In re Estate of Chabari Manyara (Deceased) (Succession Cause 117 of 2007) [2023] KEHC 18650 (KLR) (16 February 2023) (Ruling)

Neutral citation: [2023] KEHC 18650 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

SUCCESSION CAUSE 117 OF 2007

EM MURIITHI, J

FEBRUARY 16, 2023

BETWEEN

ELIAS MBAYA ..... PETITIONER

AND

MBAABU SABARI ..... 1ST APPLICANT

DAVID MUTHOMI ..... 2ND APPLICANT

AND

SALESIO RIUNGU KIUGU ..... INTERESTED PARTY

PATRICK NKOROI THURANIRA ..... INTERESTED PARTY

JOHN IKUNDA M'ANYIRI ..... INTERESTED PARTY

JOY NKIROTE MARETE ..... INTERESTED PARTY

ELIPHAS KINYAMU KAIGA ..... INTERESTED PARTY

ERASTUS RIUNGU ..... INTERESTED PARTY

RULING

1. In the course of the hearing by oral evidence of an application dated October 31, 2019 by the Applicants seeking revocation of Grant to the petitioner, Counsel for the Interested Parties made an oral application expressed to be under sections 33 and 35 of the *Evidence Act* that the Affidavit of one Peter Muriungi sworn on June 26, 2021 be adopted as evidence on behalf of the Interested Parties.

2. The Interested Parties stake claim in the estate property by reason of alleged purchase on diverse dates between 2002 and 2006 of the respective portions of land part of the deceased estate which they allege to have bought from the various beneficiaries of the deceased during his life and to have taken possession thereof upon purchase in 2002, 2003, 2006.

3. The Affidavit of Patrick Muriungi, a grandson of the deceased and nephew to the beneficiaries who allegedly sold their shares to the Interested Parties, sworn on June 29, 2021 purports principally at paragraphs 3 and 4 thereof to confirm "that my uncles sold their shares of the estate to the interested parties while the deceased was still alive" and "that the Interested Parties took possession and occupation of their respective shares while the deceased was still alive."

4. Counsel for the Interested Parties invoked sections 33 (e), (f) and (h) and 35 of the *Evidence Act*, and urged as follows:

> "The witness is not available to be produced in court to produce the affidavit. We have attempted to bring him in the last 2 occasions but he cannot be found.
>
> The witness appeared in our Chambers and swore the affidavit and due to circumstances surrounding this case the applicant has been taunting the Interested Parties that out witness will never show up.
>
> The evidence he has given relates to the relationship between the parties on both blood and business involving all the parties in the matter and the deceased. All his life he has been in occupation of a portion of the suit land and therefore his evidence is substantial to aid the court in an objective consideration of all the facts in the case.
>
> In the circumstances, we pray that the court admits the affidavit as further evidence of eh Interested Party as the witness has been put away by the adverse parties. That is all."

5. The application was opposed by the Petitioner who is a beneficiary and brother to the beneficiaries/ applicants for the revocation of the Grant, "because Muriungi has not been produced before the Court."

6. The Counsel for the Applicants in the Application for Revocation also opposed the application by the interested parties and significantly doubted and sought the court's interpretation whether an affidavit qualifies to be referred as a statement under section 33 and 35 of the *evidence Act*, and urged as follows:

> "We object because this is an affidavit which the court cannot be sure that it was made by the alleged maker, Patrick Muriungi. I can only be authenticated upon the maker attending court and owning the same document.
>
> The contents of the Affidavit of the said Patrick Muriungi at paragraphs 3, 4, 5, 7, 8 10 and 13 make very vague allegations towards the applicants and taking that affidavit without cross-examining he deponent on the contents of the affidavit will be prejudicial to the applicant, because they will not have any other avenue to counter that evidence.
>
> We have not been told where the said Patrick Muriungi is. The last time before the court, the Interested party said the said Patrick Muriungi could not attend and the court gave last adjournment to produce the witness. There is nothing to show that the interested parties have incurred any hardship in serving the said witness.
>
> Section 35 (3) of the *Evidence Act* gives exceptions where the evidence cannot be admissible providing that where the said maker of the document is an interested or a person of interested the same document cannot be admitted.
>
> The said Patrick Muriungi is a grandson of the Deceased and he is a beneficiary under the Confirmed grant. He is a person of interest in this matter who has made grave allegations, who is a beneficiary and as such under the *Evidence Act* cannot be admitted.

