



REPUBLIC OF KENYA



**Obare v Samuel (Civil Appeal E038 of 2023)  
[2024] KEHC 2962 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2962 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL E038 OF 2023  
DKN MAGARE, J  
MARCH 8, 2024**

**BETWEEN**

**DOLORES ABERNATHY OBARE ..... APPELLANT**

**AND**

**JANET OMANI SAMUEL ..... RESPONDENT**

*(Appeal from the Ruling of the senior Principal Magistrate Hon. C. Ocharo given on 18/4/2023 in Kisii Succession Cause No. E064 of 2020)*

**JUDGMENT**

1. This is an Appeal from the Ruling of the senior Principal Magistrate Hon. C. Ocharo given on 18/4/2023 in Kisii Succession Cause No. E064 of 2020. The said ruling dismissed the Appellant's objection and subsequently confirmed the grant. The effect of the dismissal was that the Objection was dismissed for several 'serious' defects in the affidavits filed.
2. For some reason, the documents filed indicate the case number as Succession E064 of 2020 and 468 of 2020. Nothing however turns on this as parties are agreed on the correct case number.
3. The dispute relates to the heirs of the estate of the deceased who died on 9/2/2020 at Oasis S. Hospital. The children of the deceased are not disputed. Only the deceased women. Happily, the children did not participate as their mothers battled. The man who created the imbroglio was resting peacefully.
4. This could have been fully avoided had the parties familiarised themselves with sections 3(5), 26, and 29 of the [Law of Succession Act](#) and Rule 44 of the Probate and Administration Rules.



5. The proceedings remind me of a tale of two cities by Charles Dickens<sup>1</sup>, in his introductory paragraph, he posited as doth: -

“It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredibility, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way--in short, the period was so far like the present period, that some of its noisiest authorities insisted on its being received, for good or for evil, in the superlative degree of comparison only.”

6. In the Chamber Summons Application dated 1<sup>st</sup> July 2022 sought to prove marriage by way of copies of the marriage certificate, photographs, and medical cover certificate attached as annexures to the Supporting Affidavit thereto. In its Ruling, the Lower Court struck out the Appellant’s Affidavit and dismissed the Appellant’s Application.

7. The Court reasoned that the Affidavit did not comply with the requirements of Section 5 of the [Oaths and Statutory Declarations Act](#) in so far as the deponent and the commissioner for oaths were in different locations at the time of signing the Affidavit. The Lower Court then proceeded to dismiss the Application for want of evidence.

8. The Appellant raised 8 grounds of Appeal as follows: -

- a. That the Learned Lower Magistrate erred in law and fact in basing her findings on irrelevant matters/ facts.
- b. That the Learned Lower Magistrate erred in law and fact in failing to consider the decisions of the appellate court as regards Succession cause, by failing to find that the objector is a wife to the deceased.
- c. That the Learned Lower Magistrate erred in law and fact by failing to determine the real issues before her.
- d. That the Learned Lower Magistrate red in law and fact by applying wrong principles of the law and thus arrived at a wrong conclusion.
- e. That the Learned Lower Magistrate erred in law and fact by failing to consider the submissions by the Objector/Appellant.
- f. That the Learned Lower Magistrate erred in law and fact by failing to consider the provisions of the [law of succession act](#) cap/laws of Kenya specifically section 12 of the succession act.
- g. That the Learned Lower Magistrate erred in law and fact by dismissing the objector/appellant's application without verifying the objector’s (position under) the Succession Act.
- h. That the Learned Lower Magistrate erred in law and fact by failing to consider all evidence placed on record by the objector/ appellant.

9. The grounds are general and repetitive. They are prolixious and unseemly. The first 5 grounds are raising the same issue as the last three. The issue that was pleaded is only one, that the court failed to properly analyze the real issues before the court and as such arrived at an erroneous decision. The real issue in controversy is who the widows of the deceased are or were. Both claimed to have been married

<sup>1</sup> James Nisbet Co Ltd, 21 Berners Street,1902.



under statute. The Appellant was the first in time. There appears to have been a burial dispute where the Appellant was allowed to participate in the burial.

