REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO 465 OF 2013

IN THE MATTER OF ESTATE OF PRADEEP BEHAL (DECEASED)

RULING

1. Alok Pradeep Kumar Behal, hereinafter referred to as the applicant, has moved the court by way of a chamber summons dated 14th September 2017, brought under sections 1A (1)(2)(3) and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 2 Rule 15 of the Civil Procedure Rules, and Rule 3 (1)(2)(3) of the High Court Practice and Procedure Rules, seeking the following orders -

(a) That the court be pleased to strike out the Petition dated 20th February 2013 and all affidavits accompanying the said petition with costs;

(b) That the court be pleased to expunged the following affidavits from the record -

(i) Affidavits of Ranjana Behal dated 28th June 2017 and 9th June 2017,

(ii) Affidavit of Alok P Behal dated the 17th May 2015, and

(iii) Affidavit of justification of proposed administrator dated 20th February 2013;

(c) That Ranjana Behal and Alok P Behal produce their signatures as a sample under the supervision of a judicial officer and that the same be forward to the CID for verification and investigation;

(d) That Ranjana Behal to deposit her passport pending the outcome of the investigation; and

(e) That upon the verification and investigation the said Ranjana Behal and Alok P Behal be charged with the relevant law if found guilty.

2. Directions were given on 20th March 2018, for disposal of the application by way of both affidavit and oral evidence.

3. It was the applicant's case that the signatures on the stated affidavits were forged and did not belong to Ranjana Behal and Alok P Behal. He stated that the same were forgeries and thus the said affidavits ought to be expunged from the record. Martin Papa, a handwriting expert, stated that he was instructed by the applicant's advocate to examine the documents and make a finding on the same. He stated that the signatures on the documents did not have commonality, neither did they share drafting character. He also explained that the samples had a five-year difference from the time the same were examined. He also stated that he could not commit himself to state that the said signatures were forgeries and that there was misrepresentation. He confirmed in cross-examination that age was a factor in changes in handwriting and that signatures varied from time to time. He stated that the samples he used were obtained from the applicant's advocate and not the parties involved. He made a report to the same effect that was produced as an exhibit.

4. The respondent on his part, denied the allegations made by the applicant. He, together with Ranjana, challenged the *locus standi* of the applicant in making the application. They stated that all the signatures alleged to be forgeries were theirs and that they were not forged. They called Chief Inspector Alex Mwongera, a forensic document examiner based at the Directorate of Criminal Investigations (DCI) in Nairobi, as their witness. He stated that he examined the documents and that he had come to the conclusion that the signatures were drafted by the same person in each case. He also prepared a report capturing the same.

5. The applicant in his submissions stated that the said signatures were forged. He relied on the evidence of the document examiner who stated the signatures contained significant dissimilarities. He discredited the evidence of the respondent's document examiner, stating that his evidence was hearsay and thus inadmissible. He also questioned the said witness's qualifications.

6. The issues that arise for determination are two, that is whether the applicant had *locus standi* to file the application, and whether the signatures are forgeries and the implication of the alleged forgery.

7. The respondents in response to the application had stated that the applicant herein had no locus in making this application. The applicant in his rejoinder stated that he was a beneficiary of the estate and thus had the locus to file the suit. The applicant herein is the son of one Vijay K. Behal, the deceased person in HCSC No. 2163 of 2012, which has been consolidated with the instant cause. He is thus a beneficiary of the estate of the deceased.

8. In *Mercy Njoki Irungu vs. Lucy Wamuyu Maruru* [2016] eKLR the court stated that

> *'It is a requirement that a party to a probate claim must have an "interest" in the estate. The foundation of title to be a party to a probate or administration action is "interest" - so that whenever it can be shown that it is competent to the Court to make a decree in a suit for probate or administration, or for the revocation of probate or of administration, which may affect the interest or possible interest of any person such person has a right to be a party to such a suit in the character either of plaintiff, defendant, protestor or intervener…Interested person" or "person interested in an estate" includes, but is not limited to, the incumbent fiduciary; an heir, devisee, child, spouse, creditor, and beneficiary and any other person that has a property right in or claim against a trust estate or the estate of a decedent, ward, or protected individual or a person that has priority for appointment as personal representative; and a fiduciary representing an interested person. The Blacks' Law Dictionary defines "interested party" as a party who has a recognizable stake (and therefore standing) in a matter.'*

9. The applicant herein being a son of and a beneficiary in the estate of Vijay Behal, whose succession cause has been consolidated with this cause, would mean that he has a stake in this cause and therefore the locus *standi* of an interested party to file the instant application.

