



In re Estate of Jackson Kiprotich Kibor (Deceased) (Succession Cause E049 of 2022) [2024] KEHC 211 (KLR) (23 January 2024) (Ruling)

Neutral citation: [2024] KEHC 211 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE E049 OF 2022
RN NYAKUNDI, J
JANUARY 23, 2024**

**IN THE MATTER OF THE ESTATE OF JACKSON KIPROTICH KIBOR
(DECEASED)**

BETWEEN

**EUNITAH JELIMO BOR 1ST PETITIONER
JONAH KIMUTAI KORIR 2ND PETITIONER**

AND

**TEGLA JEPTOO KIBOR 1ST OBJECTOR
IRENE CHEPLETING KIBOR 2ND OBJECTOR
PAUL KIRWA KIPLAGAT KIBOR 3RD OBJECTOR
CAROLINE JEPTANUI 4TH OBJECTOR
STEPHEN KIPRONO KIBOR & 24 OTHERS 5TH OBJECTOR**

RULING

1. What is pending before this court is an application dated 20th July 2022 seeking the following orders;
 1. That the original will be availed in court for further examination of the deceased's signature by the Government forensic document examiner from the directorate of criminal investigation headquarters.
 2. That the costs of this application be provided for.The application was premised on the supporting affidavit and the grounds set out in the application. The objector also sought leave to file additional documents.



2. The background underlying the application is that the applicant lodged an objection to the grant of probate on 17th June 2022 and impugned the deceased's signature on the purported will. The applicants have invited a forensic document examiner to examine the signature of the deceased alongside the deceased's other signatures.
3. The 1st petitioner opposed the application vide a replying affidavit dated 15th September 2022, filed on 4th October 2022. She deponed that the application should be dismissed as it is fatally defective and an abuse of the court process. She stated that a copy of the original will was deposited in court pursuant to section 5(1)(3) of the [Law of Succession Act](#) and Rule 7(5) of the [Probate and Administration Rules](#). Additionally, that the will is under the custody of Mr Wilson Kalya and he is willing to avail it whenever required to do so.
4. It is the respondents' position that the present proceedings are not criminal in nature and therefore the Directorate of Criminal Investigations cannot be involved in this matter. There is no proof that a report has been lodged with the DCI and thus it cannot be involved unless it wishes to investigate the validity of the signatures. Further, that it is upon the directorate to file an appropriate application and lay a proper basis before the court. The petitioner urged that the court is an impartial arbiter and cannot direct the DCI to carry out investigations on the will. She maintained that the burden of proof was on the applicants and it was not upon the court to help them with their investigations. She prayed that the application be dismissed with costs.

Applicants' case

5. The applicant submitted that it is in the interests of justice that if allowed, the same will help the Court in determining the question of validity of the purported will which was presented by the Petitioners. Further, that before the said will was produced by the Petitioners, it was not possible for the scrutiny of the signature to be done by the Objectors. Counsel cited the case of [Professor D.m. Ndeti v Orbit Chemical Industries Limited](#) (2021) eKLR in support of this submission.
6. The applicants cited section 1A of the [Civil Procedure Act](#) and urged that it is in the interest of justice and meritorious determination of the facts in issue, undue regard to procedural technicalities ought not be relied on pursuant to Article 159 (2)(d) of the [Constitution](#) of Kenya 2010. The Objectors contended that no prejudice shall be visited upon the petitioners they will have an opportunity to examine and respond before the Objectors' case is heard. They maintained that no prejudice will be occasioned on the parties as the 1st Petitioner is yet to be cross-examined in full and her witnesses are yet to testify. Furthermore, the Objectors are yet to take to the dock to testify and will be relying on these documents to advance their case. Counsel cited the Court of appeal in [Nicholas Kiptoo Arap Korir Salat v. Independent Electoral And Boundaries Commission & Others](#) (2013) eKLR in support of this submission. The applicants implored the court, in exercise of its discretion to admit the list of documents dated 24th November 2023. Counsel relied on the case of [Chairman, Secretary And Treasurer, School Management Committee Of Sir Ali Bin Salim Primary School & Another v. Francis Bahati Diwani & 2 Others](#) in support of this submission. Counsel urged the court to admit the list of documents dated 24th November 2023 after close of pleadings, in the interest of justice. The said pleadings were filed in good faith with the sole intent of assisting this Honourable Court reach a meritorious determination of the issues before it.

