



Kinuthia (Suing as the Legal Administrator of the Estate of the Late Mercy Muthoni Ngugi) v Plainsview Nursing Home Limited t/a Plainsview Hospital & another (Civil Case 1 of 2022) [2025] KEHC 3362 (KLR) (14 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3362 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL CASE 1 OF 2022
A MSHILA, J
MARCH 14, 2025**

BETWEEN

**TITUS NGUGI KINUTHIA PLAINTIFF
SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF THE LATE
MERCY MUTHONI NGUGI**

AND

**PLAINSVIEW NURSING HOME LIMITED T/A PLAINSVIEW
HOSPITAL 1ST DEFENDANT
DR. STEPHEN KIMANI NGIGI 2ND DEFENDANT**

RULING

1. Before court is an application by way of Notice of Motion dated 29th May, 2024 and brought under Article 50(1), 159(2)(d) of *the Constitution* Section 1A & IB, 63(e) and 95 of the *Civil Procedure Act* (Cap 21) and Order Before court is the application by way of Notice of Motion dated 29th May, 2024 and brought under Article 50(1), 159(2)(d) of *the Constitution*, Section 1A 51 rule of the Civil Procedure Rules 2010. The 1st Defendant/Applicant hereinafter referred to as the Applicant sought for orders that:-
 - a. Spent
 - b. That this Honourable Court do grant the 1st Defendant leave to file documents out of time.
2. The application is premised on the grounds that when the Applicant was preparing for trial, it discovered that Dr. Edwin Walong, Pathologist, had prepared two different reports one for the Respondent and one for the Applicant. The two reports have two different opinions; as such the



- Applicant should be granted leave to adduce their report dated 7/11/2019 as well as leave to file an expert report by another pathologist to enable the court establish the cause of death.
3. The application is supported by the affidavit of C. K. Kiplagat the advocate in conduct of this matter who deposed that on 17/5/2024 during pre-trial conference with the Applicant, he discovered that there were two reports prepared by Dr. Edwin Walong dated 7/11/2019 and 6/10/2020 as such both reports should be placed before the court for consideration. He therefore, seeks leave to file documents out of time as he has also commissioned another pathologist to give another opinion. He contended that no prejudice will be occasioned to the other parties if the prayers sought are granted.
 4. Titus Ngugi Kinuthia filed his replying affidavit dated 10th June, 2024. He denied that there are two reports presented in reference to the Report by Dr. Edwin Walong, Pathologist as the alleged two reports are in essence, one report as they contain similar contents. The only difference was said to be that one is a summary of the other which they chose to use for ease of understanding by this Court. Instead, the Applicant would also be seeking leave to admit its independent report. He contended that the Applicant has failed to demonstrate what probative value would be provided by granting the orders sought or how the absence of such orders will negatively impact it. The court was urged to dismiss the Applicant's application.
 5. The application was canvassed by way of written submissions.

Applicant's Submissions

6. The Applicant submits that the court should grant it leave to file the report dated 7th November, 2019 noting that Dr. Walong prepared two reports giving different opinions so that the said expert witness can explain these reports to the court. Reliance was placed in the case of Kenya Power & Lighting Company Limited vs Spedag Interfreight Kenya Limited (2023) KEHC 2052 (KLR). It was submitted that no prejudice will be occasioned to the Respondent if the second report was introduced. In any case, the trial was said to have not yet started and that the discovery of the two reports was done during pre-trial and that the instant application was made timeously. The issue of admissibility and probative value cannot be determined at this stage but during the hearing.

Respondent's Submissions

7. The Respondent submits that there are no two reports but one report broken down from the detailed original and long report to one in plain simple English language. It was submitted that the Applicant should have attached the second and independent report that it sought leave to file. Reliance was placed in the case of Kagina vs Kagina & 2others (KECA) 242 (KLR). Further, it was submitted that allowing the opinion of the pathologist intended to be relied upon would mean exhumation of the deceased's body while the Applicant has not demonstrated that the expert's own opinion would be its own independent product without relying on the other reports. Failure to file a further affidavit by the Applicant was said to be confirmation that the two reports are the same. The Applicant was said to have failed to discharge the legal burden of proving admissibility, relevance and the probative value of the additional evidence that the Applicant seeks to file. Reliance was placed in the case of Stanley Maira Kaguongo vs Isaac Kibiru Kahuthia(2022) eKLR.

Issues for Determination

8. Having considered the application by the Applicant, the replying affidavit and the rival submissions, the main issue arising for determination is whether the Applicant is deserving of the prayer sought.



