRACE NJERI GICHUHI** (hereinafter **Grace**) and **GODFREY KIHUHA GICHUHI** (hereinafter **Godfrey**). After the preliminary matters were brought to court, starting as at 30<sup>th</sup> January, 2019, the trial of this matter commenced on 23<sup>rd</sup> March, 2021.

2. Before court is an application filed by Godfrey and Grace dated 27<sup>th</sup> July, 2021. By that application, it is sought that this Court do allow Godfrey and Grace to file further documents to wit, a handwriting expert report dated 16<sup>th</sup> July, 2021 and various receipts. The application is brought under the provisions of Section 47 and 70 of the Succession Act, Cap 160, and Rule 73 of the Probate & Administration Rules; under the provisions of Chapter II Part IX and Chapter V Part II of the Evidence Act; and Articles 50 and 159 of the Constitution.

3. That application is supported by the affidavit of Godfrey. By that affidavit, Godfrey referred to a letter written by his learned counsel, dated 14<sup>th</sup> February, 2020. The letter is addressed to Directorate of Criminal Investigations (DCI). By that letter, the learned advocates had this to say:-

**“DATE: 14<sup>TH</sup> FEBRUARY, 2020**

**THE DIRECTORATE OF CRIMINAL INVESTIGATIONS**

**P.O. BOX 30036-00100**

**KIAMBU ROAD**

NAIROBI

Dear Sir, "BY HAND DELIVERY"

RE: ESTATE OF MICHAEL GICHUHI MUIRU KIAMBU HIGH

COURT SUCC CASE NO. 4 OF 2019

FURTHER EXAMINATION OF DOCUMENTS

Kindly refer to the above matter and the report prepared by your offices and filed in court on 24.01.2020 in this matter.

In the said matter one private document examiner Emmanuel Karisa Kenga has prepared a report which purports to state that the signature on the purported Will is genuine and that of the deceased.

We would like your kind offices to re-examine the documents considered by said examiner in light of other documents herewith provided and with us an opinion.

We enclose the following documents;

a) Affidavit of Emmanuel Karisa Kenga sworn on 30.7.2019

b) Report of Emmanuel Karisa Kenga dated

21.05.2019

c) Clear copy of Michael Gichuhi Muiru National

Identity card.

d) Documents obtained from Registrar of Companies respect of Sangilia Wine Manufacturers Limited bearing several signatures of the deceased clearly highlighted.

e) Original spoilt cheque number 000086 dated 19.07.2017 drawn from his KCB account with had been written by the deceased.

We are ready to meet any charges.

Please expedite the report noting that the case of (sic) for hearing on 24.03.2020

Yours faithfully,

Kinyanjui, Kirimi & co Advocates

Signed

KIRIMI DAVID"

4. Godfrey deponed by his affidavit that DCI released to his advocate its report on 26<sup>th</sup> July, 2021, which report he now seeks he be allowed to file in this matter.

5. The application is opposed by **Jeniffer Muthoni Gichui (Jeniffer)**. Jeniffer deponed that this matter is part heard and the applicant did not inform the court of intention to file further documents; that prior to commencement of the trial the applicants were accorded 21 days to file pleadings, witness statements and necessary documents to be relied upon at the hearing; that accordingly the application to allow the filing of a handwriting expert report is an afterthought and attempt to derail hearing of this matter; and allowing the filing of the report at this stage would entail recalling of the witnesses who had testified.

#### ANALYSIS

6. The applicant's counsel cited Article 50 of the Constitution which Article guarantees fair hearing of disputes and also cited Article 159 of the Constitution which Article, amongst other rights, guarantees justice to be done to all and also provides that justice should not be delayed.

7. Learned counsel for the applicants relied on the decision of **Francis GITHINJI KAROBIA VS. STEPHEN KAGENI GITAU (2014) eKLR** where the learned Justice F. Gikonyo faced with an application by the defendant to file and serve witness statements and further supplementary list and bundles of documents and list of witnesses stated thus:-

**“[7] His conduct is a complete negation of the overriding objective of the law of attaining an expeditious, affordable, proportionate and just disposal of dispute. Intuitively, I should deny them an opportunity to file any other statement on account of their conduct. Nevertheless, the Constitution says something else, and as I stated earlier, I will decide this case purely on the basis of the desire to serve substantive justice not on the basis of the conduct of the Defendant which has been exemplary and admirable in the breach of court orders and all rectitude in expeditious adjudication of cases.”**

