



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 955 OF 2013

IN THE MATTER OF THE ESTATE OF ROGER BRYAN ROBSON

(DECEASED)

PROVER HAUNT LIMITED1ST OBJECTOR

AGNES KAGURE KARIUKI 2ND OBJECTOR

V E R S U S

GUY SPENCER ELMS (*Sued as the Personal Representative and Executor to the*

***Estate of Roger Bryan Robson*) PETITIONER/APPLICANT**

RULING

Factual Background

1. Via a Notice of Motion dated 9th October, 2019 and filed on 11th October, 2019 the Executor Applicant sought orders that;

(1) This application be certified as urgent, and the same be heard exparte on priority basis and service of the same be dispensed with in the first instance.

(2) That this Honourable Court be pleased to take the evidence of the following witnesses through video-link:-

(a) Michael Fairfax Robson

(b) Sean Battye

(c) Richard J. Brooks

(3) That the Honourable Court be pleased to give such other directions as may be necessary in the circumstances.

(4) That costs be in the cause.

2. The application is premised upon grounds stated on the face of it and an affidavit in support deposed by Guy Spencer Elms the Petitioner in this cause. It is the Applicant's case that three witnesses intended to be called are residents of UK who for one reason or the other cannot travel to Kenya to testify in this matter hence the need to take their evidence via video conferencing.

3. Regarding Michael who is aged 70 years old and the only living brother to the deceased, he has sworn two replying affidavits deponed on 28th January 2016 and 13th April 2017.

4. That the witness has a mobility problem after undergoing a knee surgery associated with childhood Polio. As concerns Richard J. Brooks he averred that he is a Legal Practitioner and Notary Public in the United Kingdom whose evidence is necessary as it concerns the question whether he witnessed Michael Fairfax Robson's signature. That due to his busy schedule, he cannot be able to travel to Kenya.

5. Concerning Sean Batty who is alleged to have suffered 3rd degree burns on his hands in the year 2018, he is said to be under constant medication and supervision thus requiring great care to avoid infection which could lead to him losing his hands totally.
6. To justify the application, the Applicant contended that granting the application will greatly save Court's time and parties' costs. That the British High Commission has indicated that it will assist in facilitating the video conferencing should need arise.
7. In response, the first Objector filed a replying affidavit through its Director one Thomas Murima Mutaha sworn on 19th June 2020 thus opposing the application. He stated that the application is made in bad faith and with the ill intention to mislead the Court.
8. He further averred that, the reasons given for non-attendance of witnesses physically in court are not sufficient to enable the Court direct hearing through video conferencing. That Michael Fairfax Robson is a key witness in the case and his travel expenses can be catered for by the estate. Commenting on Michael Fairfax Robson illness, it was averred that there was no proof of illness and that at 70 years old he is full of energy.
9. He further contended that Michael's replying affidavits are viciously contested hence the need to demand his physical appearance. That Michael's signatures in his replying affidavits and various documents filed and referred to in various pages of the pleadings are at variance hence the need to be cross examined on oath given that the document examiner's report has confirmed that they were forged.
10. Commenting on Richard Brook's evidence, he stated that he is a stranger who should attend court and testify. That there is no proof that Richard Brooks is a Legal Practitioner. He averred that it was necessary for the witnesses to attend court so that the Court is able to observe witnesses' demeanour.
11. Touching on Sean Batty a co-executor who is said to be sick, it was deposed that there is no proof of sickness and that as a co-executor he is duty bound to attend court.
12. On her part, the second Objector swore a replying affidavit on 13th July 2020. She averred that, the identity of the witnesses is limited hence the need for them to attend Court. That the Applicant has not demonstrated the effectiveness of the video conference facilities and their reliability.
13. She also challenged the claim that Michael and Sean are sick yet there was no medical proof attached. She further argued that video conferencing will hinder general observation and assessment of the general demeanour of witnesses.
14. Regarding the proposal that evidence can be taken at the British Embassy in UK; it was deposed that there was no proof of any arrangements having been made. It was argued that use of video conferencing is a foreign concept in Kenya as there is no legislation yet in place governing the same and such evidence can be exposed to hacking and exposure to logging of feeds or inconsistent signals hence not reliable.

