



In re Estate of Samuel Mwangi Gatoto (Deceased) (Succession Cause E002 of 2023) [2024] KEHC 15550 (KLR) (7 August 2024) (Ruling)

Neutral citation: [2024] KEHC 15550 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE E002 OF 2023
G MUTAI, J
AUGUST 7, 2024**

BETWEEN

**LYDIA WAIRIMU MURIUKI 1ST PETITIONER
JULIET WAMBUI MWANGI 2ND PETITIONER
STEPHEN MURIUKI MWANGI 3RD PETITIONER
PHILIP KAROKO MWANGI 4TH PETITIONER**

AND

**LUCY WAMBUI IRUNGU 1ST OBJECTOR
SALLY NJERI 2ND OBJECTOR
EVANSON NJOROGE MWARANIA 3RD OBJECTOR**

RULING

1. Four applications are pending in this matter. The said applications are the subjects of this joint decision.
2. The first one is the Notice of Motion dated 15th August 2023 filed by the Petitioner vide which they seek to reopen the case of the 1st and 2nd Objector for purposes of cross-examination of the 1st Objector on the contents of the birth certificate serial number 9518221, issuance of witness summons to the Kilindini Sub County Civil Registrar, Medical Superintendent of the Aga Khan Hospital for purposes of production of medical records relating to the birth of the 2nd Objector on 29th December 1997, Medical Superintendent of Pandya Hospital for purposes of cross-examination and production of medical records related to the 2nd Objector's birth on 29th December 1997 and lastly revocation of the birth certificate issued to the 2nd Objector.
3. The grounds upon which the application was filed was that it had been established that there were two birth certificates in respect of the 2nd Objector, one of which identified the deceased as the father of the



- 2nd Objector but gave no hospital of birth and the other which identified the place of birth of the 2nd Objector as Aga Khan Hospital but did not list the deceased as her father.
4. It was thus urged that cross-examination of the individuals whose Summons were sought would cast light on the truth surrounding the matter.
 5. The second application is dated 16th October 2023. This application was filed by counsels for Sally Njeri. The application seeks leave for the advocates for the parties to jointly appoint three rent collection agents so that all the money due and belonging to the estate of the deceased is collected and remitted to the joint account held by the three counsels at KCB Bank Gateway Branch, being Account No 13xxxxx17 and that the term of their appointment be until these Succession proceedings are heard and determined.
 6. This latter application was made as the parties were apprehensive that rents due from the estate properties were not be collected in full.
 7. The Petitioners filed a Notice of Motion application dated 11th December 2023 vide which they sought to file a Supplementary List of Documents attaching the birth certificate of the children of the 1st Petitioner.
 8. An oral application was made by Mr Mbugua on 18th December seeking to have an affidavit that was filed without leave be struck out or, in the alternative, that paragraphs 10,12,13 and 14 of the affidavit dated 21st November 2023 be expunged on the ground that they were irrelevant.
 9. On 18th December 2023, the Court directed the parties to file written submissions in respect of the pending applications.
 10. The Petitioners' applications dated 15th August and 11th December 2023 were opposed by the 1st and 2nd Objectors, who filed a Grounds of Opposition in respect of the former and a Replying Affidavit regarding the latter.
 11. The 1st and 2nd Objectors filed Written Submissions dated 3rd January 2024, in which they urged that the application dated 15th August 2023 lacked merit as no sufficient reason had been given to warrant the reopening of the Objector's case and the cross-examination of the person intended to be summoned.
 12. Regarding the oral application made on 18th December 2023, it was urged in written Submissions dated 3rd January 2024 that Lydia Wairimu's Further affidavit dated 21st November 2023 was filed without leave and ought, therefore, to be struck out. In the alternative, it was urged that paragraphs 10, 11, 12, 13 and 14 of thereof be struck out for being irrelevant and oppressive on the ground that they introduced new evidence which would prejudice the 1st and 2nd Objectors. Counsels submitted that Order 19 Rule 6 of the Civil Procedure Rules permits this Court to strike out from affidavits any matters that are scandalous, irrelevant and oppressive. Reliance was placed on the decision of the Court in the case of *Musikari Nazi Kombo v Moses Masika Wetangula & 2 others* [2013]eKLR where it was said that:-

“(22) But it should be understood that, the law still requires such allegations to be made within the law; that is to say, within the legal thresholds I have stated herein above as a way of preventing prejudice to, unfair charge on or infringement of a person rights. The allegations or averments in an affidavit should also not be irrelevant; having no probative value; not tending to prove or disapprove a matter in issue. See the *Law Dictionary*, 17 th Edition. One more requirement; the averment should be supported by evidence within the affidavit itself or by some other person in the proceeding, in this case, by a witness through an affidavit filed



in court in accordance with the Elections (*Parliamentary and County Elections*) *Petition Rules, 2013.*”