1st, 2nd, 3rd, 4th and 5th Objectors' Submissions

7. The objectors submitted that pursuant to section 3A and 63(e) of the [Civil Procedure Act](#), this Honourable Court has the powers to make such other interlocutory orders as may appear to the court



to be just and convenient in order to prevent the ends of justice from being defeated. The applicants seek examination of the original by the government document examiner. The Objectors humbly submit that there is no mandatory legal provision requiring that the original will must be examined by the government's document examiner. On the contrary, the Objectors avers that they have alleged forgery and are under a legal duty to prove such allegations, citing the case of *Ndolo -V-Ndolo* [2008] 1KLR (G &F) 742 in support of the submission. To discharge this burden of proof, the Objectors would require to call an expert witness being a document examiner for purposes of examining the authenticity of the purported will.

8. Further, counsel cited the case of in *Re: Estate of Julius Mimano (deceased)* [2019] eKLR the court held that he who alleges forgery of a will must prove by calling a document examiner to give expert opinion on the signatures. To this end, the Objector's would want to bring in their own private document examiner to examine the purported original will of the deceased. It is imperative to note that the Petitioners have not filed the original will in court as required under section 51 (3) (a) the *law of succession Act*. The original will is very necessary for purposes of examination of the authenticity of the will by the document examiner. In the present case, the Objectors submit that it is imperative that the original will be availed for examination by the Objector's document examiner.
9. It is trite law that the best evidence for examination purposes is always the original documents and in this instance being the purported original will of the deceased. Counsel cited the case of *James Gitingu Wamagata & another v David Migichi Kagani* [2015] eKLR in support of their submissions. It is clear from the foregoing that in light of the salient features in an original document, it is imperative that the original document is examined by the document examiner in ascertaining the authenticity of the document. Further, that no prejudice whatsoever will be suffered by the Petitioners if the original will is presented for examination. On the contrary, the Objectors stand to be prejudiced if their document examiner is not allowed to examine the best evidence being the original will. If in fact the purported will is not a forgery, there would be no harm if the original will is produced for examination.
10. Counsel submitted that they have sufficiently demonstrated that they are deserving of the orders requiring production of the original will for examination by the document examiner.

6th, 8th, 9th, 11th, 12th, 13th and 14th Objectors' Submissions

11. The objectors cited section 109 of the *evidence act* and submitted that as they have alleged that the Will is a forgery. It follows that the onus to proof this allegation is on the Objectors. The Objectors have decided to seek an expert opinion on the issue and are inviting a document examiner to scrutinize the signature against those in documents signed by the deceased during his lifetime and render his opinion. Section 48 of the Evidence Act provides for opinions of experts and states that when the court has to form an opinion on a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions. Such persons are called experts.
12. Counsel cited Section 50 of the Act and submitted that it is the Petitioners' position that the will was signed by the deceased. It is also the Objectors' position that the signature appearing on the Will does not belong to the deceased. The Objectors have sought an expert's opinion to resolve the two rival positions. Counsel cited the court in *MSA V Parveen Yunus* (2020) eKLR when it cited *Ndolo v Ndolo* (2008) eKLR in support of the application and urged that the copies obtained from the court record are blurred and the Objectors seek an examination of the original Will purportedly signed by the deceased testator.



13. Counsel urged the court to allow the Objectors to file documents in support of their objections for a just determination of the matter. On the 2nd of August 2023, they sought leave to comply upon examination of the original will by an expert and the making of a report thereof. This is because the said report will form part of the evidence. Leave was granted. Counsel urged that the court has discretion and can make directions for just determination of matters.

Analysis & Determination

14. The following issues arise for determination;
 1. Whether the original will should be subjected to examination by a Government forensic document examiner from the directorate of criminal investigation headquarters.

Whether The Original Will Should Be Subjected To Examination By A Government Forensic Document Examiner From The Directorate Of Criminal Investigation Headquarters.