We pray that eh application be declined."

7. In reply, Counsel for the Interested Parties suggested that the applicants were responsible for the non-availability of the witness and reiterated that the provisions of the law relied applied to situations where the witness is incapable of being produced or is at large or cannot be found, and an affidavit which is made on oath carries more weight than a mere unsworn statement.

8. Ruling was reserved.

Determination

9. A peripheral issue whether the *Evidence Act* applies to the Affidavits is easily answered. There is no question since the amendment to the *Evidence Act* following the Court of Appeal for East Africa decision in Life Insurance Corporation of India v. Panesar [1967] EA 614, that the *Evidence Act* apply to affidavits. By a majority (De Lestang, VP and Spry JA, Newbold P, dissenting) the Court had held that the rules of evidence did not apply to affidavits. Subsection 2 of section 2 of the *Evidence Act* now provides clearly that "Subject to the provisions of any other Act or of any rules of court, this Act shall apply to affidavits presented to any court. [Act No. 17 of 1967, First Sch., Act No. 10 of 1969, Sch.]" This court is not aware of any other Act or rules of Court which proscribed the application of the *Evidence Act* to Affidavits. It is the more daunting question whether sections 33 and 35 apply to the Affidavit in question in this case which the court must answer in this ruling.

10. Section 33 of the *Evidence Act* provides an exception to the hearsay rule of evidence in terms as follows:

"

"33. Statement by deceased person, etc., when.
Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

a) ....

b) ....

c) ....

d) ....

e) relating to existence of relationship

when the statement relates to the existence of any relationship by blood, marriage, or adoption between persons at whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised;

f) relating to family affairs

when the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree or upon

any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised;

g) ....

h) made by several persons and expressing feelings

when the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question."

11. The Court has no problem finding that an affidavit and statements made in writing therein are "Statements, written or oral or electronically recorded" within the meaning of section 33 of the Act which applies to matters of evidence made by persons who cannot, for the reasons, set out therein be called as witnesses. An affidavit by definition set out in Order 19 Rule 3(1) as containing "such facts as the deponent is able of his own knowledge to prove" is clearly such a statement, whether as a whole or a body of distinct statements contained therein, for purposes of the provision. Section 35, however, appears to apply to a document itself as evidence made on a matter of admissible fact rather than an affidavit setting out the deponent's testimony of the matter or statements in the wording of section 33. In the context of a transaction for transfer of land, the Green Card register at the Lands Office may be such a document.

Rule against hearsay

12. The importance of the rule of evidence especially rule against hearsay was underscored by Charles Newbold, P in his dissenting opinion in Life Insurance Corporation of India v Panesar, supra, admirably as follows:

> "It is said that because s 2 of the *Evidence Act*, 1963 states that the Act shall not apply "to affidavits presented to any court or officer not to proceedings before an arbitrator", therefore there are no rules of evidence relating to what can be set out in affidavits, other than the rule in O 18, r 3 (1) which confines affidavits "to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted, providing that the grounds thereof are stated", or relating to what can be placed before an arbitrator. I reject such a proposition completely; and I say that it is not only wrong but manifestly wrong. Affidavits are intended to be probative of the facts which the party filing the affidavits seeks to prove before the court in the particular proceedings in which the affidavits are filed. The accumulated wisdom of the courts over the ages has laid it down that any attempt to prove facts save in accordance with such rules as the experience of the courts has shown to be essential is worthless. I cannot accept that because the provisions of the *Evidence Act* do not apply to affidavits or to arbitration proceedings therefore there exists no rules as to what may be set out in affidavits, other than r 3 of O 18, or as to what evidence may be led before the arbitrator. To accept that would be to substitute chaos for order and to permit of any sort of evidence being placed before a court or an arbitrator as probative of the fact sought to be proved. Such an astounding position would require the highest authority before I would accept it, but no single authority is quoted in favour of it. I confess that I have been unable to find any decision of a court specifically on the point; but that is because the proposition is so manifestly wrong that no one has the temerity in the past to advance it. The very provisions of O18 r3 (1), which permit in certain applications statements in affidavits to be based on belief thus relaxing in these circumstances the hearsay rule, shows that r3 is based upon he assumption that the normal rules of evidence apply to affidavits. Were it otherwise r3 would be classic example of straining at a gnat but swallowing

