



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

SUCCESSION CAUSE NO. 133 OF 2010.

IN THE MATTER OF THE ESTATE OF BERNARD KARANI AYUGU.....DECEASED

AND

MARY GRACE AYUGU.....PETITIONER/ADMINISTRATOR

VERSUS

ALICE SEBI NINAYO.....OBJECTOR/DEFENDANT

R U L I N G

Introduction.

1. When this case came up on the 4th October, 2016 to confirm the filing of written submissions Mr. Osango Advocate for the objector sought to withdraw the replying affidavit sworn on 11th November, 2015 because it had an error on the face of it and he also ought to file another affidavit. This was objected to by Staussi Advocate for the objector who argued that written submissions had already been filed and it was late in the day to now withdraw and file another affidavit, arguing further that they had already used the contents in the said affidavit to prepare their written submissions.

2. The error according to Mr. Osango was that the name of Barongo Advocate was used on the affidavit instead of the objector's name and they were seeking for orders to either withdraw the said replying affidavit or file a fresh affidavit. He relied on the Supreme Court judgment in the case of **Raila- vs-Uhuru, EP Petition No. 1 of 2013.**

3. On her part Mrs. Staussi in response objected to the withdrawal of the replying affidavit and to the filing of another affidavit. Counsel emphasized that her submissions were written with the contents of the replying affidavit in mind. They had, In fact, indicated in their supplementary affidavit that the affidavit in question dated 11th November, 2015 should be struck out. She further submitted that the objectors counsel was indolent and did not take his time to look at the said replying affidavit and rectify the issue in good time. She maintained that the said error was the result of sheer negligence.

Submissions.

4. The court allowed the parties to file written submissions on the issue at hand. In their submissions filed on 3rd November, 2016 the objector explained the defect being that the person who swore the said affidavit is shown as BARONGO GIDEON instead of ALICE SEBI MINAYO. Counsel explained that the defect was not deliberate and it did not affect or dilute the contents in the body of the said affidavit. He further submitted that a replying affidavit is treated as a pleading and for it to be withdrawn, amended

and/or substituted after pleadings have been closed leave of the court has to be sought and such an application can be made at any stage before determination of the case. He added that there would be no prejudice caused to the petitioner/administrator as the matter is yet to be determined on merit.

5. In her submissions the petitioner contended that the objector chose to withdraw the replying affidavit after reading through the petitioner's written submissions because the petitioner had wanted the court to strike out the affidavit. Counsel for the petitioner have pointed out the defects in the affidavit of 11th November, 2015. She also points to the objector's behaviour in this whole case and asks the court to take note of the same.

Determination.

6. The only issue to be determined is whether to allow the objector to withdraw her replying affidavit and file a fresh one. The court has considered the submissions by the rival parties together with the authorities relied upon. It is clear that a replying affidavit is a pleading and that for it to be amended, withdrawn and/or substituted after close of pleadings leave of the court ought to be sought.

7. That being the case, the objector is entitled to seek leave of the court at this stage though the parties have already filed their written submissions. It has been explained to the court, that the only error in the objector's replying affidavit dated 11.11.2015 is the indication that the affidavit has been sworn by BARONGO GEDEON instead of the objector herself, ALICE SEBI MINAYO as clearly set out in paragraph 1 of the affidavit, the question that this court must answer is whether the objector should be allowed to file a fresh affidavit and what the content of the fresh affidavit should be?

8. The answer to the above question, I have referred to Rule 7 of Order 19 of the Civil Procedure Rule (CPR) 2010 which rule reads as follows;-

“ 7. The Court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.”

9. I have also had recourse to Article 159(2)(d) of the Constitution 2010 whose provisions are to the effect that “justice shall be administered without undue regard to procedural technicalities, and.....”. I have also considered the provisions of Section 1A and 1B of the Civil Procedure Act whose overriding objective is that all disputes brought before the court shall be disposed of in a just expeditious, proportionate and affordable manner. A Similar Objective is found in Rule 73 of the Probate and Administration Rules.

10. In light of the above, and though the court has power to grant the leave sought, I am of the considered view that there will be undue in concluding this matter which has been doing the rounds in the court since 2010. The court will allow the objectors counsel to manually amend the name of the deponent in the objector's affidavit dated 11.11.2015, countersign the same so that the matter can proceed to the next stage. I accordingly do so.

11. The petitioner shall have the costs of this application

Orders accordingly

Ruling delivered, read and signed in open court at Kakamega this 30th day of November, 2017

RUTH N. SITATI

JUDGE

In the presence of;-

.....Miss Atieono for M/S Maghani (present).....for Petitioner

.....M/S Stauss Asuna & CO. (absent).....for Respondent

.....Polycap.....Court Assistant