



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 106 OF 1985

IN THE MATTER OF ESTATE OF MARY NYAMBURA NDUNG'U (DECEASED)

MICHEAL MAINA MITARU.....ADMINISTRATOR/RESPONDENT

VERSUS

WILSON WAHABA GATIMU.....OBJECTOR/APPLICANT

RULING

1. The matter is coming up for ruling of an application dated 28th June, 2018 filed in by the objector seeking for the following orders:

1. Spent.

2. That the Honourable Court be pleased to reopen the objector's case and leave be granted to the objector to call for more evidence.

3. That the cost of this application be provided for.

2. The application was based on the grounds that the objector took over the matter from his late father James Gatimu Wakaba who passed on the 8th October 2009, the objector's case was closed on the 17th June 1996 and after the objector was substituted it come to his attention that some crucial material in support of their case had been left out which include the grandfather's death certificate, father's birth certificate and the objector's birth certificate and they are essential in proving that the objector and his father are beneficiaries in the estate of the deceased. Further no prejudice will be suffered by the Respondent's if the application is allowed as they have not closed their case and they will have an opportunity to cross examine and call more evidence.

3. The application is strongly opposed by the administrators who filed their grounds of opposition dated 27th February 2019 stating that the application is bad in law, fatally defective incompetent and unsustainable. The application is an afterthought designed to frustrate the conclusion of this old case as the objector's closed their case in 1996 and thereafter went into slumber and no reason has been advanced by the objector on why the documents intending to be produced were not produced at the hearing of their case. The respondent will suffer prejudice if the application is allowed as he will incur costs since the matter was filed over decades.

4. The objector filed a further affidavit stating that his application is meant to aid the court come to a just and conclusive determination of the issues in its entirety. The process of substituting the deceased objector took time as the current objector had to obtain letters of administrators from the courts and it took long. The crucial documents were not introduced during the hearing of the objector's case because they were unavailable and the circumstances have changed since the objector's case was closed. Further the objector states that the Respondents if prejudiced in any way they can be compensated by way of cost.

5. Both parties filed in their submissions which the court has considered.

6. The decision of *Kasango J* in the case of **SAMUEL KITILEWA vs HOUSING FINANCE CORPORATION OF KENYA LTD AND ANOTHER (2015) eKLR** is spot on where she stated;

“I agree with the holding in the case of Smith Versus South Wales Bar Association (1192) 176 CLR 256, where it was held that the question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened. Consequently even after the case has been reopened, the court retains its discretionary powers whether to admit any piece of evidence or not....”

7. It is my finding that the documents the applicant intends to produce are not new evidence and the same are in the court record, the grandfather death certificate being the deceased in this matter Wahaba Ngaburia and the father's birth certificate (objector's exhibits 1) being that of James Gatimu dated 1st September 1982 showing Wahaba Ngaburia as the father and Wangui Gatimu as the maiden name, the same was produced by the deceased objector during his testimony and therefore I see no need of the same being produced again. I further find the objector has not provided sufficient evidence and reasons why his birth certificate is important or necessary at this time as there isn't any dispute as to his paternity. The Respondent does not dispute that the current objector is the son of James Gatimu. There is no dispute as to the paternity of the objector herein. What they dispute is that James Gatimu was the son of Wahaba Ngaburia and his birth certificate was produced to that effect.

8. In the end, I find the current application is brought after inordinate delay, the evidence sought to be introduced is on record save for the applicant's birth certificate which is really unnecessary in the context of this case and no sufficient ground has been shown to warrant the re-opening of this very old litigation and the calling of more evidence.

9. The application dated 28th June 2018 is without merit. It is dismissed. Each party to bear its own costs.

Dated and Delivered at Nakuru this 23rd day of July, 2019.

A. K. NDUNG'U

JUDGE