Submissions

15. During the hearing, Mrs. Wambugu for the Applicant orally submitted literally relying on the averments contained in the affidavit in support. She contended that during this error of Covid-19, the witnesses who are all based in the UK cannot travel to Kenya to testify. That the witnesses have already sworn their testimony which is not controverted. Counsel submitted that the application is in tandem with the Chief Justice's Practice Directions on Electronic Case Management through video conferencing.
16. Regarding the issue of assessment of witnesses' demeanour, Mrs. Wambugu submitted that the same is taken care of by Section 55 of the Evidence Act.
17. Mr. Ondigi holding brief for Mr. Nyasimi also adopted the averments contained in the replying affidavit of the 1st Objector. Counsel submitted that Michael has sworn affidavits with varying signatures hence the need to appear with his Passport for positive identification. That the witnesses have given different addresses in various documents hence the need to appear, identify themselves and be subjected to cross examination.
18. Learned Counsel contended that, there was a possibility of coaching witnesses while another one is waiting to testify. That during cross-examination, it would be difficult to refer witnesses to various documents which are contradictory as well as forged documents.
19. Mr. Ochichi holding brief for Mr. Osundwa for the 2nd Respondent/ second Objector also relied entirely on the averments contained in their replying affidavit. He fully associated himself with the submissions of his colleague.
20. In her rejoinder, Mrs. Wambugu relied on the averments contained in their further affidavit sworn on 16th July 2020 thereby referring to the Gazette Notice on the Chief Justice's Practice Directions. She also stated that due to delayed hearing, one of the witnesses has since died thus the need to conclude this matter.

Determination

21. I have considered the application herein, responses thereto and oral submissions by counsel. The only issue for determination is whether the Petitioners' witnesses residing in the United Kingdom can be allowed to testify through video conferencing.

22. The application herein is brought under Rule 73 of the P & A Rules which provides that nothing in the P & A Rules under the Law of Succession limits or otherwise affects the inherent power of the Court to make such orders as may be necessary for the ends of justice to be met or to prevent abuse of the process of the Court.

23. Although no specific provision governing taking of evidence through video conferencing was cited by the Applicant, this Court is bound by the overriding objective of Sections 1A and 1B of the Civil Procedure Act which provides that Rules are meant to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

24. Rule 49 of the Probate and Administration Rules further goes on to provide that:-

“A person desiring to make an application to the Court relating to the estate of a deceased person for which no provision is made elsewhere in these rules shall file a summons supported if necessary by an affidavit.”

25. I do agree with Mr. Ondigi that there is no specific legislation in Kenya governing the conduct of Judicial proceedings via video conferencing in Kenya. However, the Civil Procedure Act Section 81(3) empowers the Chief Justice in consultation with the Rules Committee to issue practice notes or directions to resolve procedural difficulties arising under this Act in order to facilitate the attainment of overriding objective of this Act as specified in Section 1A.

26. Pursuant to those powers conferred upon the Chief Justice, on 20th March 2020, he issued Practice Directions on Electronic Case Management (see G. N. 2357). Among the directions made was taking of evidence through video conferencing. These Rules were necessitated by the prevailing Covid-19 conditions which made physical court appearance impossible. Rule 6(2) of the said Practice Directions provides that in every judicial proceeding, the Court shall employ the use of technology to expedite the proceedings and make them more efficient. Some of the technology listed is video conferencing.

27. Following those Practice Directions, all courts in the Republic of Kenya went to video conferencing through platforms like Zoom, Skype and Teams to conduct court business. I take Judicial notice of the fact that all courts in Kenya are conducting court business virtually with witnesses testifying through electronic media (video conferencing).

28. The objective of conducting virtual proceedings was to avoid delays in conducting court business; to promote social distancing which was fixed at 1.5 metres; to exclude people with pre-existing conditions and people aged above 58 from unnecessary exposure and risks to a symptomatic or already infected people with Covid.

29. Based on the World Health Organization and Ministry of Health guidelines, courts could not and are not even now encouraged to conduct open court proceedings unless under extreme circumstances.

30. In essence, a court seized of a matter has the discretion to determine on the suitability of a case deserving disposition through video conferencing depending on the unique circumstances and or merits of each case. Courts are however enjoined to bear in mind the advantages or benefits of taking evidence through video conferencing without compromising the ends of justice.

31. It is obvious from the submissions of both counsel that, video conferencing is fairly a new concept in Kenya but which has quickly gained prominence and popularity since gazetting of the Chief Justice Practice Directions.

