

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO 182 OF 1994

In Matter of the Estate of Gikunda M’rinkanya (Deceased)

GLADYS KATHUNI.....PETITIONER

RULING

Recall of witness

[1] M/s. Esther Mwangi applied to recall PW1 to clarify where the deceased child by the name of Gikunda M’Rinkanya was buried. M/s. Mwangi told this court that Pw1 is the biological mother of the said deceased son of the deceased herein and it is only fair and just that she is recalled to shed light on this aspect which is important piece of evidence in these proceedings.

[2] Mr.Murango opposed recalling of PW1 and he gave his reasons; (1) that this is the second time that M/s.Mwangi has recalled PW1 to clarify issues; (2) that the question of where the deceased child was buried did not arise during cross-examination or examination in chief; (3) that counsel is just trying to seal loopholes emerging in the case; and (4) that this kind of approach will lead to endless litigation. According to Murango the application for recall of PW1 has come too late in the day, it is unfair to his client and should be denied.

DETERMINATION

[3] Upon consideration of the above rival arguments by counsel, the circumstances of this case and the law, I take the following view of the matter. I do not wish to re-invent the wheel here. As a matter of law, the party applying to recall a witness must show the necessity to recall the witness. Such necessity may be established in a number of ways but it must be weighed against the nature of the proceedings and the purpose being advanced which must be to advance justice and not to circumvent it. If the recall would infringe on the rights of the other party, that is not advancing justice. It is quite significant consideration that these proceedings relate to the estate of a deceased and I would be hesitant to employ a purely adversarial stature- a practice that largely restricts the intervention the court can make into a case to avoid descend to the arena. In succession causes however, the court is clothed with wide powers to do all that is possible within the law to ensure the ends of justice are met. Therefore, whereas PW1 has been recalled one other time earlier, should not necessarily prohibit recall of the witness where it is shown that there is absolute necessity to do so in the interest of justice. I draw from the report of the Commission which midwived the Law of Succession Act and also the Law of Succession Act itself which require courts to serve justice to all parties without undue regard to technicalities. I need not state that even the constitution emboldened this approach in the administration of justice. I note one of the issues for determination in this case and which has been forcefully argued is that the deceased had a son called Gikunda s/o M’Rinkanya who was given parcel no. 576 by the deceased in 1964 but died thereafter in the same year. Given the nature of the dispute before me, this issue is so critical-also at least from the emphasis being applied to it by PW1. Also contrary to Murango’s submission the issue of the alleged deceased son of the deceased kept on emerging in the evidence of witnesses including PW3 and PW4 during examination-in-chief and cross-examination. I am, therefore, convinced that there is need to recall and allow PW1 to come and shed light on where the said child was buried, if at all. I am aware that witnesses should be able to give full evidence in the first instance but it bears repeating that a recall may become necessary but only where it is absolutely necessary and a basis for recall is laid. Except, I must place due caveats; that this shall be the last time PW1 will be recalled and she shall restrict herself to only the issue on where the deceased son was buried. It is so ordered.

Dated, signed and delivered in open court at Meru this 27th day of July, 2016.

F. GIKONYO

JUDGE

In the presence of:

M/s.Mwangi advocate for petitioner

Mr.Murango advocate for objector

F. GIKONYO

JUDGE