13. The Petitioner’s Submissions in respect of the application dated 11th December 2023 are dated 15th January 2024. The counsel for the applicant urged, relying on the decision of the Environment and Land Court in *Johana Kipkemei Too v Hellen Tum* [2014] eKLR, that this Court should allow the adduction of further evidence as long as it did not prejudice the hearing.
14. In the Submissions filed on 5th February 2024, the Petitioner’s counsel submitted that since the 2nd Objector had presented two birth certificates, it was necessary to establish which of the two was genuine. Counsel urged that procedural concerns should not trump substantive justice.
15. Counsel submitted that the failure to file birth certificates was a regrettable mistake. Reliance was placed on the decision of Madam JA in *Murai v Murai (No 4)* (1982) KLR 38, where the eminent jurist eloquently pronounced himself as follows:-

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule. It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of the years since the decision was delivered so requires. It is all done in the interests of justice. A static system of justice cannot be efficient. Benjamin Disraeli said change is inevitable. In a progressive country change is constant. Justice is a living, moving force. The role of the judiciary is to keep the law marching in time with the trumpets of progress.”
16. It was urged that the Court should not allow the application for striking out as what was sought to be struck out was contained in the Notice of Motion dated 11th December 2023.
17. The 1st and 2nd Objector’s counsel filed further submissions on 7th February 2024 in opposition to the submissions of the counsel for the Petitioners and in opposition to the application dated 11th December 2023.
18. I have perused the three applications and considered the oral application. I have also considered the parties’ written submissions and must make my determination in respect of each of them.
19. I note that the application dated 16th October 2023 is not opposed. In the circumstances, I allow it and order that the three firms of advocates jointly appoint a collection agent. In default, the collection agent shall be appointed by the Deputy Registrar of this Court from a list proposed by the parties.
20. Should the Court permit the Petitioners to reopen their case by summoning the Medical Superintendent of Aga Khan and Pandya Hospital and the Registrar of Births? To answer this question I will be guided by the decision of the Munyao Sila, J *Johana Kipkemei Too v Hellen Tum* [2014] eKLR where the said Judge held as follows:-

“This however is not to say, that the Court can never under any circumstances, permit a party to adduce additional evidence, that was not furnished to the other party as provided under



the rules. The Court as a shrine of justice, has a mandate to do justice to all parties and not to be too strictly bound by procedural technicalities. This flows from the provisions of article 159(2)(d) of the *Constitution*. Where such evidence can be adduced, without causing undue prejudice to the other party, the Court ought to allow the application, so as to allow such party, the opportunity to present his case in full. The Court may consider various factors including, but not restricted to, the earlier availability of the witness, the discovery of a new document, and the stage of the proceedings at which the additional evidence is sought to be introduced. If for example, the trial has not started, little prejudice may be caused to either party if one is permitted to introduce additional evidence. The prejudice to the other party no doubt increases as the trial progresses. But it is up to each court to weigh the surrounding circumstances of each case, and determine whether it will be in the interests of justice, to allow such evidence to be tendered, though outside the time frame provided by the rules.”

21. It would appear to be that such an action would be fair and just. This is so because there are, in fact, two birth certificates in respect of the 2nd Objector with different information. In my view, having the three officers attend the Court for the production of documents and for cross-examination would help this Court arrive at a fair and just decision. All the parties will benefit if the truth about the paternity of the 2nd Objector is established.
22. In a similar vein, it is in the interest of justice to ensure that the proceedings are not tainted by fraud and impropriety or that the decisions are not anchored on falsehoods.
23. Courts permit the reopening of cases subject to safeguards. I agreed with the holding of Osiemo, J in *Panian Ole Mutua & 3 Others-v-Registered Group Representatives Kimana Tikondo Group Ranch* Civil Case 522 of 2006, where the learned Judge stated that:-

“The rules of procedure are meant to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it.”
24. I do not see what prejudice the Objectors will suffer if the application is allowed, as they could if they wish, seek leave to adduce additional evidence rebutting that of the Petitioners, and this Court would consider it. No doubt, while considering the application, the court will be governed by the dictates of justice, fairness, and the need for a fair trial.
25. In the circumstances, I allow also the application dated 15th August 2023.
26. Having allowed the said application, it seems reasonable to me to also allow the application of 11th December 2023. I see no prejudice that the Objector will suffer if the birth certificates sought to be produced are produced.
27. However, the oral application of 18th December 2023 is denied. The said application is technical in nature and would run counter to the principles stated in Article 159 (2)(d) of the Constitution of Kenya, 2010, which provides that justice ought to be done without undue regard to procedural technicalities.
28. The upshot of the foregoing is that:-
 1. I allow prayers 1, 2, 3 and 4 of the Notice of Motion dated 15th August 2023. Prayer 5 shall be determined on merits upon conclusion of the hearing;
 2. The Chamber Summons dated 16th October 2023 is allowed as stated in paragraph 19 above;
 3. The Notice of Motion dated 11th December 2023 is allowed as prayed; and



4. The oral application dated 18th December 2023 is dismissed as the Court will benefit from the evidence adduced.
29. As this is a Succession matter, each party shall bear its own costs.
30. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 7TH DAY OF AUGUST 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Mr Wa Njeri, for the Petitioners;

Mr Oduor, for the 1st and 2nd Objectors;

No appearance for the 3rd Objector; and

Arthur - Court Assistant.