10. It should be recalled that Order 42 Rule 1 of the Civil Procedure Rules provides as doth: -

“1. Form of appeal –

- (1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
- (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

11. The Court of Appeal had this to say regarding rule 86 of the Court of Appeal rules (which is *pari materia* with order 42 Rule 1) in the case of *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] eKLR: -

“We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See *Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others* [2013] eKLR) and *Nasri Ibrahim v. IEBC & 2 Others* [2018] eKLR. In the latter case, this Court lamented:

“We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs.” The 18 grounds of appeal presented by the appellant, *Robinson Kiplagat Tuwei* against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues...”

12. In the case of *Kenya Ports Authority v Threeways Shipping Services (K) Limited* [2019] eKLR, the court of appeal observed that: -

“Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the [Kenya Ports Authority Act](#) ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In *William Koross V. Hezekiah Kiptoo Kimue & 4 others*, Civil Appeal No. 223 of 2013, this Court stated:

“The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it



before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better.”

### Submissions

13. The Appellant filed submissions and Bundle of Authorities dated 2<sup>nd</sup> December 2023. It was submitted that the Lower Court erred in striking out the Affidavit and dismissing the Appellant’s Application.
14. The Appellant relied on the case of Kenya Commercial Finance Company Limited V Richard Akwesera Onditi [2010] eKLR to submit that the court should lean towards sustaining a suit rather than dismissing it. The court stated as doth:

“Since the enactment of the said provisions, which brought in the principle or concept of overriding objective in litigation, there can be no automatic striking out of an appeal or a notice of appeal unless there is no alternative to that course. The Court has fully dealt with such issues in various decisions such as City Chemist (Nrb) & Others Vs. Oriental Commercial Bank Ltd, Civil Application No. Nai. 302 of 2008 (UR. 199/2008), (unreported), Deepak Chamnlal Kamani & Another Vs. Kenya Anti-Corruption Commission & 3 Others [2010] e KLR and numerous other cases. In Kamani’s case the Court cited and approved the remarks of Lord Woolf in Biguzzi Vs. Rank Leisures Plc [1999] 1 W.L.R. 1926. Lord Woolf’s Committee had introduced in the English legal system the concept of overriding objective of litigation and his remarks in the Biguzzi case can bear repeating in the matter before us. He said: ‘are new procedural code with overriding objective of enabling the court to deal with cases justly’. The problem with the position prior to the introduction of the CPR was that often the courts had to take draconian steps, such as striking out proceedings, in order to stop a general culture of failing to prosecute proceedings expeditiously: That led to litigation which was fought furiously on both sides: On behalf of the claimants to preserve their claim, and on behalf of defendants to bring the litigation to an end irrespective of the justice of the case because of failure to comply with the rules of the court”.

“Under the CPR the position is fundamentally different. As rule 1.1 makes clear the CPR are

15. They argued that the court ought to have ordered for amendment and not striking out or dismissal of the suit, the Appellant cited a plethora of authorities including Mwangi v Mwangi (1999) 2 EA 224.
16. It was also submitted in material that if there was any defect in the Affidavit, it was not a fundamental defect or irregularity as the same was a defect in form. They relied on the case of Dilshad Hassanali Manji V Hassanali Vasanji Manji [2006] eKLR KLR as follows:

“I must state here that before the response was made by Mr. Sevany, I indicated to both the counsel, that I have made a ruling in the case of Ocean Freight Transport Co. Ltd. Versus Purity Gathoni Wamae and Another (H.C.C.S. No.3958/91 (unreported) which touches on the same issue and was on all fronts similar on facts herein and wherein relying on Section 72 of the [Interpretation and General Provisions Act](#) (Cap 2 Laws of Kenya) I have found and I quote: -

“In my humble opinion, the present affidavit falls squarely within the above provision of the Act of Parliament. I am also fortified by the fact that the stamp affixed by the Commissioner



of Oaths does state the place of his signature. I would have presumed that if he or she was not affixing the stamp on the place where it was signed, the necessary statement or amendment to the stamp would have been made. In any event, I can safely surmise that the stamp affixed does satisfactorily state the place where the affidavit was sworn and that the omission to mention the place in jurat is not a deviation in substance but is in its form and the same is not prejudicial to the opposite side and is not calculated to mislead...

