



**In re Estate of Macharia Mwangi (Deceased) (Family Appeal
E001 of 2020) [2023] KEHC 19862 (KLR) (5 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19862 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
FAMILY APPEAL E001 OF 2020**

GL NZIOKA, J

JULY 5, 2023

**IN THE MATTER OF THE ESTATE OF MACHARIA MWANGI
(DECEASED)**

BETWEEN

JAMES MWANGI MACHARIA APPELLANT

AND

GABRIEL STEPHEN MWANGI MACHARIA RESPONDENT

RULING

1. By a notice of motion application dated May 24, 2021 brought under the provisions of Order 51 rules 1, 3 and 4, Order 42 rule 27 (1) (a) and (b) of the [Civil Procedure Rules](#) 2010, Rule 54 of the [Probate and Administration Rules](#) 1980, section 35 (5) of the [Evidence Act](#) and all other enabling provisions of law applicant is seeking for orders that: -
 - a. This Honourable court be pleased to admit evidence in an affidavit of due execution drawn by one Jeff Muli Muthoka, an attesting witness present during the execution of the Late Macharia Mwangi's written will, filed in court on June 8, 2016 by the appellant.
 - b. This Honourable court be pleased to admit evidence in an affidavit of due execution drawn by Amos Munyiri Kimaru, 2nd attesting witness present during the execution of the Late Macaharia Mwangi's will, filed in court on June 8, 2016 by the appellant.
 - c. This Honourable court be pleased to grant leave to the appellant to lodge evidence in a medical report in support of an affidavit of notice filed in court on May 7, 2019, notifying the court that Mr Jeff Muli Muthoka the 2nd attesting



witness scheduled to testify in court on May 22, 2019 had fallen ill and unable to attend trial on the date stated.

- d. This Honourable court be pleased to grant the appellant leave to once again lodge his written submissions on arguments in support of grounds of appeal pursuant to Order 42 rule 16 (10 of the [Civil Procedure Rules](#) 2010, the first document having been expunged on account of wrong timing.
2. The application is supported by the grounds thereto and the affidavit of the even date sworn by the appellant wherein he avers that he filed the affidavits of the subject persons; Amos Munyiri Kimaru and Jeff Muli Muthoka as witnesses on June 8, 2016 pursuant to Rule 54 (1) of the [Probate and Administration Rules](#), 1980. That, on July 25, 2016 he appeared before Hon P Gesora, the trial Magistrate at the time, with those witnesses, and were ready to testify. However, George N Kimani, the advocate of the respondent was absent and efforts to have him attend court were futile.
3. Consequently, pursuant to section 67 of the [Law of Succession Act](#) (Cap 160), the trial Magistrate published a notice of application dated December 22, 2016 indicating that the matter was testate.
4. However, that the Gazette Notice No 1555 of 2017 was tampered with distorting the name of the deceased, the date of death and altering the word testate to read intestate. That, he petitioned the court to correct the Gazette Notice and subsequently Gazette Notice No 5587 of 2017 was published on June 9, 2017 with the correct details.
5. That, the learned trial Magistrate, Hon KA Bidali, recalled the witnesses and on December 19, 2018, he testified. but Mr. Muli did not testify as the court was time barred and adjourned the matter for further hearing on January 30, 2021.
6. That on January 30, 2021, the trial court was not sitting and the matter was rescheduled to May 22, 2019, unfortunately, Mr. Muli fell ill on May 2, 2019 and was admitted at Kenyatta National Hospital on May 6, 2019. As a result, he filed an affidavit on the May 7, 2019 indicating that Mr. Muli would not be able to attend court on account of his illness. That on May 25, 2019, he applied for a medical report from Kenyatta National Hospital which was issued on November 9, 2019 and which showed Mr Muli's incapacity to attend court.
7. That, while a party is not entitled to bring new evidence, Order 42 rule 27 (1) (a) of the [Civil Procedure Rules](#) 2010 makes an exception where the trial court refused to admit evidence which ought to have been admitted. That, the medical report of Mr Muli satisfies the criteria set under Order 42 rule 27 (1) (b) of the [Civil Procedure Rules](#), 2010 and section 35 (5) of the [Evidence Act](#) (Cap 80).
8. Furthermore, that the record of appeal having been filed, it is timely that his document entitled "submissions of arguments in support of the memorandum of appeal" is admitted on record.
9. The application was served but the respondents informed the court that they were not going to respond to the same and left the court to deal with the matter.
10. Having considered the application, I find that the documents referred to in prayer (a), (b) and (c) are already part of the Record of Appeal filed herein, therefore an order to admit them will be superfluous, as such prayers (a), (b) and (c) are allowed save that the said documents will not be admitted afresh but will be considered as part of the Record of Appeal.
11. As regards the last prayer the appellant cannot file submissions before the Court admits the appeal and gives directions thereon. As such that prayer is not granted.
12. It is so ordered.



DATED, SIGNED AND DELIVERED THIS 5TH DAY OF JULY 2023.

GRACE L. NZIOKA

JUDGE

In the presence of:

Appellant in person

Mr Kimani for the Respondent

Ms Ogutu; Court Assistant

