REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 1141 OF 2011

IN THE MATTER OF THE ESTATE OF THE LATE KENNEDY MURIMI NJOGU-DECEASED

GERALD MACHARIA NJOGU ……PETITIONER/APPLICANT

VERSUS

SAMUEL MACHARIA MURIMI……OBJECTOR/RESPONDENT

RULING

By way of a summons dated 3rd December 2015 expressed under the provisions of Rule **73, 49** and **59** of the Probate and Administration Rules, **Gerald Macharia Njogu** (hereinafter referred to as the applicant) moved this court seeking orders that:-

> *i. That the orders made on 6th February 2012 be vacated and in lieu thereof, the objection by the objector be heard and determined by way of oral evidence and witnesses.*
>
> *ii. That the costs of this application be provided for.*

The application is supported by the annexed affidavit of the applicant herein. Essentially, the applicant avers:-

> *i. That on 6th July 2012 this court directed that the objection herein be determined by way of written submissions.*
>
> *ii. Pursuant thereto the objector filed their submissions on 7thJanuary 2015 and served the same upon the applicants advocates*
>
> *iii. That upon considering the matters raised in the objection and in the submissions, the applicant feels that the matters in question are weighty and cannot be fairly determined by way of submissions, hence the application now seeking to have the said orders vacated.*

The applicant is opposed. The Respondent states in his affidavit that:-

> *i. The application was brought after a delay of almost 4 years.*
>
> *ii. That the applicant chased him from the land in question, hence he is suffering and living like a destitute and he is not benefitting from the estate despite being a son of the deceased.*
>
> *iii. That the objection raises purely issues of law.*

iv. That there is no dispute on who the beneficiaries are, the only issue for determination is the distribution.

At the hearing of the application, both advocates essentially adopted their respective clients affidavits.

Section **47** of the Law of Succession Act[1] enjoins the High Court to entertain any application and determine any dispute under the Law of Succession Act[2] and pronounce such decrees and make such orders therein as may be expedient. Further under Rule **73** of the Probate and Administration Rules it is provides:-

"73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

Rule **49** of the Probate and Administration Rules provides that:-

"A person desiring to make an application to 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 affidavit"

Rule **59 (1)** provides that *"save where otherwise provided in these rules every application to the court or to a registry shall be brought in the form of a petition, caveat or summons as may be appropriate."*

It's not in dispute that parties had sought and obtained directions from the court that this cause be determined by way of written submissions. Now the applicant/petitioner states that upon reflection, he thinks this is not appropriate because the matters raised in the submissions and the affidavits are weighty while the respondents counsel takes the view that the matters raised are purely matters of law that can be determined by way of written submissions.

The issue that falls for determination is whether the hearing of this cause should be by way of oral evidence or by way of written submissions. I have no doubt in my mind that this court has power to determine the application before me. Rules 47 & 73 cited above in my view clothe this court with powers to make such orders as may be necessary for the interests of justice. Further, the issue for determination falls within the discretion of the court.

If the matter in dispute is solely a question of law-in other words, if there are no facts in dispute between the applicant and the respondent-there would be no benefit in having oral evidence. However, if there are facts in dispute, there still may be need for oral evidence-depending on the nature of the facts in dispute.

The law of evidence encompasses the rules and legal principles that govern proof of facts in a legal proceeding. These rules determine what evidence must or must not be considered by the court in reaching its decision, and sometimes, the weight that may be given to that evidence. The law of evidence is also concerned with the quantum, quality and type of proof needed to prevail in litigation.

The quantum of evidence is the amount of evidence needed; the quality of proof is how reliable such evidence should be considered. This includes such concepts as hearsay, authentication, admissibility, reasonable doubt, and clear convincing evidence.

When a dispute reaches court, there will always be a number of issues which one party will have to prove in order to persuade the court to find in his or her favour. The law must ensure certain guidelines are set out in order to ensure that evidence presented to the court can be regarded as trustworthy.

I am fully aware that affidavits are an alternative to oral evidence and are often used particularly in applications. However, the law provides that a deponent in an affidavit can be cross-examined on oath. Further, if credibility is at issue, or if crucial information is not obtainable through the affidavit evidence, then oral evidence will be required as may be necessary. However, where the facts are uncontroversial, an

oral hearing is not necessary.

The advantage of oral evidence is that the witness is available for cross-examination, and thus the strength of evidence may be tested. That is why reliable *viva voce* evidence is sometimes given more weight.

Turning to this case, there is a will annexed to the petition. The objector is contesting the will and states that the same is invalid. The issues in dispute are both matters of law and facts. While the matters of law may basically be provided for under the provisions governing making of wills under the law, the facts surrounding the making of the said will and or the grounds for opposing the said will are in my view issues of fact which call for the parties to give oral evidence, call witnesses and be subjected to cross-examination to enable the court to assess the credibility, relevancy and trustworthiness of the evidence and effectively and competently resolve the matters in controversy.

I therefore hold that it will be in the interests of justice that the application before me be allowed and that this case be determined by way of oral evidence. In any event, the orders granted cannot be said to prejudice the respondent but is for the benefit of both parties that the court goes to the root of the dispute by hearing oral evidence so as to effectively do justice to both parties.

I share the concern expressed by the respondents counsel that the applicant has taken long to bring this application. It's unfortunate and unacceptable that the case has taken too long to be heard, but I think both parties have not explained why they took directions way back in 2012 and the respondents only filed their submission on 7thJanuary 2015 while the applicant filed the present application on 4.12.2015. The delay on both sides is inordinate and unacceptable.

However, I allow the application dated 3rd December 2015 and order as follows:-

> *i. That the directions/orders made on made on 6th day of July 2012 to the effect that this petition be determined by way of written submissions are hereby set aside subject to paragraph three below.*
>
> *ii. That this petition be determined by way of* ***viva voce*** *evidence and parties be at liberty to call witnesses.*
>
> *iii. That the parties are directed to take a hearing date for this petition within the* ***next 30 days from the date of this order in default of which the orders granted herein shall lapse and the order made on 6th July 2012 shall stand reinstated in the event of which the petitioner shall have only seven days (from the date of the expiry of the said period of 21 days) within which to file his submissions and upon the expiry of the seven days either party shall be at liberty to list this cause for mention for purposes of taking directions on a judgement date WHEREUPON the court shall determine the case by way of submissions as per the aforesaid order.***
>
> *v. No orders as to costs.*

Right of appeal **30** days

Dated at Nyeri this 28th day of January 2016

John M. Mativo

Judge

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[1] Cap 160 Laws of Kenya

[2] Ibid