Section 72 of *Interpretation and General Provisions Act* (Cap 2 Laws of Kenya) stipulates that whenever a form is provided by a written law (which definitely is so in the present case), the document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document or which is not calculated to mislead.

In my considered opinion, the defect in jurat does not affect the substance of the affidavit.

I also note that the applicant is silent on the issue of whether the said defect is calculated to mislead, and I do not find any ground otherwise to hold so.”

17. It was thus submitted that the Lower Court erred in disregarding the Supporting Affidavit. The court was urged to allow the Appeal.
18. The Respondent filed submissions dated 5<sup>th</sup> December 2023 were filed. It was submitted that the Lower Court was correct in striking out the Supporting Affidavit to and dismissing the Application dated 1<sup>st</sup> July 2022. They placed reliance on Section 5 of the *Oaths and Statutory Declarations Act* as follows:

“Every Commissioner for oaths before whom an oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation (emphasis mine) at what place and what date the oath or affidavit is taken or made.”

19. It was submitted that the Affidavit did not comply with these legal provisions. The Appellant also submitted widely on issues that were not raised in the Lower Court. I will not delve into these issues for they are not before this Court for determination.

### **Analysis**

20. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a lower court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence firsthand. Luckily for this matter, there were no witnesses.
21. In the case of *Esther Sugut v Jemutai & 3 others* (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment), Neutral citation: [2023] KECA 202 (KLR), Justice Kiage JA stated as doth: -

“I do accord due respect to the factual findings of the lower court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already halfway heard. Her conclusions on the evidence and findings of fact



were therefore from a reading of what was recorded by the previous judge. I think that this further widens our latitude for departure where necessary.”

22. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

23. The duty of the first appellate Court was discussed by Clement De Lestang, VP, Duffus and Law JJA, in the locus classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the law looks in their usual gusto, held by as follows;-

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-lower and the Court of Appeal is not bound to follow the lower Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

24. In the case of Peters vs Sunday Post Limited [1958] EA 424 the former East African Court of Appeal rendered itself as follows: -

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

25. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows: -

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

26. The Appeal could have been avoided, had the Appellant filed the Application in the high court as required under section 76 of the *law of succession act* as read with Rule 44 of the Probate and Administrative Rules. The Rule provides as follows: -

“44. Revocation or annulment of grant (1) Where any person interested in the estate of the deceased seeks pursuant to the provisions of section 76 of the Act



to have a grant revoked or annulled he shall, save where the court otherwise directs, apply to the High Court for such relief by summons in Form 107 and, where the grant was issued through the High Court, such application shall be made through the registry to which and in the cause in which the grant was issued or, where the grant was issued by a resident magistrate, through the High Court registry situated nearest to that resident magistrate's registry.

- (2) There shall be filed with the summons an affidavit of the applicant in Form 14 for revocation or annulment identifying the cause and the grant and containing the following particulars so far as they are known to him—
  - (a) whether the applicant seeks to have the grant revoked or annulled and the grounds and facts upon which the application is based; and
  - (b) the extent to which the estate of the deceased has been or is believed to have been administered or to remain un-administered, together with any other material information.
- (3) The summons and affidavit shall without delay be placed by the registrar before the High Court on notice in Form 70 to the applicant for the giving of directions as to what persons (if any) shall be served by the applicant with a copy of the summons and affidavit and as to the manner of effecting service; and the applicant, upon the giving of directions, shall serve each of the persons so directed to be served with a notice in Form 68, and every person so served may file an affidavit stating whether he supports or opposes the application and ...”.

