



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 503 OF 2013

IN THE MATTER OF THE ESTATE OF MAERO TINDI (DECEASED)

RULING

1. The application dated 4th June 2014 is brought at the instance of one Maxwell Ottawa Maero, one of the administrators of the estate of the deceased.
2. It seeks several orders, among them-
 - a. *That Catherine Wambilyanga, the applicant in the summons for revocation of grant dated 24th September 2013 be required to submit all the originals in respect of the documents annexed to her further affidavit sworn on 18th November 2013;*
 - b. *That the Summons for revocation of grant dated 24th September 2013 be stayed pending submission of the report of the document examiner;*
 - c. *That the court file herein be kept in the strong room of the Honourable Court;*
 - d. *That the court do require the document examiner to submit his report in court whereupon the court then should give further directions arising from the matter stated in the report;*
 - e. *That Catherine Wambilyanga be censured by the court for trying to misled it;*
 - f. *That the affidavit of Catherine Wambilyanga be struck out; and*
 - g. *That the said Catherine Wambilyanga be compelled to hand over the birth certificate of Daniel Kioko Tindi, annexed to her affidavit of 24th September 2013.*
3. The applicant's case is that the documents attached to the affidavit in support of the Summons of 24th September 2013 are all forgeries and the respondent, Catherine Wambilyanga, has uttered the said forgeries in a quest to advance the case that she has stated in the said application.
4. The documents that the applicant points at as forgeries include:-
 - a. *Cheque leaves numbers 000265 and 000266 dated 2nd January 2005 and 6th February 2005;*
 - b. *Sale agreement dated 7th December 2010 in respect of the purchase of Mavoko Town*

2/11065 and 1/1066;

c. Minutes of Tentec International Company of a meeting held on 22nd April 2010;

d. Medical receipts annexed as CW3 to the said affidavit;

e. All the documents annexed as CW9 to the said affidavit; and

f. All the documents annexed as CW5 to the said affidavit;

5. On the birth certificate of Daniel Kioko, he depones that the same was mistakenly annexed to the said affidavit instead of a certificate of death; and states that the said birth certificate was among a bundle of documents that were removed by the respondent from the deceased's house at Syokimau when the former raided the same with the assistance of the police.
6. I have noted that the applicant has not deposed in his affidavit to facts as to why the court file should be kept in the strong room nor as to why the alleged affidavit of the respondent ought to be struck out and the respondent censured.
7. The respondent in her response to the application dated 4th June 2014, through her replying affidavit of 4th August 2014, has largely dwelt on matters that are not germane to the application. She largely depones that the said documents are genuine.
8. It was directed on 27th October 2014 that the application dated 4th June 2014 be disposed of by way of written submissions. I have on record written submissions by one party, the applicant. The said submissions are dated 6th March 2015 and were filed herein on 10th March 2015.
9. The tenor of the application dated 4th June 2014 is to invite me to conduct an inquiry into the authenticity of the documents that the respondent proposes to place before the court in support of her case for revocation of the grant. I am being asked, should I find the said documents to be forgeries, to strike out the respondent's affidavit referring to and bearing the said documents and to censure the respondent.
10. The Kenyan judicial process is adversarial in nature. It is the responsibility of the person relying on the documents to prove their authenticity, and that of the opposing party to establish their lack of genuineness. The trial on the authenticity of the documents should be conducted within the suit or application where the documents are sought to be relied on, but not in separate or parallel proceedings.
11. In this case the documents in question are sought to be relied on in the summons dated 24th September 2013. Whether the said documents are genuine or authentic is a matter that ought to be tried at the hearing of the said application; but not in separate proceedings as is sought by the applicant in the instant application.
12. The applicant is inviting this court to adopt a process which is alien to the common law, akin to that in Civil Law traditions where the court conducts an inquisition. The role of this court is not inquisitorial. It would be unprocedural to conduct an inquiry into the authenticity of the said documents outside of the hearing of the application where the said documents are intended to be relied on.
13. The best the court can do for the applicant is to facilitate the availing of the originals of the said documents by the respondent so that the applicant can give them to a document examiner for assessment. The document examiner in question should not be appointed by the court, but by the party who intends to rely on his evidence. The court should also not scrutinize the document examiner's report before the hearing of the application where the authenticity of the documents in

question first arose. The report of the said expert should not be submitted to court outside of the hearing of the application dated 24th September 2014.

14. The court is invited to strike out the replying affidavit bearing the said documents and to censure the respondent. That, according to the applicant, should happen after the court has scrutinized the document examiner's report. It would be unprocedural for the report to be submitted in proceedings outside for the application dated 24th September 2014. The issue of the striking out of the rival affidavit and the censure of the respondent should therefore not arise. What the applicant appears to me to be doing is to deal with aspects of the said application in ahead of its hearing. Such an approach would, in my view, be unwarranted and unjust.

15. On the birth certificate of Daniel Kioko, it do note that the respondent in her reply has not alluded to the said certificate. She does not deny having possession of the original of the certificate and does not explain how it came to her possession. She is not Daniel Kioko, nor the parent or spouse of the latter. There is no reason why she should continue to have possession of the said document.

16. The orders that I am disposed to make are as follows:-

a. That the respondent, through her counsel, shall avail to the applicant, through counsel, the originals of all the documents referred to in paragraph 4 of this ruling;

b. That the said documents shall thereafter be used by the applicant for the purpose only of having them assessed by a document examiner;

c. That thereafter the originals of the said documents shall be returned to the respondent or her advocates;

d. That the application dated 24th September 2013 shall only be fixed for hearing upon compliance with (a), (b) and (c) above;

e. That the respondent shall in the next fourteen (14) days surrender the original certificate of birth relating to Daniel Kioko to the applicant, and

f. That the documents referred to in (a), (b) and (c) shall be furnished to the applicant within thirty (30) days of the date of this ruling.

17. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 18TH DAY OF DECEMBER, 2015.

W. MUSYOKA

JUDGE