



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 181 OF 2014

IN THE MATTER OF THE ESTATE OF EPHRAIM KABUI NDEI ALIAS EPHRAIM KABUI NDII (DECEASED)

PETER MWANGI KABUI

JAMES MURIUKI KABUI.....APPLICANTS/PROTESTERS

VERSUS

MAGDALENE WANJIKU KABUI

SIMON MWANGI KABUI.....RESPONDENTS/APPLICANTS

RULING

The application before me is the Summons General dated 23rd April 2018 brought under rule 49 of the P & A rules. It seeks orders that the protester's case be re-opened and the 2nd Protester be allowed to testify together with one witness one Eustace Kahuthia Kabui. The grounds for the application are set on the face of the application and the supporting affidavit of James Muriuki Kabui sworn on the same date.

The application is opposed through the affidavit of Simon Mwangi Kabui sworn on the 14th May 2018.

Parties filed written submissions through their respective counsel M.K Kiminda for the respondents and C.M king'ori for the applicants.

The main grounds for the application are that when the protesters case was heard the 2nd respondent did not testify because he believed that his interests would be taken care of by the testimony of the 1st protester. However, when the respondents testified, a new issue that was not expected was raised by the respondents: specifically, that he, the 2nd protester was not a beneficiary of the deceased's estate and secondly, that one of his personal properties was part of the deceased's estate.

I have carefully considered the submissions by each counsel.

The applicant relied on two authorities **Re Epicure (1960) EA 302** and **Rufus Kiuna & Anor vs Francis Njue Nyaga [2016] eKLR.**

The protesters' case was closed on 16th October 2017. The applicant's case started and was to continue on 25th on May 2018 after two adjournments, but in between the instant application was filed.

Clearly, what the applicant is raising are issues that ought to have been settled by way of cross examination of the respondents and their witnesses, and by way of putting to them the facts of the applicant being a beneficiary of the estate, and his alleged property not being part of the deceased's estate. The respondents have argued that the application is not tenable in law as the applicant had all the time to cross examine and put their joint case as protesters before the court.

The applicants on their part argue that there was new evidence that they had not anticipated.

The omission to do the above must have been a failure/mistake on the part of counsel for the protesters. The applicant will obviously be greatly prejudiced if the facts he alleges to be true are not placed before the court for consideration.

The respondents have not demonstrated that they will suffer any prejudice and in any event will have the opportunity to cross examine the applicant and his proposed witness.

The principle that this is a court of justice which ought not to be too tightly bound by certain processes is clearly encapsulated in the often quoted words of Apaloo J.A in **Philip Chemwolo & Another vs. Augustine Kubede (1982 -1988) KAR 103** at 140 that though blunders may be made by parties and in this case by advocates, “ ***I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of parties and not for the purpose of imposing discipline***”

In this case I do not see any signs of fraud or treachery but a request to place before the court material that may be useful in assisting the court to arrive at a just decision. In any event there is no room for ambush in the current constitutional dispensation, and it is not denied that the respondent introduced new material. Rather than push this matter to the point of review on a point of new evidence, I would rather deal with it now, before each party has closed its case.

Hence, it is my considered view that the application will not cause any prejudice to the respondent. I allow the same with costs to the respondent. In addition, the applicant will supply the respondents with the witness statement of his witness and any documentary evidence he wishes to rely on within 15 days from the date hereof.

Dated, delivered and signed at Nyeri this 25th day of January 2019.

Mumbua T.Matheka

Judge

In the presence of:

Kinuthia holding brief for King'ori for protesters.

Kiminda for applicants-no appearance

Jerusha-Court Assistant.

Mumbua T.Matheka

Judge

25/1/19