27. These powers were not donated to the lower court by dint of section 47 of the Succession Act. I shall revert to this latter.
28. Turning to the case, Respondent, Janet Omani Samuel petitioned for Letters of Administration on 22/10/2020. In Petitioning for letters of administration intestate, she relied on the Mekenene location chief's letter dated 27/4/2020.
29. The Appellant was not included in the Chief's letter. He listed the following as beneficiaries of the deceased herein: -
  - a. Jane Omani Samuel - widow
  - b. Omani Isaac Osiemo – son
  - c. Rose Magoma Omani – daughter
  - d. Vanessa Bonareri Obare – daughter
30. Assets that were listed were as follows: -
  - a. Land parcel No. West Kitutu /Bomatara 3706,
  - b. Matutu Settlement Scheme/811, and



c. Wanjare/Bogiakumu/3409,

The assets were all estimated to be valued at Kshs. 5,000,000/=

31. The court is required to take judicial notice of certain matters under Section 60(1)(h) and (o) which provides as follows: -

“ 60.

(1) The courts shall take judicial notice of the following facts -

(h) natural and artificial divisions of time, and geographical divisions of the world, and public holidays;

(o) all matters of general or local notoriety;”

32. By dint thereof, it is noted that it is a matter of local notoriety and geographically true that West Kitutu and Matutu Settlement Scheme, where the first 2 parcels are situate are in Nyamira County. The last Parcel is situated in Kisii County. The letters of administration were issued by a chief in Nyamira County, confirming the Deceased as a resident therein.

33. On 5/5/2021, the lower court issued Letters of Administration intestate net Janet Omani Samuel on 5/5/2021. On 9/11/2021, an application for confirmation of grant was filed. The appellant made an application for revocation on 11/4/2022. On 27/6/2022, the appellant appointed the current advocates on record.

34. The firm of A n Moruri and company advocates filed a notice of change of advocates and subsequently the Application dated 1/7/2022. The Appellant stated that she married the deceased in the State of New Jersey in the USA. She sought to nullify the grant and strike out the petition, in limine

35. They argued that the objector was a wife/widow and there was no full inventory and or disclosure. I wish that parties could avoid superfluous applications and go to the core of what they were seeking. No court, in its right mind can strike out a petition for the reasons given.

36. In the said Applications was to the effect that the deceased was married to the Applicant on 20/12/1986, at Jackson City Hudson in the United States, and could not marry anyone else. She stated that the Respondent obtained the letters of administration fraudulently. The appellant stated that the Respondent was aware of the Appellant but did not disclose her in the Application.

37. The Respondent filed an affidavit in response to the Application dated 1/7/2022. The Response related to failure to reply to a notice to produce. The same indicated that the Deceased came to Kenya in 1988 and married the Petitioner and listed the three issues. The Respondent argued that the marriage between the Appellant and the Deceased is fallacious “existing only in papers”.

38. According to the Respondent, the said application was inadmissible and unmerited. They attached a burial program where they did not recognize the Appellant as the wife of the deceased. They stated that the Appellant attended the funeral like anyone else who knew the deceased. She stated that she paid medical bills from NHIF where she is the contributor. She did not attach any marriage certificate of her own.

39. The Respondent was in a sense, with bravado and gusto suggesting in a rather cavalier manner that the Appellant attended burial like any other mourner. Nobody can believe such a line of reasoning. It is such conduct on the part of a witness that Odunga J (as he then was), alluded to in the case of Kioko



Peter v Kisakwa Ndolo Kingóku [2019] eKLR while referring to the reasoning of Madan J, (as he then was) in the case of N vs. N [1991] KLR 685, where the Learned Judge lamented as follows: -

“Parties and Counsel ought to give the courts some credit that the courts are not manned by morons who can be easily duped into believing all manner of incredible stories with little or no iota of truth. It is these kinds of allegations that Madan, J (as he then was) had in mind when in N vs. N [1991] KLR 685 when he expressed himself in the following terms:

“I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not a reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid lies, which both disappointed and made me feel intellectually insulted.”

