In re Estate of Stephen Kinini Wango'ndu (Deceased) (Probate & Administration E010 of 2021) [2025] KEHC 6167 (KLR) (13 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6167 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

PROBATE & ADMINISTRATION E010 OF 2021

DKN MAGARE, J

MAY 13, 2025

IN THE MATTER OF THE ESTATE OF STEPHEN KININI WANGO'NDU (DECEASED)

BETWEEN

ELIJAH KININI WANG'ONDU ..... 1ST APPLICANT

DAVID MWORIA WANG'ONDU ..... 2ND APPLICANT

AND

SOLOMON MWIHUNGI MAHUGU ..... 1ST RESPONDENT

PETER NYIKA MUCHIRI ..... 2ND RESPONDENT

CHARLES MUCHEMI KARWERU ..... 3RD RESPONDENT

JOSEPH MAHUGU MBARIRE ..... 4TH RESPONDENT

JOSEPH MWIHUNGI ..... 5TH RESPONDENT

JANE WAMUCII WANJUKI ..... 6TH RESPONDENT

DANIEL THIRIKWA KININI ..... 7TH RESPONDENT

JAMES MURAGE ..... 8TH RESPONDENT

ESTHER WANGARI KININI ..... 9TH RESPONDENT

PAUL KURIA ..... 10TH RESPONDENT

MARY WANJIRU WANGAI ..... 11TH RESPONDENT

JAMES MWANIKI MUTHIKE ..... 12TH RESPONDENT

RULING

1. The late Stephen Kinini Wango'ondu (Deceased) died on 7.5.2021. Subsequently, a grant of probate of a written will was issued to Solomon Mwihungi Mahugu and Peter Nyika Muchiri on 30.08.2021. The petition was filed by the firm of Mahugu Mbarire. The application was supported by the annexed affidavit of the 3rd Respondent, Charles Muchemi Karweru. He stated that the deceased left a will dated 5.10.2020 and a codicil dated 12.4.2021. The deceased was 73 years old at the time of his demise, leaving an estate estimated at 500,000,000/=.

2. The said will is now a subject of contestations. The firm of Mahugu Mbarire & Company Advocates drew the contested will and codicil. The codicil was said to have been drawn by Mahugu Mbarire. The testator, Elijah Kinini Wang'ondu, reportedly executed the Will in the presence of Waweru Wanjau and Ondieki Joel.

3. The testator, Elijah Kinini Wang'ondu, reportedly executed the codicil at Nyeri G.K. Prison in the presence of Waweru Wanjau, Ondieki Joel, and Solomon Mwihungi.

4. Several applications were filed, of which there is no need to regurgitate them here. The main applications are for revocation and another dated 2.9.2024. The application for revocation dated 11.10.2022 was filed by Elijah Kinini Wang'ondu and David Mworia Wang'ondu. The second application was again filed by the same parties. The file has unnecessarily bulged. Parties are filing documents, including multiple numbers of notices of appointment. A party acting for 10 parties files 10 notices of appointment. An affidavit of service is 10 pages long.

5. The matter had even gone to the Court of Appeal regarding the application for preservation of the estate.

6. The Applicant herein filed a humongous application dated 2.09.2024. He abandoned the first prayer. The remaining prayers are:

    a. Abandoned

    b. The 4th Respondent be restrained from giving evidence in support of the 1st to 3rd respondents.

    c. That this honourable court be pleased to expunge from the record the 769 paragraphed affidavit sworn on 13.12.2022.

    d. Costs.

7. The main grounds are that the 4th Respondent is a former advocate of the deceased and the 1st to the 3rd Respondent and the deceased. They allege that privileged communication may be provided pursuant to Section 134 of the *Evidence Act*. The said affidavit disclosed confidential communication. They relied on the decision of King Woolen Mills Ltd, formerly known as Manchester Outfitters Suiting Division Ltd & Another V. Standard Chartered Financial Services Ltd & 2 Others (1995) JELR 100321 (CA).