a camel. Even in relation to r3 this court has laid down certain requirements so as to ensure that the relaxation of the hearsay rule is kept within very close confines and that the courts are not asked to act upon evidence which experience has shown to be valueless of any fact."

13. The Court must, therefore, consider whether the statements made in the Affidavit in issue are admissible facts as prescribed in sections 33 and 35, and whether they may be admitted within the said provisions without calling the maker thereof.

14. Hearsay in the nature of matters of information [and belief, the case of a deponent who is not called as a witness], may be made in an affidavit in interlocutory proceedings, subject to the sources of information and grounds of belief being disclosed, as provided in Order 19 Rule 3 [previously 18 r3], which provides as follows:

> " [Order 19, rule 3] Matters to which affidavits shall be confined.
>
> 3.
>
> (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:
>
> Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof."

15. It may be argued that an application for revocation of grant of letters of representation such as the one in which the affidavit in issue was made, is an interlocutory proceedings which, if successful, may lead to further proceedings for further proceedings for fresh grant and distribution of the estate, and, therefore, matters of information and belief, the sources and grounds whereof are disclosed, may be made without offending the hearsay rule of evidence. It would also appear that the intendment of the affidavit in issue is to support the Interested Parties' case for a final order of the court which validates the alleged purchase of portions of the estate and therefore finally declares the Interested Parties as entitled to the estate assets, as to remove it from the realm of interlocutory proceedings in which hearsay rule is excepted.

16. Be that as it may, whether the statements in the Affidavit of Patrick Muriungi are taken to be matters within his positive knowledge or information, admission thereof without calling the maker requires the passing of the admission test under sections 33 and 35 of the *Evidence Act*.

Sections 33 and 35 qualification

17. The permissive provisions of section 33 (e), and (f) are all predicated upon an overarching conjunctive requirement that "the statement was made before the question in dispute was raised" and paragraph (h) requires the statement to be made by a group of people which is not the case here.

18. Section 35 of the *Evidence Act* provides as follows:

> "
>
> " 35. Admissibility of documentary evidence as to facts in issue."
>
> 1. In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—

a. if the maker of the statement either—

i. had personal knowledge of the matters dealt with by the statement; or

ii. where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

b. if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

2. In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) of this section shall be admissible or may, without any such order having been made, admit such a statement in evidence—

a. notwithstanding that the maker of the statement is available but is not called as a witness;

b. notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or the court may approve, as the case may be.

3. Nothing in this section shall render admissible any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

4. For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible.

5. For the purpose of deciding whether or not a statement is admissible by virtue of this section, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a medical practitioner."

19. With respect, the affidavit herein made by Patrick Muriungi does not meet the criteria for admission in section 35 because of his obvious interest and the Affidavit was made "at a time when proceedings were pending ... involving a dispute as to any fact which the statement might tend to establish."

20. This provision is important in underlining the crucial test of evidence that it be reliable and free from hearsay, with exception being made in the special circumstances strictly set out in the sections with in-built guarantee that the evidence is not manufactured in contemplation of the court proceedings to fit a certain narrative presented by a party interested in the suit. Hence the qualification for admissibility as in section 33 of the *Evidence Act* that the statement in issue must have been made before the commencement of the suit.

21. In the two main statements in the affidavit in paragraph 3 and 4 set out above "that my uncles sold their shares of the estate to the interested parties while the deceased was still alive" and "that the Interested Parties took possession and occupation of their respective shares while the deceased was still alive", the deponent purports to confirm sale of portions of land by certain beneficiaries who he says are his uncles, during the life of the deceased and further that the said purchasers took possession of the suit land upon purchase and during the life of the deceased. These statements are not what is contemplated in paragraphs (e) and (f) of section 33 under which the application is brought. They do not meet the requirement that "the statement was made before the question in dispute was raised."