40. With all these evidence on both sides, the court struck out the evidence for being sworn with the deponent in a different place from where the commissioner for oaths was. I do not know where the court got this idea that the commissioner of oaths and the deponent must be in the same place. I have perused the Affidavit and note that the same are perfectly in order.
41. The lack of evidence was caused by the court striking out the affidavit. It reminds me of a story, where a person kills both his parents, and upon conviction, he is called to mitigate. He then mitigates that he is an orphan have killed both his parents. An application not supported by an affidavit can only be struck out not dismissed.
42. The above is informed by the fact that affidavits are drawn by advocates. They will continue making mistakes and that should be taken into consideration. It should not be a basis for driving out of the seat of justice. In the case of Philip Keipto Chemwolo & another v Augustine Kubende [1986] eKLR, the Court of Appeal, Platt, Gachuhi & Apaloo JJA) where Apaloo JA stated as doth; -

“I think a distinguished equity judge has said:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits.”

I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline. In this case, the appellants offered to pay the costs. The Respondent will not agree.”

43. The words “only in paper”, mean that the marriage exists. A party cannot simply throw words and presume that the court will be sifting through them to find their true meaning. It was the duty of the person alleging that this was only on paper to shed light on the admission that there was a marriage but only on paper, the burden shifts radically under section 112 of the *Evidence Act*. The section provides as follows: -
  112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.



44. In the case of *Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR*, Justice G V Odunga, as then he was, stated as doth:

“The Court of Appeal in *Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278* had this to say on the issue:

“Where documents are put in by consent, as for example an agreed bundle of correspondence, the usual agreement is that they are admitted to be what they purport to be (so as to save the necessity for formal proof of each document).”

41. Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In *Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR* the court stated as follows:

“Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:

‘In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.’

Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make the adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of *Kimotho –vs- KCB (2003) 1 EA 108* the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession.”

45. They refer to a matter, *Keroka PMCC 25/2020*. I do not know what the burial program was meant to prove, given the bad blood between the two women.

46. The mere denial that the marriage was on paper does not suffice. In the case of *Raghibir Singh Chatte v National Bank of Kenya Limited [1996] eKLR*, where the court of Appeal stated as doth: -

“Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible”, (underling supplied).

I will also add that the crucial deficiency of a general denial which I have already described also applies to the evasive, inconsistent, and contradictory alternative general traverse in the appellant’s defence. This was that if the Respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence ...”

47. The court heard the matter in a rather cavalier manner, the court concentrated on mundane issues of what is or is not before a commissioner for oaths. They did not deal with the real issues in controversy. The matter of the contents of an affidavit, if they offend any rule the court ought to strike out the affidavit and order that a proper one be filed.

48. It is not honest to strike out an affidavit and then proceed that there is no affidavit. If that is the case, you cannot dismiss the suit or application but equally strike it out to allow a party to file a fresh one.



But dismissing the application the court stole a match from the appellant and drove her out of the seat of justice based on a technicality that never was.

49. In *Microsoft Corporation v Mitsumi Computer Garage Ltd & another* [2001] eKLR, Justice (Rtd) Ringera, as he then was, stated as doth; -

“The next matter for consideration is whether I should consequently strike out the suit itself. Rules of procedure are the handmaidens and not the mistresses of justice. They should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not to fetter or choke it. In my opinion, where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form and procedure that do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In those instances, the Court should rise to its higher calling to do justice by saving the proceedings in issue. In the matter at hand, I am of the view that the error manifest in the verifying affidavit neither goes to the jurisdiction of the Court nor prejudices the defendants in any fundamental respect. Indeed no prejudice has been alleged.”

50. Secondly, there was a binding Court of Appeal decision on the matters by justice CB Madan. In the case of *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] eKLR, the court of Appeal, C B Madan JA stated as doth: -

Upon appeal: -

“That is a very strong power, and should only be exercised in cases which are clear and beyond all doubt....the court must see that the plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments.”

per Lindley L.J. *ibi*, p. 602.