15. This being a cause based on testate succession, the crux of the matter is the validity of the original will of the deceased. The petitioners maintain that the will is genuine and that the deceased signed the same in the presence of witnesses, who are listed as witnesses on the suit and have written statements in support of the same. The objectors contest the validity of the will and maintain that the same is a forgery. There are also objections to the properties bequeathed by the deceased, including an objection by the 28th objector to the effect that the deceased bequeathed properties that were not registered in his name. the 26th and 27th objectors have also raised issues with the failure of the will to give provisions for the property they are in occupation of. It follows that the first port of call is to determine the validity of the will.
16. The petitioner, in her affidavit dated 15th September 2022, deponed at paragraph 7 that the original will is in possession of Mr. Wilson K. Kalya's custody, an advocate of the high court and that he is willing to produce the same in court. in opposing the application, the 1st petitioner was adamant that as this is not a criminal matter, the Directorate of Criminal Investigations cannot be involved and further, that the court is merely an arbiter and cannot direct that the document be examined by a forensic examiner. The 1st petitioner is misguided in this approach as the forensic examiner is not pursuing a criminal matter in this instance, the purpose of the examiner from the DCI is to give expert evidence that will enable the court to determine whether the will is valid. As the court is not trained in the methods of document examination and forensics, there is no other way that the validity of the will can be determined. Despite the fact that the system of law in Kenya is adversarial, the court has inherent jurisdiction under the succession act to make orders that are in the interest of expedience of justice.
17. Section 48 of the *evidence* Act provides as follows;
 - (1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.
 - (2) Such persons are called experts.
18. In the instant proceedings the requirement that the document purporting to be a will and must have been drafted or executed by the testator is at the heart of the intended distribution of the testator's estate. The correct interpretation of the word drafted following the literal approach is that the impugned document before this court must have been prepared personally by the deceased and not any purported third party. In this probate cause of action the issue on trial is whether the deceased



intended testamentary had been written as his final will or simply gave instructions for the same to be drafted by a third party to give effect to the corpus of inheritance. Here the authenticity of the will is in question by the heirs to the estate.

19. Indeed, if the signature is determined to have been forged, it would influence the result of the verdict. As the pre-trial stage has already lapsed, it follows that the report would qualify as additional evidence. It is my considered view that the report being pursuant to a court order, the applicants need not seek leave to file the same in court as the document examiner shall file the same in compliance with the court order. However, to tie all the loose ends, I shall grant leave to file additional evidence to the applicants and corresponding leave to the respondents to respond to said additional evidence by way of affidavit. This will enable the court settle the issue of whether the deceased died testate or intestate conclusively. As this is a contentious matter, it would be in the interests of impartiality that the document examiner be one from the Directorate of Criminal Investigations to quell any claims of interfering with the outcome of the document examination
20. The only way that the court can determine the allegations of validity of the signature of the wills is through the opinion of an expert witness. As the original will is available, the same should be submitted to Director of Criminal Investigations Nairobi located along Kiambu road to delegate to the appropriate department for forensic analysis. The report so extracted from the forensic analysis be made available to the court at a scheduled session. In conclusion, at the back of my mind I restate that in every case the onus of proof under section 107 (1) 108 and 109 of the *evidence Act* lies on the propounders of a will to satisfy the court that the instrument before court is the last will of a free and capable testator. By this decision for an order to have the original will submitted to the document examiner does not necessarily shift that standard and burden of proof. The power of the court to make an order under rule 73 (1) of the *probate and administration rules* has ripened in an application filed within a trial of the objection proceedings.

Whether The Applicants Should Be Granted Leave To File Additional Evidence

21. It is trite that in any proceedings before a court of law there is discretion duly donated by the rules of evidence and procedure that It may refuse to allow evidence in which a party proposes to rely on if it appears to the court that having regard to all circumstances and pleadings including the nature of the evidence and how it was obtained the admission of additional new evidence would have such an adverse effect on the right to a fair trial in Article 50 of the *Constitution*. More significant is to guard against hearsay rule in both criminal and civil proceedings. Hearsay is not made generally admissible by the scheme of the *evidence Act*. Evidence previously represented by a party is not admissible as new evidence to prove existence of a fact if a person so compelled to seek leave of the court and given evidence about an asserted fact. The discretion of the court may also be exercised to a party to re-open his/her case if the evidence in question arose which no human ingenuity could have foreseen. It is not evidence based on what the adversarial party has heard from the opposing party and for that matter he/she is compelled to seek leave of the court to submit new evidence against such other party seeking to fill in gaps or correct mistakes in the case. In particular, the court is never permitted under this rule to exercise discretion or admission of new evidence which is likely to occasion prejudice, injustice or unfair advantage to the adverse party. In application of this nature the owners of prove in on the party to establish to the court that the evidence is material to an issue that is properly part of his/her case pending trial.
22. Courts have often found that once the parties have concluded their pre trial stage and all documents have been filed, the trial should proceed to its logical conclusion. In the present cause, the situation is unique as the applicants seek to have the will produced and examined, after which the examiner shall file the report in court.



