



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 90 OF 2001

IN THE MATTER OF THE ESTATE OF BONIFACE MUNGUTI MUTISO (DECEASED)

AGNES MUMBI MUNGUTI.....PETITIONER

VERSUS

ALPHONSE MUTISOPROTESTOR

RULING

The Petitioner herein was issued with a grant for letters of administration intestate with respect to the estate of Boniface Munguti Mutiso (hereinafter referred to as “the deceased”) on 7th June 2001. The Petitioner claims to be the widow of the deceased and she subsequently filed a Summons for confirmation of the said grant on 5th December 2011. The Protestor, who claims to be a son of the deceased, then filed an affidavit of protest to the confirmation on 17th January 2012.

This Court directed that the said summons for confirmation of grant and affidavit of protest be heard and determined together by way of *viva voce* evidence, and that the Petitioner and Protestor file and serve their respective witnesses’ statements before the hearing date. At the hearing on

5th October 2016, the Protestor called Juliana Loko Munguti as his first witness, having filed a statement by the said witness dated 13th November 2012 in Court on the same date. At the commencement of her examination-in chief, the said witness stated that she remembered writing the said statement and that she wanted it adopted as her evidence. The witness then gave additional oral evidence.

Upon cross-examination by Mrs Nzei, the learned counsel for the Petitioner, the witness stated that she does not know how to read or write, and that she signs her documents by way of her thumbprint impression. Upon being shown her witness statement, the witness confirmed that the said witness statement did not bear her thumbprint. Mrs Nzei then applied to have the said witness statement be expunged from the record, and that the forgery of the witnesses’ signature be investigated.

I have read and carefully considered the pleadings and submissions made by the Objectors and Petitioner. As the alleged forgery of the witnesses’ signature has not been proved to the required standard and a finding to this effect made by a court of law, I find that the only issue to be decided is whether the witness statement by Juliana Loko Munguti dated 13 November 2012 and filed in Court on the same date should be expunged from the record.

In this regard, this Court notes that there is no provision made for witness statements either by the Law of Succession Act or Probate and Administration Rules. Rule 59 of the Probate and Administration Rules provides as follows as regards the form of succession proceedings:

“1) 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.

(2) In the case of a pending proceeding the court or a registrar may of its or his own

motion or at the request of any party, but without a formal application, cause the matter to be set down for mention before the court or registrar upon notice to such persons (if any) as the court or registrar may direct.

(3) Unless otherwise directed by the court every application shall be heard in chambers in the presence only of the parties, their advocates and such other persons as the court or registrar may permit.

(4) Every petition and cross-application for a grant shall be signed by the petitioner in the presence of his advocate or not less than two other adult witnesses who must sign giving their names, addresses and descriptions.

(5) A summons shall be in one of Forms 104 to 110 as appropriate and be signed by the applicant or his advocate.

(6) Save where it is otherwise provided in these Rules there shall be filed with every application such affidavits (if any) setting out such material facts and exhibiting such documents as the applicant may think necessary.

Rule 73 of the Probate and Administration Rules however saves 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, and Article 159 of the Constitution now gives the Courts the authority to avail substantive justice and not to give undue regard to procedural technicalities. In this regard, some parties in succession proceedings prefer to file witness statements and not affidavits of the witnesses they wish to call in support of their cases due to the fact that fewer procedural requirements and lesser costs are involved in the filing of witness statements, and when such requests are made this Court has allowed them in the spirit of Article 159 of the Constitution and Rule 73 of the Probate and Administration Rules.

A witness statement is in this regard a written statement signed by a person which contains the evidence which that person would be allowed to give orally. The primary objective of witness statements is to improve the efficiency and expedite the hearing of civil trials, by ensuring that by the time of trial each party is fully prepared and aware of the full extent of the other party's case. In Halsbury's Laws of England Vol. 11, 5th Edition Para 751 the application of witness statements is explained as follows:

“If a party has served a witness statement and he wishes to rely at trial on the evidence of the witness who made the statement, he must call the witness to give oral evidence, unless the Court otherwise.....Where a witness is called to give oral evidence under this provision, his witness statement will stand as his evidence in chief unless the Court orders otherwise. A witness giving oral evidence at trial may, with permission of the court, amplify his witness statement and give evidence in relation to new matters which have arisen since the witness statement was served on the other parties. The Court will give such permission only if it considers that there is a good reason not to confine the evidence of the witness to the contents of his witness statement”

In addition, Kimondo J. held as follows in Surgipharm Ltd V Kenya Invalid & Pharmacy Supplies Ltd & 2 Others[2013] e KLR as regards the distinction between witness statements and affidavits:

“12. Clearly, a witness statement remains a guide for the oral testimony in court. As part of evidence in chief it is subject to cross-examination. But the witness can deviate from it with

leave of the court. It would thus be to turn logic on its head to strike out an action based entirely on the contents of the statements.

13. I am fortified in that finding by the following. The witness statement is not a deposition or sworn statement. I can draw an analogy: In proceedings commenced by originating summons, parties often choose to rely entirely on their affidavits to determine the matter. In such a scenario, a party may very well argue that the deposition does not disclose a case against it. The court in dealing with such matter would be well guided since all the evidence would be before it.....

15. As a witness statement is a synopsis of intended evidence at the trial, it is not the exclusive basis for evidence to be submitted in support of facts alleged in the claim. The Court can grant leave to deviate from the statement, to amplify the evidence or even to refer to new matters.”

Therefore, the averments made in a witness statement are not cast in stone, and the witness may add to, correct and indeed deviate from the said averments. In the present application it is contended that as the witness statement has not been signed by the witness, it should be expunged from the record. However, in light of the objectives and application of witness statements enunciated in the foregoing, it is still open to the witness to confirm if indeed she made the contents of the statement and to sign the statement if that is the position, given that she testified that she remembered preparing the statement.

I accordingly order as follows:

1. The said witness statement by Juliana Loko Munguti dated 13th November 2012 and filed in Court on the same date shall be read out to the said witness in the language she understands.
2. The said witness shall thereupon confirm whether or not she made the contents of the said statement.
3. In the event that the witness confirms that the contents of the statement are of her making she shall proceed to sign the said statement by an impression of her thumbprint, and the Petitioner's counsel and Protestor's counsel shall be at liberty to respectively further cross-examine and re-examine the witness on the contents of the witness statement.
4. If the witness denies that the contents of the statement are of her making, the said statement shall be expunged from the record

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 29th day of November 2016.

P. NYAMWEYA

JUDGE