22. Even if the statements in the Affidavit were considered to fall within the definitions of section 33 (e), (f), and section 35 of the *Evidence Act*, seeing they did not antedate the filing of the suit disqualifies them from admission in the absence of production of the maker. Obviously, with the affidavit of Patrick Muriungi is shown to have been sworn on June 29, 2021 in support of the Interested Parties/ applicants' case herein long after the commencement of this case by Petition dated March 16, 2007 and filed on April 13, 2007, or indeed the filing of the application to revoke the grant on October 31, 2019. The Affidavit simply does not meet the strict test of admissibility of statements made by persons who cannot be called as witnesses. And, needless to say, as urged by Counsel for the Applicants, there is no guarantee that the affidavit was made by the person it purports to have been made, or indeed that the said deponent of the affidavit does exist and is not a phantom witness!

23. As regards, the Affidavit as a document, even if it were so considered, there is a statutory proscription of reliance on a document prepared by a person who has an interest in the matter. Although the counsel for the Interested parties appeared to cast the deponent of the Affidavit as a disinterested person whose interest lay with that of the applicants as a person listed as a beneficiary in the Confirmed Grant, the very interest as an beneficiary under the Grant is, in the respectful view of this court, an interest within the meaning of section 35 of the *Evidence Act*.

24. Moreover, there is the possibility that the deponent may have sworn the affidavit to defeat the position taken by the applicants who he said had threatened his very interest in the inheritance. In paragraph 8 of the affidavit sought to be admitted, the deponent tellingly says:

> " 8. As a matter of fact they [the applicants] have threatened to deprive me my share should they succeed in this claim because I have refused to support their false hoods."

The deponent has therefore an interest to ensure the applicant do not succeed so that they do not deprive him his share. That is a clear interest in the meaning of section 35 (3) of the *Evidence Act*. The maker of the affidavit, if it be a document, is disqualified and so is his document!

25. In addition, having given directions for the hearing of the application for revocation of Grant by viva voce evidence, and the applicants and the Petitioner having already closed their cases, it is inequitable, unfair and contrary to principles of fair hearing to permit the Interested Parties to have admitted an affidavit on which the deponent has not been produced for cross-examination by the other parties who therefore have no opportunity to rebut the allegations of fact contained in the Affidavit. As held by the

Court of Appeal for Eastern Africa in De Souza v Tanga Town Council, (1961) EA 377 the classic case on fair hearing in context of quasi-judicial proceedings, [a fortiori in judicial proceedings] fair hearing includes a provision that:

> " A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view."

26. Without calling the maker of the Affidavit to give oral evidence and be cross-examined before the court, the other parties' right to fair hearing will be violated; and in the complete absence of justification in accordance with the applicable provisions in the *Evidence Act* which offer statutory guarantees in the interests of fair hearing, the said Affidavit cannot be relied upon, and it must be rejected. The Court must in the words of Newbold, P. in Panesar, supra, resist the invitation "to act upon evidence which experience has shown to be valueless of any fact."

27. Finally, the Court considers that that the question as to whether the Interested Parties bought portions of land from beneficiaries to the estate of the deceased during his life is one that falls to be proved by documentary evidence in accordance with section 3 the *Law of Contract Act*, and on the principles of the *Law of Succession Act* on disposal of immovable property.

ORDERS

28. Accordingly, for the reasons set out above, the Interested Parties' oral application under sections 33 and 35 of the *Evidence Act* for the admission into evidence of the Affidavit sworn by one Patrick Muriungi herein on June 29, 2021 is declined.

29. Costs in the Cause.

Order accordingly.

DATED AND DELIVERED ON THIS 16TH DAY OF FEBRUARY, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances

Mr. Kithinji, Advocate for the Applicant.

Mr. Thangicia Advocate for the Interested Parties.

Mr. Elias Mbaya, Petitioner/Respondent in person.

5

MERU HC SUCC. NO. 117 OF 2007