



REPUBLIC OF KENYA



In re Estate of Jotham Njiru Jonah (Deceased) (Succession Cause 81 of 2013) [2024] KEHC 6965 (KLR) (11 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6965 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
SUCCESSION CAUSE 81 OF 2013**

SM GITHINJI, J

JUNE 11, 2024

IN THE MATTER OF THE ESTATE OF JOTHAM NJIRU JONAH (DECEASED)

BETWEEN

HENRY KAMAU GICHERU & ANOTHER & ANOTHER APPLICANT

AND

NAOMI RUGURU GACHECHE PETITIONER

RULING

1. For determination is the Notice of Motion dated 28th September 2023 seeking the following orders;
 1. Spent.
 2. That this honourable court be pleased to reopen this cause and any consequential orders and today's proceedings pending the hearing of this application.
 3. That this honourable court be pleased to reopen this cause and any consequential orders and today's proceedings pending the hearing and determination of this cause.
 4. That costs of this application be borne by the defendant.
2. The application is founded on the grounds set out on its face and the grounds on the supporting affidavit of Henry Kamau Gicheru, the Applicant who deponed that he is one of the surviving brother of the deceased Jotham Njiru Jonah and therefore a beneficiary of the estate. He stated that the matter was presented to court on 28th September 2023 but he did not hear what the judge said as there was no one to translate to him as he only understands his mother tongue. Further, that his advocate Mr. Dullu who was present virtually but due to bad network he was not heard by the court. It was additionally stated that the confirmed grant of 31st May 2018, his name was omitted in the schedule and therefore, it is imperative to reopen the case. Further, that the purported application for withdrawal is strange as he had not given any instructions to that effect.



3. In response, the respondent filed a replying affidavit stating that the Applicant herein filed summons for revocation of grant under a certificate of urgency dated 12th September 2023. That later on 22nd September 2023, the Applicant filed and served her advocates with a Notice of Withdrawal and a Notice of Intention to act in person. That on 28th September 2023, both parties were physically present in court and both indicated that there was no dispute in the matter and the court proceeded to mark the file settled. She further stated that the Applicant is well known to her and is able to communicate in Kiswahili and was able to follow proceedings on the said date.

Disposition

4. The application was disposed of by way of written submissions. I have considered the Application, the grounds it is set upon, the replying affidavit and the submissions by the parties. The only issue arising for determination is whether the application for reopening the case as sought is merited.
5. Whether or not to reopen a case is the discretion of the court, which discretion ought to be exercised judiciously. In *Susan Wavinya Mutavi v Isaac Njoroge & another* [2020] eKLR, the Court held that-

“Over the years, Kenya’s superior courts and courts in the Commonwealth have developed principles which guide the exercise of jurisdiction to re-open a case and receive additional evidence in a civil trial court. First, the jurisdiction is a discretionary one and is to be exercised judiciously. In exercising that discretion, the court is duty-bound to ensure that the proposed re-opening of a party’s case does not embarrass or prejudice the opposite party. Second, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. Third, the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on the part of the applicant. Fourth, the applicant is required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case. Fifth, the evidence must be such that, if admitted, it would probably have an important influence on the result of the case, though it need not be decisive. Lastly, the evidence must be apparently credible, though it need not be incontrovertible.”

6. Similarly, in *Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another* [2015] eKLR, the Court observed as follows; -

“Uganda High Court, Commercial Division in the case of *Simba Telecom –v- Karuhanga & anor* (2014) UGHC 98 had occasion to consider an application to re-open the case for purpose of submitting fresh evidence. That court referred to an Australian Case *Smith – Versus- New South Wales* [1992] HCA 36; (1992) 176 CLR 256 where it was held:

“If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered. In the latter situations the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised.”



The Ugandan Court in the case Simba Telecom (supra) held thus:

“I agree with the holding in the case of Smith Versus South Wales Bar Association (1992) 176 CLR 256, where it was held that the question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened. Consequently, even after the case has been reopened, the court retains its discretionary powers whether to admit any piece of evidence or not.”

The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also such prayer for re-opening of the case will be defeated by inordinate and unexplained delay.”

7. The applicant seeks to reopen this case on basis that he did not understand the proceedings of 28th September 2023 as there was no one to translate to him as he is unable to understand Kiswahili or English and there was a pending application for revocation that was yet to be heard and determined. The Respondent opposes the application on grounds that she is aware that the Applicant understands Kiswahili. I have taken into consideration both arguments. In the interest of justice, I believe it would be fair to grant the orders to reopen the case to allow the Applicant prosecute his application for the same to be determined on merit. Further, I note that the application was timeously made. In so finding, I do not see any prejudice that will be occasioned to the Respondent. Thus, I allow the Application dated 28th September 2023 with no orders as to costs.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 11TH DAY OF JUNE, 2024.

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S.M. GITHINJI

JUDGE

In the Presence of: -

1. Mr Oduol for the Respondent
2. Mr Komora for the Applicant (absent)

Court; - Mention on 9th July, 2023. Applicant be notified.

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S.M. GITHINJI

JUDGE

11/6/2024