Analysis

9. The Applicant herein through its advocate sought leave to file documents out of time. The said advocate alleges that when they were preparing for trial, they discovered that Dr. Edwin Walong, Pathologist, had prepared two different reports one for the Respondent and one for them. It's their contention that the two reports have two different opinions as such they should be granted leave to adduce the report dated 7/11/2019 as well as leave to file an expert report by another pathologist to enable the court establish the cause of death.
10. The Respondent on the other hand, denies that there are two reports, citing that it was one report broken down from the detailed original and lengthy report to one in plain simple English language. Further, the Applicant contends that allowing the opinion of the independent pathologist would mean exhumation of the deceased's body while the Applicant has not demonstrated that the expert's opinion would be their own independent product without relying on the other reports.
11. This Court having perused the said two reports by Dr. Edwin Walong, Pathologist as attached in the instant application, takes note of the fact that indeed two reports exist and one is dated 7/11/2019 while the other is dated 6/10/2020.
12. The Respondent claims that his report is a summary of the detailed and long report. The Applicant equally claims that its report dated 7/11/2019 by the same pathologist will shed more light as to the cause of death and will assist the court in making its determination.
13. In the circumstances and bearing in mind that the Applicant presumably discovered that there were two reports on 17/5/2024 while conducting pre-trial conference and proceeded to file the instant application on 29/5/2024, the court is satisfied that there was no delay in filing the instant application.
14. Article 50(1) of *the Constitution* guarantees every person the right to access a court of law for determination of a dispute.
15. Further, under Article 159(2) of *the Constitution*, courts are mandated to administer justice without undue regard to procedural technicalities.
16. Subsequently, the instant matter is yet to be heard. In any case, the parties wish to pursue Court Annexed Mediation after this ruling. Be that as it may, the Applicant contends that no prejudice would be occasioned to the Respondent if the leave sought is granted. Whereas the Respondent states that the Applicant has failed to discharge the legal burden of proving admissibility, relevance and the probative value of the additional evidence that it seeks to file.
17. Being that the Respondent has failed to demonstrate how he would be prejudiced, if the Applicant is granted leave to file its report as prepared by the pathologist, this court has power to grant leave to the Applicant to file the said autopsy report dated 7/11/2019 by Dr. Edwin Walong, Pathologist.
18. This court makes reference to Order 11 of the Civil Procedure Rules, which provides that nothing prevents the court from exercising discretion and allowing parties to call further witnesses or file further documents as stipulated in Order 18 Rule 10 of the Civil Procedure Rules and Section 146 of the *Evidence Act*, the provisions are made to ensure that every party is accorded a fair hearing as guaranteed in Article 50(1) of *the Constitution* and an opportunity to present or defend their case in a fair and just manner.
19. Refer also to the case of Raila Odinga & others v IEBC & 3 Others Supreme Court of Kenya Presidential Petitions Nos 3, 4, 5/2013 [2013] eKLR, where the Supreme Court considered whether to



allow additional evidence filed outside the contemplation of the rules in a Presidential Election Petition and set the principles applicable as-materially:

“The parties have a duty to ensure they comply with their respective time – lines, and the Court must adhere to its own. There must be a fair and level playing field so that no party or the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the Court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided.

The other issue the Court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small or limited so that the other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the Court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence.”

20. In the instant case, the document that the Applicant seeks to be granted leave to file is a report prepared by the pathologist who prepared a similar report for the Respondent, the Respondent contends that it's a similar report while the Applicants contention that there are two different reports.
21. At this point and in the interest of justice, while invoking the overriding objective of the law in civil cases as stipulated in Sections 1A and 1B of the *Civil Procedure Act*, this Court is satisfied that it is fair and just to allow the Applicant to file its report dated 7/11/2019 to assist its case and to also assist the court in arriving at its determination.
22. This Court, however, declines to grant leave to the Applicant to file another report from an independent pathologist. The Respondent submitted that the same would include exhumation of a body suspected to have decayed and the Applicant has not demonstrated that the independent new report will be solely independent and that it will not make any reference to the existing reports.
23. This Court is satisfied that the said request to file another report from an independent pathologist is frivolous and/or intended to delay the just and expeditious determination of the suit.
24. In the circumstances, this Court is satisfied that this is a suitable case in which to exercise its discretion and invoke the overriding objective of the law in civil cases as mentioned herein above and to partially allow the application;

Findings and Determinations

25. For the above reasons this court makes the following findings and determinations;
 - i. The application is found to be partially with merit and it is partially allowed.
 - ii. The Applicant be and is hereby granted leave to file the Report dated 7/11/2019 out of time.
 - iii. Leave to file an independent expert report by another pathologist is disallowed.
 - iv. The Applicant shall bear the costs of this application.
 - v. Mention on 4/06/2025 before the Deputy Registrar for screening for Court Annexed Mediation.

Orders Accordingly.



**DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 14TH DAY OF MARCH,
2025**

A. MSHILA

JUDGE

In the presence of;

Sanja - Court Assistant

Mburu For the Respondent

Kiplagat - For the Applicant

Nyoro – for the 2nd Defendant