8. The applicant’s learned counsel also relied on the case of ***KAM COMPANY LIMITED VS. SHELTER AFRIQUE & ANOTHER (2015) eKLR*** where Justice E.K.O. Ogola considering an application to allow the plaintiff leave to file additional documents out of time and after the close of the plaintiff’s case and on granting the prayer stated:-

**“To address the issue, it is now clear that under the law all the parties will be afforded a fair opportunity to access the seat of justice. A party who has failed to file important documents in support of his case will be allowed to do that upon application if good reasons are provided. It is the Applicant’s case that the documents they seek to produce relate to the ownership of the suit premises as late as at the 19th June 2014...”**

**The main opposition to the application is that the said documents to be admitted are irrelevant to the Plaintiff’s case and shall misled the court, and prejudice the Defendants. It is not stated how the Defendants would be prejudiced, but the Applicant has stated that the Defendant will be given a chance to respond to the same. In this regard, I do not foresee, any prejudice to be suffered by the Defendant which cannot be remedied by costs.”**

9. Learned counsel for the applicant also stated that the applicant wishes to produce documents that had been considered by the documents examiner, previously, which were not attached to the earlier handwriting expert report.

10. In opposing the application the learned advocate for the respondents cited the case ***SAMUEL KITI LEWA VS. HOUSING FINANCE CO. OF KENYA LTD & ANOTHER (2015) eKLR*** where the plaintiff sought to re-open his case to produce a document which would discount the one produced by the defendant. The plaintiff’s and defendants’ case had in that case been heard fully. The court in that case stated:-

**“19. The Plaintiff in seeking to reopen his case, other than saying that he wished to testify further and wished to call the Land Registrar did not explain why he did not sufficiently testify when he initially gave evidence and why the Land Registrar is to be called to testify after the Defendants had closed their case.**

**20. The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also such prayer for re-opening of the case will be defeated by inordinate and unexplained delay.”**

11. The respondents also cited the case ***NAYAN MANSUKHLAL SALVA VS. HANIKSSA NAYAN SALVA (2019) eKLR*** where the court consider an application for adducing further evidence at the hearing of an appeal. Justice Asenath Ongeri had this to say:-

**“In the *WANJE V SAKWA (supra)* case, the court dismissed an application for additional evidence because most of the evidence sought to be admitted was not new, having been used before the trial court and because the applicants were merely trying to have a second bite at the Cherry. Courts have also disallowed such applications where the evidence sought to be admitted was in possession of the applicant at the time of the hearing before the trial court See *CHEPKOECH SALAT V JOSEPHINE CHESANG CHEPKWONY SALAT CA APP 211/2014*.**

**9. The Court of Appeal further said in the case referred to above that:-**

**‘In *WALTER JOE MBURU V ABDUL SHAKOOR SHEIKH & 3 OTHERS CIVIL APPEAL NO. 195 OF 2002 [2015] ECLR* it was stated:-**

**‘Having considered the application, the various affidavits for and against it, as well as the submissions made and authorities cited, we come to the inescapable conclusion that this application for the taking of additional evidence is wholly devoid of merit. First, the taking of additional evidence lies in the discretion of the Court and is intended to aid in the attainment of the ends of justice. Being a plea to the Court’s discretion, we take the view that the length of time it takes to bring the application, in this case well over a decade, is a relevant consideration that militates against a favourable exercise of our discretion. The delay is inordinate and no attempt was made to explain it. Its timing bears the hallmarks of dilatoriness and is not in keeping with the salutary object of expeditious justice.**

**...that the principal rule has been that there must be exceptional circumstances to constitute sufficient reason for receiving fresh evidence at this stage.”(emphasis added).**

12. The applicants by approaching this Court with their application seeks to invoke the exercise of this Court’s discretion to permit them to file the handwriting expert report dated 16<sup>th</sup> July, 2021.

13. On 26<sup>th</sup> September, 2019 Justice C. Meoli directed the parties to file their witness statements and further directed that the hearing of this matter would proceed by parties adopting their affidavits and being cross examined. The learned Judge also ordered that the hearing would

contemporaneously be the proving of the deceased's Will in respect of the probate cause. The hearing commenced on 23<sup>rd</sup> March, 2021. On that day, all counsels stated that they were ready to proceed. No counsel informed the court that any further documents would be filed. On that day this Court received the evidence of the counsel who prepared the deceased's alleged Will. The objection raised hereof by Grace and Godfrey is that the Will is not of the deceased and that the signature thereof is not the deceased's signature.

14. The applicants on 24<sup>th</sup> January, 2020 filed in court their handwriting expert report by *Chief Inspector Alex Mwangera* dated 20<sup>th</sup> May, 2019. The respondents had filed their handwriting expert report by *Emmanuel Karisa Kenga* earlier on, on 17<sup>th</sup> September, 2019.