8. They also state that the 4th Respondent attached a list of those who attended the opening to the replying affidavit in Nyeri CA Application No. E032 of 2023. They also state that there is a deed of settlement in pages 149 to 150 of the summons for revocation.

9. The 4th Respondent opposed the application and contended that the current application is merely the latest in a series of calculated efforts by the Applicants to obstruct the conclusion of the

succession proceedings. This assertion is supported by a pattern of conduct exhibited by the Applicants throughout the matter. Notably, the 1st Applicant previously attempted to dispossess their stepmother, Mrs. Scholastica Wachuka Wang'ondu, of her rightful bequest, her matrimonial home, by using the Respondent as an intermediary, a fact the 1st Applicant has openly acknowledged.

10. He contends that upon the 4th Respondent's refusal to comply, citing the impropriety of such an action, the 1st Applicant reportedly demanded the withdrawal of a Deed of Settlement dated 18.07.2021, which involved himself, the 2nd Applicant, their half-brother Mr. Crispin Kinini Wang'ondu, and their mother. Before the Respondent could respond to this demand, she received a perplexing call from Advocate Lucy Mwai, who revealed that another advocate would not take up the 1st Applicant's brief. The Respondent duly informed the 1st Applicant of this conversation.

11. Following this, the 4th Respondent stated that he became an adversary in the Applicants' eyes, and the succession matter has since been bogged down by a litany of applications that fail to articulate the Applicants' objectives clearly. Documents filed by the Applicants include multiple notices, summonses, affidavits, and appeals—all aimed, it appears, at derailing the process. The Respondent points to the dismissed Court of Appeal application as further evidence that these actions are strategic and intended solely to delay the resolution of the matter.

12. The 4th to 12th Respondents filed submissions stating that the first prayer was withdrawn and cannot be reinstated. They relied on Gisege & another (Suing as administrators of the Estate of Dorica Ondieki Gisege) v Chairman School Management Committee Daraja Mbili Mixed Secondary School [2024] KEELC 5412 (KLR):

> Secondly, it is not routine to reinstate a withdrawn suit. In his submissions, Mr. Wabwire urged that a withdrawn suit cannot be reinstated and he cited the case of Priscilla Nyambura Njue v Geovhem Middle East Ltd & another (Nairobi HCCC No 415 of 2016) [2021] eKLR and Charles Kiptarbei Birech v Paul Waweru Mbugua & another [2021] eKLR. In the case of Priscilla Nyambura Njue v Geovhem Middle East Ltd & another, an application to reinstate a withdrawn suit was made. Mativo J, dismissed the application stating as follows:
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> > 24. Withdrawal of a suit is itself its end. The right of a plaintiff to withdraw his suit is not a divine right but a right expressly conferred upon him by Order 25 and no right is similarly conferred upon him to revoke or rescind the withdrawal. So long as he remains the plaintiff, he may do any act which he may do in that capacity; he cannot, after withdrawal of the suit resulting in the loss of the capacity, do an act which can be done only in that capacity. Put differently, there is no provision conferring the right to revoke the withdrawal and there is no justification for saying that the right to withdraw includes in itself a right to revoke the withdrawal. Certain consequences arise from the withdrawal which prevent a party from revoking the withdrawal. The withdrawal is complete or effective as soon as it takes place. The right to revoke the withdrawal can only be allowed by the legislature by expressly providing so in the rule and not by the courts. In the same vein, the rules do not confer the court with power to reinstate a suit once withdrawn. Order 25 Rule 1 provides that the withdrawal shall not be a defence to any subsequent action. Before me is not a subsequent action, but the same suit.

13. The applicants stated that they have abandoned prayers 2 and 3. They were only pursuing prayer 1. In view of this, it is not necessary to go to the rest of the submissions.

Analysis

14. This is the saddest day in practice and the duty of counsel to assist the court in the administration of justice. The applicants appear to be embroiled in subterfuge and skulduggery meant to obfuscate issues with a view to derail the determination of the case before the court.