“It has been said more than once that rule is only to be acted upon in plain and obvious cases and, in my opinion, the jurisdiction should be exercised with extreme caution.”

Per Lord Justice Swinfen Eady in *Moore v. Lawson and Another* (*supra*) at p. 419.

“It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised. and only in exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved”. per Lord Herschell in *Lawrence v. Lord Norreys*, 15. A.C. 210 at p. 219.

51. Striking out an affidavit does not amount to divorce. An objector does not cease to have a claim simply because a court struck out their claim. The evidence so far, on a *prima facie* basis shows that the Appellant was a wife of the deceased. The only question remaining is whether the Respondent is a wife or the other woman by dint of section 3(5) of the Succession Act, which provides as doth: -

“(5) Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband



has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.”

52. The affidavit, which I hold was stuck out erroneously showed a marriage certificate. This was not challenged. The Respondent filed a notice to produce. And failure was taken adversely. This cannot be true. A notice to produce is a matter for full hearing. There is no hearing so far.
53. The Appellant has time till the hearing is conducted to produce the original of what was demanded. Failing which, the Respondent is at liberty to produce a copy. The notice does not and will never mean that the person served will not produce the document at the hearing. It means that the person serving will be allowed to produce secondary evidence.
54. Section 69 of the *evidence act* provides as doth: -
- “69. Secondary evidence of the contents of the documents referred to in section 68 (1) (a) shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such notice to produce it as is required by law or such notice as the court considers reasonable in the circumstances of the case:
- Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases
- i. when the document to be proved is itself a notice;
  - ii. When from the nature of the case, the adverse party must know that he will be required to produce it;
  - iii. When it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
  - iv. when the adverse party or his agent has the original in court;
  - v. when the adverse party or his agent has admitted the loss of the document;
  - vi. when the person in possession of the document is out of reach of, or not subject to, the process of the court;
  - vii. in any other case in which the court thinks fit to dispense with the requirement.
55. A notice to produce is thus irrelevant in an application not heard by way of viva voce evidence.
56. In this case the court was under a duty, notwithstanding the striking out of the application for revocation, to consider whether the Appellant was a beneficiary or dependant. It was surprising that the court confirmed the grant while the application dated 11/4/2022 was pending.
57. An application of the nature that was filed required that notices be issued and directions be issued for viva voce evidence. I am satisfied that the Appeal is merited. The court erred in disallowing the Application on the grounds it did.



58. I equally find as a fact that the Appellant is the first wife of the deceased. The question that remains is whether the Respondent is a wife or the other woman. This will be dealt with in succession. Whichever way, she is still a dependant of the deceased.
59. I now turn to section 12 of the Law of Succession Act as raised by the Appellant. Section 12 of the Succession Act, provides as follows; -
- “ 12. Incorporation of papers by reference If a testator, in a will or codicil, refers to another document then actually written, and expressing any part of his intentions, that document, where it is clearly identified as the document to which the will refers, shall be considered as forming part of the will or codicil in which it is referred to.”
60. The section has nothing to do with intestate succession. The ground on section 12 of the succession act is consequently dismissed.
61. The court is obligated, to investigate and deal with claims of beneficiaries or potential beneficiaries. directions have to be given no who else is to be served. I am surprised that the court did not bother to rule on the two marriages claimed by the two parties. It is more poignant when the issue raised was a statutory marriage versus a customary marriage.
62. Though not raised, the question of revocation ought to be raised in the high court. Advocates must be advised to avoid a scenario where the lower court will be handling matters where it has no jurisdiction.
63. The court should have advised parties to the high court. The matter places the court at cross roads. If the Application is dismissed Application for lack of being filed in the lower court instead of the high court, the erroneous ruling of the lower court which was issued without jurisdiction will stand. The ruling of the court below was a nullity. It is not based on the pleadings before the parties. Being a nullity, it is convenient to set the same aside in toto.
64. Where did the nullity come from? The court struck out the affidavit contrary to a binding precedent in the case *Microsoft Corporation v Mitsumi Computer Garage Ltd & another* [supra]. After striking out the affidavit, the only recourse available was to equally strike out the notice of motion. By dismissing the court fettered its discretion and fell into error. It is an error that cannot be allowed to stand. In *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;
- “If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”
65. Further, the court also fell into error by disregarding the applications on record and confirming the grant without all dependants being dealt with. Even where someone is not a beneficiary, they can still be a dependant. It therefore follows that the court was plainly wrong.
66. I note that parties were battling as at 12/4/2022, when an application to set aside, dated 11/4/2022 was filed. Nevertheless, the court confirmed the grant. It is a miscarriage of justice that has caused what I can describe as a tragedy of cataclysmic proportions. It was improper to confirm the grant on the face of the summons dated 11/4/2022. This was stealing a match from the parties.