23. The Supreme Court, in the case of *Mobamed Abdi Mahamud v Ahmed Abdullabi Mohamad & 3 others* (2018) eKLR laid down the circumstances under which additional evidence may be admitted as follows;

“We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:

- a. The additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
- b. it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
- c. it is shown that it would not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
- d. where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
- e. the evidence must be credible in the sense that it is capable of belief;
- f. the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
- g. whether a party would reasonably have been made aware of and procured the further evidence in the course of the trial is an essential consideration to ensure fairness and due process;
- h. where the additional evidence discloses a strong prima facie case of wilful deception of the court;
- i. the court must be satisfied that the additional evidence is not utilized for the purpose of removing the lacunae and filling gaps in evidence. The court must find the further evidence needful;
- j. a party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in the appeal, fill up omissions or patch up the weak points in his/her case;
- k. the court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.”

The court also stressed that, in exercise of its absolute discretion, it will only allow additional evidence sparingly and with abundant caution on a case-by-case basis.

24. Approaching the question of admission of evidence as submitted by the parties I bear in mind that is a matter for the discretion of this court based on all of the circumstances of the case in accordance with the philosophy of the *Constitution*. That means, that the mandated discretion inquiry must be grounded in the facts of a particular case to determine whether evidence so outlined to be produced or



taken may be in breach of the Constitutional fair trial rights once admitted. It is permissible to note that rules of procedure are servants of justice and not its masters. That's why even after pre-trial conference inevitably the court has to view the case as a whole and if a need arises for a party to seek leave to introduce new evidence that right should not be denied capriciously or whimsically for the Constitution guarantees fundamentally fair trial rights. Finally, in exercising discretion in the instant case to admit late evidence I am persuaded not to overlook the right of a party to provide critical evidence which can be helpful to this court to resolve the essential elements of the case. The principle of equality before the courts in Art. 27 of the Constitution means in the first place that regardless of one's gender, race, origin, sex, or financial status has the right not to be discriminated against either in the course of the proceedings or in the way the law is applied to the person concerned. The principle of equality as a Constitution imperative is guaranteed throughout the pre-trial and trial stages of either civil or criminal proceedings. I think this is the interface of the doctrine of equality of arms as part of a fair trial concept. In my view these applications before me to subjected the original will to the document examiner and on the other hand to uphold the adversarial nature of civil proceedings to admit new evidence is to underscore the idea that every individual is entitled to equal interest and equal respect in adjudication of disputes by an independent tribunal in Art.50 (1) of the Constitution.

25. Applying the test above, it is clear that the additional evidence is directly relevant to the matter before the court and in the interest of justice.
26. In the premises, my orders are as follows;
 1. The Petitioner/executor in possession of the original copy of the testators will do produce and submit it via personal delivery to the Director of Criminal Investigations domiciled along Kiambu road for the same to be subjected to forensic examination within 10 days from today's date.
 2. That the Director of Criminal Investigations shall be at liberty to secure any samples, tools, writings from the deceased estate in collaboration with the petitioner to enhance the forensic analysis.
 3. The Directorate of Criminal Investigations to conduct a forensic document examination on the original will and file a report in court on 26th February, 2024 for a scheduled status conference of the case.
 4. To the extent on the part of the other applicant application to adduce new evidence notwithstanding the stage of this trial leave be and is hereby granted for that purpose.
 5. In relation to this leave in clause 4 the same be shared so that both parties be given an equal opportunity with regard to the evidence tendered by the applicant to file any rejoinder within a reasonable time.
 6. In all the circumstances leave to apply in any event granted.

It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 23RD DAY OF JANUARY 2024

R. NYAKUNDI

JUDGE

In the presence of;

Ms. Chesoo Advocate



Mr. Esikuri Advocate

Mr. Maathai Advocate

