



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**SUCCESSION CAUSE NO. 516 OF 2013**

**IN THE MATTER OF THE ESTATE OF EVANTUS GIKANDI MAINA (DECEASED)**

**MIRIAM WAITHERA.....ADMINISTRATOR/APPLICANT**

**VERSUS**

**ROSE WANGARI MAINA..... 1<sup>ST</sup>RESPONDENT/OBJECTOR**

**RUTH WANGARI MURIITHI.....2<sup>ND</sup> RESPONDENT/OBJECTOR**

**JAMES MACHARIA WACHIRA.....1<sup>ST</sup> INTERESTED PARTY**

**SAMUEL LORD KAIRU GACHERU.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

**Brief facts**

1. The applicant has brought this application dated 15<sup>th</sup> July 2020, under Rule 73 of the Probate and Administration Rules seeking leave to file a further affidavit to the application for confirmation of the grant dated 21<sup>st</sup> August 2017 and recalling of the administrator to give further additional evidence in support of the summons for confirmation.

2. In opposition to the application, the respondents have filed replying affidavits dated 22<sup>nd</sup> September 2020 and 25<sup>th</sup> August 2020 respectively.

**The Applicant's case**

3. The applicant states in her supporting affidavit that she has since learnt that the objectors Ruth Wangari Muriithi, Alvan Calvin Maina and Shantel Wangari are strangers to the applicant and that they have been named as beneficiaries. According to her the beneficiaries are her children namely Roselyne Njambi Gikandi, Taracisio Maina Gikandi and Trizah Wangari Gikandi. The applicant denies consenting to the said persons being named as beneficiaries.

4. The applicant contends that there are some assets left out of the deceased's estate which are as follows:

- i. Kenya Commercial Bank Accounts No.s 1124479163, 30442827-1, 1123534632 Karatina Branch.
- ii. National Bank of Kenya Bank Account No.s 3044282701 Karatina Branch, 3044282702.
- iii. Co-operative Bank Account No. 01136055965500 Karatina Branch
- iv. Biashara Sacco Society Ltd Account No. 6432-09-00747
- v. Family Bank Account No. 057878120100047 Kanjoya Branch
- vi. Barclays Bank Account No. 2127530 Nyeri Branch

5. Shares:-

- i. Elam Agencies Ltd
- ii. Tagima Ltd- Deceased held 75% of the shares
- iii. Siochirata Co. Ltd – Deceased held 50% shares
- iv. Narogi Service Station Ltd
- v. Evagima Agencies Ltd
- vi. Tiger Track Limited
- vii. Mephans Auto Spares Ltd
- viii. Mathira Farmers Sacco Society Ltd
- ix. Mathira Tea Growers Sacco Society Ltd

6. Motor Vehicles:-

- i. KAD 363G
- ii. KAD 994L
- iii. KBA 016F
- iv. KBB 998K – Mitsubishi Truck
- v. KBH 156N – Mitsubishi Lorry
- vi. KBF 511U – Toyota Station Wagon
- vii. KAR 932J – Mitsubishi Truck
- viii. KBA 947T – Toyota Pickup
- ix. KBM 775H- Isuzu NKR Truck.

7. The applicant further contends that she was under the belief that her previous advocates had captured everything in the affidavit at the time of signing the affidavit in support of the summons for confirmation.

8. The applicant states that injustice will be committed to the deceased's estate and the beneficiaries if the court does not allow her to introduce the additional evidence and also clarify some issues. She adds that the orders sought should be granted before the subject matter proceeds for further hearing.

**The 1<sup>st</sup> Respondent's Case**

9. The 1<sup>st</sup> respondent contends that the applicant is dishonest, is notorious for taking the court round in circles and has filed the instant application to further delay the matter.

10. The 1<sup>st</sup> respondent further contends that the applicant has not come to this court with clean hands, she has been changing advocates on record in order to obfuscate issues and she cannot amend affidavit evidence which she swore to be the whole truth without risking her credibility as a witness. As such, the instant application has no merit and ought to be dismissed.

**The 2<sup>nd</sup> Respondent's Case**

11. The 2<sup>nd</sup> respondent contends that if there are any assets which have been left out, the applicant can bring them forth without derailing the case any further. She adds that the applicant is acting in bad faith as she had put down the 2<sup>nd</sup> respondent and her children as beneficiaries of the estate and is now having a change of heart.