67. Though the application ought to have been made by the parties in the high court, it was the duty of the court to pronounce itself before confirming the grant. Section 71 of the [law of succession Act](#) provides as follows: -

“Confirmation of grants

- (1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.
- (2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may-
  - (a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or
  - (b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 inclusive, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or
  - (c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or
  - (d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares.

- (2A) Where a continuing trust arises and there is only one surviving administrator, if the court confirms the grant, it shall, subject to section 66, appoint as administrators jointly with the surviving administrator not less than one or more than three persons as proposed by the surviving administrator which failing as chosen by the court of its own motion. (3) The court may, on the application of the holder of a grant of representation, direct that such grant be confirmed before the expiration of six months from the date of the grant if it is satisfied-
  - (a) that there is no dependant, as defined by section 29, of the deceased or that the only dependants are of full age and consent to the application;
  - (b) that it would be expedient in all the circumstances of the case so to direct.



- (4) Notwithstanding the provisions of this section and sections 72 and 73, where an applicant files, at the same time as the petition, summons for the immediate issue of a confirmed grant of representation the court may, if it is satisfied that-
- (a) there is no dependant, as defined by section 29, of the deceased other than the petitioner;
  - (b) no estate duty is payable in respect of the estate; and
  - (c) it is just and equitable in all circumstances of the case, immediately issue a confirmed grant of representation.
68. How will the court, in good conscience be satisfied that the shares of beneficiaries have been ascertained when there is a pending application for revocation or striking out by a person claiming to be a wife? It is untenable and not good for the administration of justice, where justice should be administered without undue regard to procedural technicalities. The Ruling given on 18/4/2023 is untenable. It is thus set aside in limine.
69. I will therefore exercise my inherent jurisdiction in this matter. The note that, however, erroneously filed, the court could not confirm grant before hearing and dismissing the Application to set aside. I cannot send the Application to the lower court for re-hearing when their powers are doubtful. The court will invoke its inherent jurisdiction revoke the said certificate of confirmation of grant for being issued in vacuo.
70. It is noted that the court did not secure the rights of the parties and as a result, a miscarriage of justice occurred. Given the factual matrices in this case, I will proceed with the Application as if it was first filed herein. The application was fully argued and as such this court can and will decide the matter.
71. I have perused the Application dated 1/7/2022 and the attached marriage certificate. I have also seen the postulations by the Respondent. The two women allege to be married to the deceased. By relying on mundane sections of the *Oaths and Statutory Declarations Act*, the court veered off the course of justice and entered into a fetish. In the case of in the matter of the estate Nyamoringo Okinyi (DECEASED)-Teresa Mwangi Versus Joel Mose Nyamoringo & 3 Others, I stated as follows: -
- “Children are not segregated. Under the law of succession (Amendment Act) 2022 discrimination) was fully removed. What the court did earlier was to dismiss the application for revocation. The applicant was never excluded as a beneficiary. No one has a right whatsoever to exclude a beneficiary from benefitting from her father’s estate unless certain circumstances obtained in the penal code Apply which is not the case here.
72. The marriage between the deceased and the Appellant was not contested. It was a statutory marriage. The Appellant was a wife of the deceased. The Respondent was married under customary law to the deceased after the first marriage between the Deceased and the Appellant. However, this only raises questions within the meaning of section 3(5) of the Succession Act.. It had been brought to the attention of the court that there was a possibility of either polygamy or application of section 3(5) of the succession Act. The court ignored all these facts in favour of mundane issues.
73. The court finds that the two women, the Appellant and the Respondents were dependants of the deceased. Since the Appellant who is the wife of the deceased was excluded and she has priority over most of the named beneficiaries, the letters of administration intestate cannot stand. Consequently, the letters of administration intestate issued to the Respondent are hereby revoked.