15. By the present application, the applicants seek permission to file yet another report by *Chief Inspector Alex Mwangera* dated 16<sup>th</sup> July, 2021. The counsel for the applicants submitted that he forwarded the report of *Emmanuel Karisa Kenga* the respondent's handwriting expert on 14<sup>th</sup> February, 2020 to *Chief Inspector Alex Mwangera* for re-examination and production of another report. That is the report which is now sought to be produced by the present application. The applicants through the affidavit of Godfrey, in support of the present application deponed as follows:-

***“10. THAT it is in the interest of justice that we be allowed to adduce this important pieces of evidence which comprises of handwriting expert report, documents examined and this affidavit.***

***11. THAT the respondent (sic) handwriting expert witness has not testified in this matter and he will have an opportunity to comment on the report sought to be produced.***

***12. THAT the respondent has not closed their case and they will be at liberty to file further evidence or call any other witness of their choice to counter the evidence sought to be adduced.”***

16. The above is the totality of what the applicants brought to this Court requesting the court to exercise its discretion in their favour. In my view, there is an unexplained delay in filing the present application. As stated before, applicants filed their handwriting expert report on 24<sup>th</sup> January, 2020 which report is dated 20<sup>th</sup> May, 2019. The filing of that report was after the respondents had filed theirs on 17<sup>th</sup> September, 2019. If indeed the present report the applicants seek to file is in response to the respondents' handwriting expert report, there is undoubtedly an obligation on the part of the applicants to explain why there was a delay from September, 2019 to July, 2021. I take into account that applicants' counsel forwarded the respondents' hand writing expert report to *Chief Inspector Alex Mwangera* on 14<sup>th</sup> February, 2020. There was also need to explain why that police officer did not produce his report but waited until the respondents had called a vital witness to their case, the advocate who drew the alleged Will. No explanation was given for the delay.

17. What does seem clear to me is that there was lack of diligence on the part of the applicants to file the document they now seek to file. The prevailing jurisprudence is that when the court exercises discretion for one party that exercise of discretion should not result in prejudice to the other party. In my view, the respondents having concluded with the evidence of the advocate who drew the alleged will there will be prejudice caused by the applicants' delay in filing the second hand writing expert report. The Supreme Court in the case *PARLIAMENTARY SERVICE COMMISSION VS. MARTIN NYAGA WAMBORA & OTHERS (2018) eKLR* considered the discretion set out in **Rule 53** of the Supreme Court Rules and cited the following from the court's previous decision:-

***“This discretion is a very powerful tool which in our view should be exercised with abundant caution, care and fairness; it should be used judiciously and not whimsically to ensure that the principles enshrined in our Constitution are realized.”***

18. I dare say that statement above is very applicable to the application before me. I need to be cautious in exercising the discretion the applicants seek. The exercise of discretion by this court cannot be on whimsical grounds. It has to be supported by grounds and reasons why documents were not filed before the trial started.

19. The applicants sought to invoke Article 159 of the Constitution arguing that the Court should grant them their prayers to ensure dispensation of substantive justice. That same Article however, also requires that justice should not be delayed. The Supreme Court cautioned the overlooking of procedures, in cases, while relying on Article 159 of the Constitution in the case *MOSES MWICIGI & 14 OTHERS VS. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 5 OTHERS (2016) eKLR* as follows:-

***“[65] This Court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.***

***[66] Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159 (2) (d) of the Constitution, which proclaims that, “... courts and tribunals shall be guided by ... [the principle that] justice shall be administered without undue regard to procedural technicalities”. This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the Courts.”***

## **DISPOSITION**

20. For the reasons set out above, the Notice of Motion dated 27<sup>th</sup> July, 2021 is devoid of merit and is dismissed with costs.

21. Orders accordingly.

**RULING DATED AND DELIVERED AT KIAMBU THIS 28TH DAY OF SEPTEMBER, 2021.**

**MARY KASANGO**

**JUDGE**

Coram:

Court Assistant : Ndege

For Petitioner in Succ. C. No. 8 of 2019 – Mr. Musyoka, Mrs. Karanu and Mr. Nyamu

For Petitioner in Succ. C. No. 4 of 2019 – Mr. Kirimi

**For Beneficiaries:-**

Jeniffer Muthoni :-

Mr. Maina

Estate of Eddah Wajiku :-

**COURT**

Ruling delivered in open court.

**MARY KASANGO**

**JUDGE**