12. Parties canvassed this application by way of written submissions which are summarised herein.

### **The Applicant's Submissions**

13. The applicant reiterates that a further affidavit is necessary because the current affidavit is flawed as it excludes many of the deceased's assets, it includes strangers as beneficiaries and it contains a flawed mode of distribution. The applicant is ready and willing to testify and be cross examined on the new issues therefore no party is bound to suffer any prejudice by her being recalled or putting forth additional evidence. The applicant relies on the persuasive authority in **Siaya HC Civil Appeal No. 43B of 2019 E.O vs C.O.O [2020] eKLR** to support her contention on allowing additional evidence which will assist the court in reaching a fair and just determination of the case.

14. The applicant contends that she is very eager to have the matter heard and concluded as the same pertains to her husband's estate. She submits that delay in the matter has not been occasioned by her but by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. She adds that as much as changing of an advocate is her constitutional right, she has only changed advocates once in the past and in any event, that has not delayed the case. The applicant adds that by bringing this application now, she is saving on judicial time, saving on unnecessary costs and it is procedural as the confirmation process should deal with all the issues as known to the parties on the deceased's assets, the mode of distribution of those assets and the beneficiaries thereof.

15. The applicant reiterates that she can at any time amend her pleadings before the matter is concluded. She relies on the cases of **Daniel Ouma Okuku vs Kenya Plantation & Agricultural Workers Union Civil Appeal 85 of 2019 [2019] eKLR and Eastern Bakery vs Caslelino [1958] EA 461**. She adds that the evidence sought to be introduced will help the court determine the real issues in controversy as it will bring on board all the relevant facts.

### **The 1<sup>st</sup> Respondent's Submissions**

16. The 1<sup>st</sup> respondent states that the application is incompetent because the applicant is Miriam Waithera but the submissions talk of Miriam Waithera Gikandi and the proceedings talk of Miriam Waithera Irungu.

17. The 1<sup>st</sup> respondent submits that Succession Cause No. 270 of 2002 is not relevant to the instant cause and that the evidence the applicant is seeking leave to introduce, ought to be done by amending the petition for letters of administration. Further, the applicant has not attached any certificates from NTSA to confirm ownership of the motor vehicles. Neither has she attached any current search certificates in respect of the shares she claims from the companies noted in her affidavit. Instead, the 1<sup>st</sup> respondent states that since the applicant has failed to diligently collect all the assets and liabilities of the estate, the said grant ought to be revoked.

18. The 1<sup>st</sup> respondent reiterates that the applicant has filed the application to further delay the process. She adds that the applicant cannot rely on issues already dealt with by the court as a ruling was made by Justice Wakiaga on 13/6/2014. As such, the 1<sup>st</sup> respondent prays that the application is dismissed with costs.

### **The applicant's submissions in response to the 1<sup>st</sup> respondent's submissions**

19. On the issue of the names, the applicant contends that all the names refer to the same person save that the surnames Irungu being the applicant's maiden name before marriage and Gikandi after marriage. Further, the applicant brings forth the court's attention that the 1<sup>st</sup> respondent is deceased, she is a mother of the deceased and has no basis to be in the instant cause as she is not a beneficiary and therefore she has no cause to oppose the application herein. Neither does she claim ownership of what is being introduced as belonging to the estate.

20. The applicant submits that the Succession Cause No 270 of 2002 is relevant to the instant cause because the deceased herein was a beneficiary in the said estate and thus the assets due in that estate have to be factored herein. On the issue of ownership of the motor vehicles, the applicant states that the court at this stage should not be considering the ownership of the said vehicles as this is an issue to be addressed at the main hearing. Further, the applicant contends that she is the wife of the deceased and thereby knows what belongs to the estate and proof of such ownership, which proof can be challenged at the hearing of the confirmation of the grant.

### **Issues for determination**

21. After careful analysis, we humbly submit that the main issue for determination is whether the applicant should be granted leave to file a further affidavit.