32. I am sure, counsel appearing in this matter have been conducting their court proceedings virtually hence nothing strange or unique. Technology is with us and it is dictating on how we shall be conducting business conveniently and in a more cost effective way which includes the manner and style in which we conduct our legal proceedings or business.

33. In upholding the above proposition, I am guided by J. Kasango's holding in the case of **Kuguru Food Complex Ltd v Mashreq Bank P.S.C (2019)eKLR** where the learned Judge allowed witnesses to testify from UK through video conference. The Hon. Judge had this to say:-

“The overriding objective of the Civil Procedure Act, Section 1A, provides that the Act and the Rules are to facilitate the just expeditious, proportionate and affordable resolution of Civil disputes. One of the ways cases are to be expeditiously, proportionately and affordably resolved is by use of suitable technology. Video conferencing is an audio-visual medium which can enable, as in this case, the plaintiff's witness to engage in virtual face-to-face interaction with the learned counsels and the court. There is no impediment either to the court or learned counsel's perception of such evidence, when received through video conferencing. Allowing video conference of the plaintiff's witness is vital because it means the difference between receiving that evidence and not receiving it. Video conferencing is also one way of ensuring a party has access to justice.”

34. In the instant case, the Applicant is seeking leave to have his witnesses testify through video conferencing on account that two witnesses are sick suffering from various ailments which makes it impossible for them to testify. Secondly, one Michael is at 70 years and that one Richard Brookes is a Legal Practitioner who has a busy schedule. Lastly, that with the Covid Pandemic, it is not wise to travel to Kenya and that it is less costly and convenient for both parties for those witnesses to testify while in U.K.

35. The evidence of Richard Brooks who is said to be a lawyer and who is said to have attested some documents is merely coming to ascertain whether he indeed witnessed the disputed signatures. This form of evidence is merely formal. It does not require someone to travel all the way from UK to come and confirm.

36. Regarding the testimony of Sean and Michael, they have filed their affidavits which will form the basis of their cross examination.

These can be done through video conferencing. They will simply adopt the content contained in their affidavits in examination in chief and thereafter be cross examined. Evidence given on video conference will not be any difference.

37. If it is the question of the Objector's counsel referring to various documents contained in various parties' bundles of documents, the applicant will avail to the witnesses the relevant bundles for ease of reference should cross examination take that direction. I do not find any difficulty in cross examining a witness on documents already in the court record.

38. Regarding age, we are still observing the Corona Virus or Covid-19 Pandemic World Health Organization and or Ministry of Health guidelines. People aged 58 years old are advised to keep off from social gatherings or to be specific, attending open court sessions. We do not know when Covid will cease. On that ground alone Michael cannot attend court physically.

39. Concerning the element of assessment of demeanour in Civil cases, video conferencing is a mutual face to face interaction which also provides room for assessment of demeanour which basically refers to body language or expression of oneself either physically or by word of mouth which can be done during video conferencing.

40. As regards failure by the applicant to adduce evidence as a result of witnesses' sickness, I do agree with the objectors that there was no proof that Mr. Michael and Sean are sick. There was no medical evidence attached. However, sickness was just but one of the reasons advanced to support hearing through video conferencing.

41. Given the Covid-19 Pandemic, and considering that this is an old matter which needs to be concluded in good time and further taking into account the convenience and cost implication on litigation, the scales of justice will tilt in favour of holding and taking evidence of the witnesses through video conferencing. It will serve the ends of justice by saving on travel costs and associated expenses like accommodation and food. It is convenient to both parties in terms of being less disruptive on personal engagements, and it reduces the cost of litigation generally.

42. As to the efficacy of video conferencing, the applicant will make necessary arrangements to have a video conference facility organized at either the British High Commission office or as parties may by consent agree. From the Judiciary's end, the Deputy Registrar shall make arrangements for a bigger screen to be availed for the sake of clarity of pictures.

43. For the above reasons stated, it is my finding and indeed holding that the application herein is merited and the same is allowed with orders that;

(a) The Honourable Court shall take the evidence of Michael Fairfax Robson, Sean Battye and Richard J. Brooks through video conferencing.

(b) That parties shall agree by consent on proper venue in UK from which the witnesses shall testify through video conferencing.

(c) That Deputy Registrar Family Division to make necessary arrangements in availing a venue with a bigger screening for taking evidence through video conferencing.

(d) Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2020.

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J. N. ONYIEGO

JUDGE