



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of the Late Stephen Kipngetch Sang (Deceased) (Succession Cause E135 of 1999) [2025] KEHC 5920 (KLR) (12 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5920 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE E135 OF 1999  
RN NYAKUNDI, J  
MAY 12, 2025**

**BETWEEN**

**THOMAS KIPKORIR NGETICH ..... 1<sup>ST</sup> APPLICANT**

**FRED KIPTANUI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**LUCY KIMITEI ..... 1<sup>ST</sup> PROTESTOR**

**BEATRICE CHEBET ..... 2<sup>ND</sup> PROTESTOR**

**PATRICK KIPLIMO ..... 3<sup>RD</sup> PROTESTOR**

**RULING**

1. The are two applications before me for determination. The first is dated 7<sup>th</sup> March, 2025 seeking to arrest a ruling which was scheduled for delivery on 11<sup>th</sup> march, 2025 pending the hearing and determination of the affidavit of protest dated 20<sup>th</sup> February, 2025. The second application is dated 3<sup>rd</sup> April, 2025 in which the applicant seeks a direction that the hearing of this matter be conducted viva voce, and the applicant be allowed to call witnesses to adduce oral evidence in support of the application.
2. The application dated 7<sup>th</sup> March, 2025 is expressed to be brought under the provisions of Section 47 of the *Law of Succession Act*, Rule 73 of the Probate and Administration Rules. In asking the court to arrest its ruling that was scheduled on the 11<sup>th</sup> March, 2025 pending the hearing and determination of the Affidavit of protest dated 20<sup>th</sup> February, 2025, the applicant stated that the protestors have filed and served an affidavit of protest, which raises substantive issues that ought to be considered before any ruling is delivered. That if the ruling is delivered without addressing the protest, the will be an injustice occasioned and all the legitimate beneficiaries will suffer irreparable harm.



3. In response to the application dated 7<sup>th</sup> March, 2025, the Protestor filed a replying affidavit sworn on 18<sup>th</sup> March, 2025 in which the Petitioner deposed that the application is bad in form as the same is in the form of Notice of Motion as opposed to summons given that this is a succession cause.
4. The petitioner further stated that he is a legitimate son of the deceased herein and he is the only son who bears the deceased's middle name "Ngetich" as it should be according to Nandi customs. That he is a very active participant of all family function, meetings and events of his family contrary to the claims of the objectors. He deposed that there is no need of providing documentary evidence while in fact, it is the 1<sup>st</sup> protestor who always talks to him and he usually sends him money. That the prayer for DNA cannot be granted as the only prayer is for arresting the ruling which was to be delivered on 11<sup>th</sup> March, 2025. He prayed that the application be dismissed with costs and the ruling set on 11<sup>th</sup> March, 2025 be delivered.
5. Lucy Kimitei filed yet another application dated 3<sup>rd</sup> April, 2025 expressed under the provisions of section 63 of the Evidence Act, Order 18 Rule 3 of the Civil Procedure Act, Section 146 of the Evidence Act. She sought orders that:
  - a. Spent
  - b. This court pleased to direct that the hearing of this matter be conducted viva voce, and the applicant be allowed to call witnesses to adduce oral evidence in support of the application.
  - c. This Honourable court grants any other orders it deems fit in the interest of justice.
6. The application is based on grounds that the matter herein raises complex and contentious issues of facts that cannot be adequately determined through submissions alone. That the applicant has critical witnesses whose oral testimony is necessary for a just and fair adjudication of the matter. She contends that there is a real risk that the applicant's rights will be prejudiced if the matter is determined solely based on affidavit Evidence.
7. In response, the Petitioner filed a Notice of Preliminary Objection dated 8<sup>th</sup> April, 2025 raising grounds captured as hereunder:
  - a. That the application herein offends the provisions of section 5 and 8 of the Oaths and Statutory Declarations Act.
  - b. The application is defective in law, frivolous, vexatious, baseless as the supporting affidavit is not commissioned hence legally untenable before any court of law.
  - c. That the application herein offends the provisions of Rule 59(1) of the Law of Succession Act.
  - d. That the application herein is brought under Notice of Motion instead of summons hence the same is defective.