15. When the matter came before me on 28.01.2025, Dr. Kamau Kuria, Senior Counsel, addressed the court as follows:

> We have summons for revocation dated 11.10.2022, and directions have been given. There is an application dated 2/9/2024. The prayer against Mahugu has been overtaken by events. We were to expunge an affidavit. I abandon the first prayer.

16. Having abandoned prayer 1, only two prayers remained, that is 2 and 3. The applicant cannot abandon the same in submissions. He needed to either submit in court or file a notice of withdrawal. Mwera J, posited as follows when postulating on what is the role of submissions. He stated that they are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim. In the case of Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993 it was stated that:

> " Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

17. Submissions are not, strictly speaking, part of the case, the absence of which may do no prejudice to a party. Their precence or absence does not in any way prejudice a case as held in Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749 that:

> " As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

18. The Court of Appeal was more succinct in that Submissions cannot take the place of evidence when they addressed the question in the case of Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is

the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

19. To avoid these issues from coming back again, the court will still determine the issues submitted to the court. The first issue is the alleged confidentiality. Section 134 of the *Evidence Act* provides as follows:

    1. No advocate shall at any time be permitted unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment: Provided that nothing in this section shall protect from disclosure-

        a. any communication made in furtherance of any illegal purpose;

        b. any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client.

    2. The protection given by subsection (1) of this section shall continue after the employment of the advocate has ceased.

20. This means that the advocate-client privilege belongs to the client, not others. An advocate who wrote a will is entitled to testify to prove or propound a will. The 4th Respondent cannot be stopped from testifying regarding whether he drew the will. Gagging the 4th respondent, will ipso facto hold the hands of the executors in proving the will.

21. The 1st to 3rd Respondents are entitled to propound the will in the best way they wish to do so. The court cannot decide a priori, which evidence is to be excluded. There is no evidence tendered on the failure of the impugned affidavit. The same will have to be tested in the main hearing. The applicants must understand that courts are not manned by morons or nincompoops. The court will be able to rule on the admissibility of specific evidence. The parties must and their advocates should aid the court in expeditious disposal of the matters. The ruling by Kimaru JA comes to mind, especially where he stated in Nyeri CA Civil Application No. E032 of 2023 - Elijah Kinini Wang'ondu and David Mworia Wang'ondu Versus Solomon Mwihungi Mahugu & 11 Others, as follows:

> "This Court finds no fault with the trial court's direction which were made pursuant to Section 1B of the *Civil Procedure Act* that requires courts, in "handling all matter presented before it" to consider, inter alia, the "efficient disposal of the business of the court" and "the timely disposal of the proceedings".

This Court takes judicial notice of the fact that some succession disputes tends to be acrimonious and emotionally draining. The only way that courts can assist disputing parties, is to expedite the hearing and disposal of such disputes. The directions issued by the trial court should be viewed in that context, considering the fact that the succession dispute involved herein is an example of such contested succession disputes.

22. In the circumstances, the application dated 2.9.2024 lacks merit and is accordingly dismissed. The next question is whether to award costs. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> " It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

23. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

24. In the circumstances, the application dated 2.9.2024 is dismissed with costs to the 4-12th Respondents. The 1st to 3rd respondents shall bear their own costs.

Determination

25. In the circumstances, the court makes the following orders:

    a. The application dated 2.9.2024 is dismissed with costs to the 4-12th Respondents. The 1st to 3rd respondents shall bear their own costs.

    b. Following directions given hitherto, and my directions on 28.01.2025, the matter shall be heard daily from 20.05.2025.

    c. The court will not entertain any further interlocutory applications.

    d. Any application filed shall be dealt with together with the application for confirmation and the application for revocation.

    e. Hearing on 20.05.2025 as earlier ordered.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 13TH DAY OF MAY, 2025.

Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Dr. Kamau Kuria for the Applicants

Mr. Hassan Abdiaziz for the 4th – 12th Respondents

Mr. Hassan Abdiaziz for Mr. Karweru for the 1st – 3rd Respondents

Mr. Peter Kwenjera for Scholastica Wang'ondu

Court Assistant – Michael