### **The Law**

#### **Whether the applicant should be granted leave to file a further affidavit.**

22. The Supreme Court in **Mohammed Abdi Mohammed vs Ahmed Abdullahi Mohammed & 3 Others [2018] eKLR** laid down the guiding principles for additional evidence which include:-

a) **The additional evidence must be directly relevant to the matter before court and be in the interests of justice;**

b) **It must be established that, if given it would influence or impact the result of the verdict;**

c) **It is shown that it would not have been obtained with reasonable diligence for use at the trial process, was not within the knowledge of or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;**

- d) Where the additional evidence adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
- e) The evidence must be credible in the sense that it is capable of belief;
- f) The additional evidence discloses a stronger *prima facie* case of will deception on the court;
- g) Whether a party would reasonably have been aware of and procured the further evidence in the course of the trial is an essential consideration to ensure fairness and due process;
- h) Whether the additional evidence discloses a strong *prima facie* case of wilful deception of the court;
- i) The court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence;
- j) The court must find the further evidence needful;
- k) A party who has been successful at the trial must not seek to adduce evidence to make a fresh case on appeal, fill up the omissions or patch up the weak points in his/her case;
- l) The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other;

We must stress here that this court even with the application of the above stated principles will only allow additional evidence on a case by case basis and even then sparingly, with abundant caution.”

23. Similarly in **Raila Odinga & 5 Others vs IEBC & 3 Others [2013] eKLR** the Supreme Court added its voice on reception of additional evidence in the context of presidential election and stated:-

“The other issue the court must consider when exercising its discretion to allow a further affidavit is the nature, context and the extent of the new material intended to be produced and relied upon. If it is small and limited so that the other party is able to respond to it, than the court ought to be considerate taking into account all aspects of the matter. However, if the evidence is such as to make it difficult or impossible for the other party to respond effectively, the court must act with abundant caution and care. In the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence...”

24. In **Johana Kipkemei Too vs Hellen Tum [2014] eKLR** the court analysed factors to consider before allowing a party to put in additional documents, they include:-

- a) Discovery of new documents;
- b) The stage of the proceedings;
- c) Whether any party would suffer prejudice and
- d) Whether it would be in the best interests of justice.

25. I have perused the documents attached to this application and has made some observations:-

- a) That some assets listed herein were distributed in Succession Cause No. 270 of 2002 where the 1<sup>st</sup> respondent was the sole beneficiaries in the estate of Maina Gikandi alias Tarasichio Maina. This fact is admitted by the applicant.
- b) On the bank accounts, the applicant has presented documents showing that the bank accounts were registered in the name of the deceased Evantus Gikandi Maina
- c) As for shares in limited liability companies, the said shares should not be dealt with under the Succession Act for they belong to a different legal regime.
- d) As for the motor vehicles listed herein, only those with attached documents of ownership in the name of the deceased Evantus Gikandi Maina ought to be considered as assets of the deceased in this cause.

26. Upon perusal of the application, it leaves no doubt that the applicant intends to altar the evidence that she has already given to the court in regard to who are the rightful beneficiaries of the estate. The applicant states that her previous counsel included the 1<sup>st</sup> and 2<sup>nd</sup> respondents as beneficiaries while they are strangers to the estate. The advocate having been on record for the applicant got instructions on whatever he did from the applicant herself.

27. I am not convinced that the applicant has satisfied the test laid down in the case of **Mohamed Abdi case(supra) and that of Johana Kipkemei(supra)** for additional evidence in regard to who are the beneficiaries of the estate. It cannot be said that there has been any new discoveries in the further evidence. This further evidence if allowed is likely to cause further delay in the case and would not serve the interests of justice.

28. Having considered the issues in this application and the arguments as well as submissions of the parties. I hereby find that this application is partly successful and it is hereby allowed in the following terms:-

a) That the applicant is hereby allowed to file a further affidavit only in regard to :-

i. Any additional assets for movable and immovable the deceased listed in this application supported by ownership documents in the name of the deceased

ii. Bank accounts held in various banks listed herein and in the name of the deceased shall form part of the deceased's assets in this cause.

b) That assets already distributed in Succession Cause No. 270 of 2002 shall not form part of this Succession Cause.

c) That any shares in limited liability companies listed herein should be dealt with in accordance with the relevant law.

29. The further affidavit to be filed within twenty one(21) days and that if need be, the applicant may be cross-examined on the said affidavit.

30. Each party to meet its own costs of this application.

31. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 15<sup>th</sup> DAY OF JULY, 2021.**

**F. MUCHEMI**

**JUDGE**

**Ruling delivered through video link this 15<sup>th</sup> day of July, 2021.**