### **Analysis and determination**

8. The substratum of this litigation in so far as the interlocutory applications are concerned touching on the summons for confirmation of grant and subsequent preliminary objections raised to the offending affidavit cannot escape the interpretation of Article 27, 48, & 50 of the constitution. The right to a fair trial in our Article 50 of the constitution seems on the face of it to speak to the class of persons involved in the criminal justice docket, but that is far from the truth. The provisions are broader than the list of specific rights set out in the Article emphasising on the right of an accused person. The fair trial rights in equal measure apply to the domain of civil law adjudication. In Article 50 (1) every person has the



right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body. A right on access to a hearing both in Article 40 & 40 offers protection in respect of any restrictions such as ouster clauses which touch on procedural defects and other procedural rules like the facts of this matter does seek relief on the requirement of notarization or commissioning of an affidavit. The forum constituted under Article 50(1) of *the constitution* is clothed with white jurisdiction of powers to sustain her suit or an application which falls squarely on procedural rules and prescription legalise to a litigation. What *the constitution* demands under the doctrine of equality of arms as underpinned in Article 50 on fair trial rights is independence and impartiality, notes and hearing requirements, disclosures, both at pre-trial and the full hearing where evidence is adduced and tested within the provisions of the *Evidence Act*. It is necessary to appreciate by the fairness of a trial as to take into account the circumstances of each case. When one talks of fairness in the context of civil proceedings, consideration of certain factors may be different from the text and context in criminal justice administration. What lies at the heart of important rights embodied in our constitution is one of right to a fair hearing where the disputants to a cause of action are given an opportunity to adduce evidence, have it challenged, and at the conclusion of it all a properly constituted court, or independent tribunal makes a decision on the merits. My reading of Article 50 embraces the concept of substantive fairness. It must be understood that there is a distinction between substantive and procedural fairness both textually and contextually as it relates to the core of Article 50 of *the constitution*. These provisions together with Article 27 on equality and freedom from discrimination as read together with Article 48 of *the constitution* on Access to courts will mirror more prominently on the outcome of this contest.

9. This Court has carefully considered the two applications before it: first, the application dated 7<sup>th</sup> March, 2025 seeking to arrest the ruling that was scheduled for delivery on 11<sup>th</sup> March, 2025 pending the hearing and determination of the affidavit of protest dated 20<sup>th</sup> February, 2025; and second, the application dated 3<sup>rd</sup> April, 2025 seeking directions that the hearing of this matter be conducted viva voce with the applicant being allowed to call witnesses to adduce oral evidence. The Petitioner has raised a preliminary objection dated 8<sup>th</sup> April, 2025 regarding procedural defects in the second application. I shall address each application on its own merits.
10. Starting with the application dated 3<sup>rd</sup> April, 2025, the preliminary objection contends that it is defective on several grounds, chief among them being that the supporting affidavit is not commissioned as required by Sections 5 and 8 of the *Oaths and Statutory Declarations Act*. Upon examination of the court record, it is evident that the supporting affidavit has indeed not been properly commissioned.
11. Section 5 of the *Oaths and Statutory Declarations Act* provides in mandatory terms that:

“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”
12. In the case of Regina Munyiva Nthenge v Kenya Commercial Bank Ltd (2005) eKLR where an affidavit had been purportedly sworn at Machakos but commissioned in Nairobi, the Court stated that:

“The second issue raised by the Applicant is that the application should be treated as unopposed because the replying affidavit is defective since it is not properly commissioned. Section 5 of the Oaths and Statutory Declaration Act provides that-

“Every Commissioner for Oaths before whom any oath or affidavit is taken or made shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made in the jurat.”



The affidavit is shown as having been sworn at Machakos in the presence of Leah Mbutia Commissioner of Oaths on 13<sup>th</sup> October 2003 but whose stamp reads Nairobi. If the affidavit was sworn at Machakos, it should have been before a Commissioner for Oaths in Machakos and the stamp should show likewise. The only conclusion one can reach on looking at this affidavit is that the place the affidavit was sworn and where it was commissioned are two different places. That is irregular and unacceptable and that affidavit is, therefore, fatally defective as it was not sworn in the presence of a Commissioner for Oaths. It is likely that stamp was just affixed. This Court would have no alternative but strike off the replying affidavit as it is not properly commissioned and that means that the application would stand unopposed."

13. Similarly, in *Re Estate Dominicus Odhiambo (Deceased)* [2020] eKLR the court stated:

"Bearing that definition of what an oath is, the question 1 must answer is whether the 1st petitioner took an oath before a Commissioner for Oaths .....

..... In my humble view, this is a defect that cannot be remedied by order 19 Rule 7 of the Civil Procedure Rules or Article 159(2)(d) of *the Constitution*. This is because the defects affect the veracity and probative value of the averments, which goes to the substance of the affidavits and the Petition for grant not being supported by the affidavit in question is no petition at all.

In addition, the other reason why this court would not issue a grant in respect of the petition for grant filed by the Two Respondents/Petitioners herein is that, the affidavits sworn by the 1st petitioner on 13th October 2015 for proposed administrator and P & A 11 are fatally defective as they are allegedly sworn at Siaya but the advocate commissioning has appended a stamp and signature with an address of P.O. Box 883 Kisumu. This offends section 5 of the Oaths and Statutory Declaration Act."