74. The estate cannot remain without administrators. The court hereby Appoints the Appellant and respondents as dependants of the deceased as co-administrators to safeguard the estate.
75. Further, given the nature of the questions that need to be addressed, this matter cannot be properly concluded in the lower court. I therefore order that the entire succession cause Succession Cause No. E064/2020 be withdrawn from Kisii Chief Magistrate's Court and Transferred to the High Court of Kenya at Nyamira for hearing and disposal.
76. The selection of Nyamira High Court is informed by the chief's letter and the fact that the majority of the Assets are in Nyamira County. The deceased appears to have resided in Mekenene location, Nyansiongo, in Nyamira county.
77. In order, to have the estate available for distribution and avoid, the estate being wasted or being sold, I direct that any transfers of any of the assets of the deceased carried out between the date of demise of the deceased to date, stand revoked and the entire estate do remain in the names of the deceased till this cause is determined. This shall take effect notwithstanding section 93 of the *law of succession Act*, since the matter has been pendente lite from the date of confirmation to date. There was no hiatus that could show that there was no dispute.
78. The estate shall be preserved till the High Court in Nyamira decides the matter.
13. On costs, 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.

79. The Order that commends itself, given the circumstances is that each of the parties bear their costs.

### **Determination**

80. In the end I make the following orders: -
  - a. I allow the Appeal, set aside the order given on 18/4/2023 dismissing the Application dated 1/7/2022. I have considered the Application afresh under the inherent powers of the high court. Upon considering the said application de no, and responses thereto together with submissions, I substitute it with an order allowing the Application partly as hereunder.



- i. I decline to strike out the petition as that is not useful employment of judicial time and resources.
  - ii. The letters of administration together with the certificate of confirmation on 12/4/2022 is hereby set aside in toto.
  - iii. I lieue thereof letters of administration intestate be issued in the names of the Appellant and Respondent, Dolores Abernathy Obare and Janet Omani Samuel
- b. The Appellant is a wife of the deceased. A question as to whether the Respondent, who is a dependant as a wife or other woman by dint of section 3(5) of the succession Act shall be determined by the court.
  - c. All transfers and subdivisions on any of the assets of the deceased carried out from the date of demise of the deceased to date are hereby revoked. The estate shall be preserved till hearing and determination of pending of the course herein.
  - d. Given the complexity of the questions of marriage of the two parties, Dolores S Abernathy Obare and Janet Onami Samuel, I hereby transfer Kisii CMCC Succession Cause No. E064/2020 to the High Court of Kenya at Nyamira for hearing and disposal.
  - e. The Registrar to direct the parties to seek directions on other persons to be served before the matter is placed before the Judge at Nyamira.
  - f. The transferred matter shall be placed before the Deputy Registrar Nyamira on 7/5/2024 for the said directions on placing the matter before the judge
  - g. The administrators to file either jointly or severally a list of assets and beneficiaries and those beneficiaries with served to participate.
  - h. Each party to bear their own costs.
  - i. This file is closed

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 8<sup>TH</sup> DAY OF MARCH, 2024.**

Judgment delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**

**JUDGE**

In the presence of:

Ms Nduhukire for M/s A. N. Moruri & Co. Advocates for the Appellant

Ms Kebungo for M/s Nyamurongi & Co. Advocates for the Respondent

Court Assistant - Brian

