



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 1781 OF 2013

IN THE MATTER OF THE ESTATE OF JULIA NGUHI WANJIRU (DECEASED)

HUMPHREY MUHAKO EFETHA.....APPLICANT

AND

VIRGINIA GATHONI MWANGI.....RESPONDENTS

RULING

1. Hearing of the evidence in this cause commenced on 19th November, 2014. Two witnesses testified in the Petitioner's case which was subsequently closed on 9th March 2015. Thereafter the 2nd Objector took to the stand to tender his evidence because the 1st Objector was said to reside in the United Kingdom had not been able to travel to attend court. The 2nd Objector was the lone witness in his case which was closed on 8th February, 2016.
2. The cause was set down for further hearing on 15th and 16th March, 2016 but was taken out of the cause list because the court was away on other official duties and did not sit on those two dates. The Petitioner took the dates of 14th and 15th June 2016 at the Registry and served the other parties on record.
3. Meanwhile on 23rd May 2016 Mr. Ochieng for the 1st Objector filed a new list of 13 documents on behalf of the 1st Objector. When the cause came up for hearing on 15th June 2016 both M/s. Kamende and M/s Murimi raised objections to the filing of the new list of documents. On behalf of the petitioner and the 2nd Objector respectively.
4. M/s Kamende raised two grounds on behalf of the Petitioner. First, she argued that the documents having been filed after the close of her clients' case she had no way of testing the truth of the content from her client's evidence. Secondly, she asserted that the cause had been a long while in court and there was no explanation where the documents coming on record at this point had been. In her view these documents had been tailor-made to answer the evidence already on record.
5. M/s. Murimi for the 2nd Objector associated herself wholly with the sentiments of M/s Kamende. In addition she stated that the documents introduced new evidence after the two parties had closed their cases. That they therefore, had no benefit of the contents when they testified and had no chance to examine the said contents. Counsel also pointed out that the documents were filed without leave of court.
6. In answer, Mr. Ochieng argued that all the documents in the list he was now introducing, except for those listed as No. 7, 10, 11 and 12 respectively, had been pleaded and introduced by the 1st Objector with his affidavit. Further that the 1st Objector only obtained document No. 7 on 1st January, 2016 hence

the belated entry into the evidence. He also maintained that the Petitioner had all along been in possession of documents No. 10, 11 and 12 which she did not produce. He took refuge under **section 112 Evidence Act**.

7. Against the foregoing M/s Kamende invoked **Section 69 Evidence Act** and contended that the 1st Objector had never asked the Petitioner to produce any documents, M/s. Murimi on the other hand denied that the Petitioner was in possession of any such documents to begin with

8. **Section 112 of Cap 80 Evidence Act** which Mr. Ochieng seeks to rely on provides as here under:

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

Section 69 of the said Act on the other hand provides as follows:

“Secondary evidence of the contents of the documents referred to in section 68(1) (a) shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such notice to produce it as is required by law or such notice as the court considers reasonable in the circumstances of the case.

Obviously then Mr. Ochieng was required by law to give notice to produce to the Petitioner, if he was aware that the Petitioner was in possession of these documents which could aid the determination of the case.

9. Mr. Ochieng’s argument that the court had only given directions on how the objection would be disposed of by way of viva voce evidence, but not as to the filing of documents seems to imply that he could therefore ignore rules of procedure. Whether or not the court gave directions on the filing of documents to be relied on in evidence, a party cannot purport to file a list of documents in evidence after the other parties have closed their cases. Further, after close of pleadings additional documents may not be filed without leave of court. What Mr. Ochieng has done amounts to trial by ambush. Directions of the court that the cause would proceed by way of viva voce evidence only meant that the parties would take to the stand to prove by oral evidence what was contained in their affidavits and annexures.

10. The Petitioner testified two years ago on 19th November 2014. It is suspicious that the 1st Objector has had this sudden brain wave only after both the Petitioner and the 2nd Objector have testified. This court has not been told that the 1st Objector has come upon or discovered some new and important evidence which after the exercise of due diligence was not within his knowledge before. He states that he knew these documents to be in existence in the custody of Petitioner which is disputed. It is noted that the 1st Objector has always had the advantage of counsel from the inception of this case.

11. To allow this new list of documents at this late hour would require the reopening of the Petitioner’s and 2nd Objector’s cases in the interest of justice. Reopening a case is not an impossibility but there must be urgent or compelling reason to do so and not merely because the 1st Objector has spotted a loophole which he wishes to seal.

12. In my view this is an attempt by the 1st Objector to steal a match against the other parties. To allow the 1st Objector to introduce this list of documents at this late hour in the trial would amount to allowing him to fill the gaps in his evidence after having heard the Petitioner’s and 2nd Objector’s cases. That would not only prejudice but also embarrass the other parties in the cause and delay the fair trial of the case.

13. Since Mr. Ochieng has stated that most of the documents he seeks to introduce have already been pleaded and annexed to the 1st Objector’s affidavit, there is no need to file another separate list. For the

foregoing reasons the Objection by M/s. Kamende and M/s. Murimi have found favour with the court. The list of documents filed by Mr. Ochieng on 23rd May 2016 is therefore struck out.

Costs in the cause.

SIGNED DATED and DELIVERED in open court this **26th day of July 2016.**

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L. A. ACHODE

JUDGE

In the presence ofAdvocate for the Applicant

In the presence ofAdvocate for the Respondent