14. In the present case, the supporting affidavit for the application dated 3<sup>rd</sup> April, 2025 has not been commissioned at all. This defect is even more severe than those addressed in the cited authorities. The lack of commissioning renders the supporting affidavit a nullity, and consequently, the application dated 3<sup>rd</sup> April, 2025 lacks evidential foundation and must be dismissed.
15. The Court must emphasize that the commissioning of affidavits is not a mere procedural technicality but a substantive legal requirement that goes to the heart of the reliability and integrity of sworn testimony. The Commissioner for Oaths serves a critical gatekeeping function in our legal system, verifying that the deponent has actually appeared in person, understood the contents of the affidavit, and voluntarily sworn to its truth. This safeguard prevents fraud and ensures the sanctity of evidence presented to the Court.
16. The absence of commissioning in the present case renders the supporting affidavit for the 3<sup>rd</sup> April, 2025 application legally non-existent, and the Court has no option but to strike it out.
17. Turning to the application dated 7<sup>th</sup> March, 2025, which seeks to arrest the ruling that was scheduled for delivery on 11<sup>th</sup> March, 2025, it is grounded on the filing of an affidavit of protest dated 20<sup>th</sup> February, 2025, which the applicant contends raises substantive issues that require consideration before the delivery of the ruling.
18. The Court observes that the affidavit of protest dated 20<sup>th</sup> February, 2025 was filed and served prior to the scheduled delivery of the ruling. While the Petitioner has raised concerns about the form of the application being a Notice of Motion rather than a summons, this Court is mindful of the



overriding principle articulated in Article 159(2)(d) of *the Constitution*, which directs that justice shall be administered without undue regard to procedural technicalities. Let me point out that succession matters are sensitive family matters that require careful consideration of all legitimate interests to ensure equitable distribution of estates. This principle is particularly pertinent where, as in this case, there are allegations touching on the very core of succession; the legitimacy of beneficiaries and their entitlement to inherit.

19. The substance of the protest raises fundamental questions that strike at the heart of this succession cause. The legitimate distribution of the deceased's estate is a matter of profound significance not just to the immediate parties but to the broader principles of justice and familial harmony that succession law seeks to uphold. To proceed with a ruling without addressing these substantive concerns would potentially undermine these principles.
20. The Court must balance the need for procedural efficiency with the paramount importance of ensuring that all legitimate claims and interests in an estate are fully ventilated and justly determined. In this delicate balancing act, the Court finds that the scales tip decidedly in favour of allowing the protest to be heard and considered before a final determination is made.
21. While the Court acknowledges the Petitioner's objection regarding the form of the application, it finds that this procedural irregularity is outweighed by the substantive justice considerations at play. The potential for irreparable harm to legitimate beneficiaries, as alleged by the applicant, presents a compelling reason to arrest the ruling pending the hearing of the protest.
22. It is important to note the intrinsic connection between the two applications before this Court. The application dated 7<sup>th</sup> March, 2025 seeks to arrest the ruling to allow the protestors to be heard on their protest. The second application dated 3<sup>rd</sup> April, 2025, though procedurally defective, reveals the protestors' intention to present their case through oral testimony rather than affidavit evidence alone.
23. Section 47 of the *Law of Succession Act*, under which the first application is brought, provides the statutory framework for objections in succession matters. The Court recognizes that such objections may necessitate different modes of hearing depending on the complexity of the issues raised. In contentious succession matters, the appropriate mode of hearing is a critical procedural determination that impacts the quality of evidence placed before the Court.
24. While this Court is constrained to dismiss the application for viva voce hearing due to the fatal procedural defect identified, this dismissal is without prejudice to the protestors' right to file a fresh application that complies with all procedural requirements. Any such application, if filed, will be considered strictly on its merits in accordance with the applicable legal provisions.
25. The Court therefore finds that justice would be best served by:
  - a. The application dated 3<sup>rd</sup> April, 2025 is hereby dismissed for lack of a properly commissioned supporting affidavit.
  - b. The application dated 7<sup>th</sup> March, 2025 seeking to arrest the ruling scheduled for delivery on 11<sup>th</sup> March, 2025 is hereby allowed.
  - c. The affidavit of protest dated 20<sup>th</sup> February, 2025 shall be heard on its merits in terms of Article 27, 48, & 50 of *the constitution*.
  - d. The protestors are at liberty to file a fresh application regarding the mode of hearing, which shall be determined on its own merits if and when properly filed.



- e. That for avoidance of doubt the impugned affidavit having been struck out leave be and is hereby granted to the Applicant to file a compliance affidavit
- f. Costs shall be in the cause.

26. It is so ordered.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 12<sup>TH</sup> DAY OF MAY 2025**

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**R. NYAKUNDI**

**JUDGE**