10. The case by the applicant is that the signatures on the affidavits are forgeries and thus they should be expunged. Section 109 of the Evidence Act, Cap 80, Laws of Kenya, places the burden of proof on him. The section provides that: -

> *'The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie in a particular person.'*

11. The need to prove and the burden of proof of such allegations was elaborated by the court in *Christopher Ndaru Kagina vs. Esther Mbandi Kagina & Another* [2016] eKLR where the court stated that -

> *'It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care needs to be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations. In the Case Central Bank of Kenya Ltd -Vs- Trust Bank Ltd & 4 Others [26] the Court of Appeal in considering the standard of proof required where fraud is alleged stated that fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof is much heavier on the person alleging than in an ordinary Civil Case. The burden of proof lies on the applicant in establishing the fraud that he alleges. In Belmont Finance Corporation Ltd. v. Williams Furniture Ltd [27] Buckley L.J. said:*
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> *"An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognized rule of practice. This does not import that the word 'fraud' or the word 'dishonesty' must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity."*
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> *In Armitage v Nurse [28] Millett L.J. having cited this passage continued:*
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> *"In order to allege fraud it is not sufficient to sprinkle a pleading with words like "willfully" and "recklessly" (but not "fraudulently" or "dishonestly"). This may still leave it in doubt whether the words are being used in a technical sense or merely to give colour by way of pejorative emphasis to the complaint."*
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> *In Paragon Finance plc v D B Thakerar & Co the court stated that it is well established that fraud must be distinctly alleged and also distinctly proved, and that if the facts pleaded are consistent with innocence it is not open to the court to find fraud. The burden is always on the claimant to prove fraud on the part of the Respondent. The standard of proof where fraud is alleged is high. Though it is the same civil standard of proof on a balance of probabilities, it is certainly higher than the ordinary proof on a balance of probabilities but lower than proof beyond reasonable doubt. It all depends on the nature of the issue and its gravity. Evidence of especially high strength and quality is required to meet the civil standard of proof in fraud cases. It is more burdensome: (see also the cases of Mpungu & Sons Transporters Ltd –v- Attorney General & another. In Jennifer Nyambura Kamau v Humphrey Nandi, the Court of Appeal, Nyeri, emphasized that fraud must be proved as a fact by evidence; and, more importantly, that the standard of proof is beyond a balance of probabilities.'*

12. It is obvious that the burden of proof was on the applicant to prove the allegations of forgery. The applicant herein relied on the evidence of a document examiner to prove his allegations. It was the evidence of the document examiner that the said signatures had significant dissimilarities.

13. Courts are guided by several principles when relying on evidence of handwriting experts. In *Christopher Ndaru Kagina vs. Esther Mbandi Kagina & Another* [2016] eKLR the court stated that -

'The fundamental characteristic of expert evidence is that it is opinion evidence. To be practically of assistance to a court, however, expert evidence must also provide as much detail as is necessary to allow the court to determine whether the expert's opinions are well founded.

While the test for admissibility of expert evidence differs from jurisdiction to jurisdiction, judges in all jurisdictions face the common responsibility of weighing expert evidence and determining its probative value. This is no easy task. Expert opinions are admissible to furnish courts with information which is likely to be outside their experience and knowledge. The evidence of experts has proliferated in modern litigation and is often determinative of one or more central issues in a case. Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence and the circumstances of the case including the real likelihood of the expert witness having been compromised or the real possibility of such witnesses using their expertise to mislead the court by placing undue advantage to the party in whose favour they offer the evidence. The court must be alert to such realities and act with caution while analyzing such evidence. It is important to bear in mind the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. Four consequences flow from this as reiterated by this court in the case of Stephen Wang'ondu Vs The Ark Limited.

Firstly, expert evidence does not "trump all other evidence." It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision. Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be "artificially separated" from the rest of the evidence. To do so is a structural failing. A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence. Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred. Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional one.'

14. In *Asira vs. Republic* [1986] KLR 227 the Court of Appeal held that –

'The most an expert on handwriting can properly say is not that somebody definitely wrote a particular thing but that he does not believe a particular writing was by particular person or that the writings are so similar as to be undistinguishable. It is the duty of a court to make an examination and satisfy itself whether the handwriting expert's opinion can be accepted and the court cannot blindly accept such an opinion…The decision on handwriting, whether it is genuine or not, always rests with the Court…The art of comparing handwriting is no doubt one in which time and thought are given to the formation of letters and words, and therefore expert status may be accorded to a person versed in such comparisons. But as has been accepted in Wainaina's case (Namaina v Republic [1978] KLR 11) such an expert is not able to say definitely that anybody wrote a particular thing. The reasoning is based upon the knowledge that handwritings can very easily be forged. Moreover a person may not write in the same style all the time. The expert is therefore faced with trying to analyze forged writing as well as disguised writing. In cases where there is a problem about the writing it is the duty of the court to satisfy itself after examination whether the expert's opinion can be accepted and cannot blindly accept such opinion. In these areas of conflict, it is prudent to look for other evidence so that forgery can be excluded on the one hand, and mistaken identification excluded on the other.'

15. In *Elizabeth Kamene Ndolo vs. George Matata Ndolo* [1996] eKLR the Court of Appeal stated that -

'…The evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say"-"Because this is the evidence of an expert, I believe it … eyewitness evidence of attesting witnesses is superior to that of handwriting experts, which really is only opinion evidence.'

16. This court in *In Re Estate of Gitau Njoroge 'B' (Deceased)* [2018] eKLR observed that -

'The findings of an expert witness are not binding on a court. Such findings amount to no more than mere opinion. Although the same are admissible as evidence, they are not conclusive, the court has to evaluate them alongside any other available evidence.'

17. In the case of *Rose Kaiza vs. Angelo Mpanju Kaiza* (2009) eKLR the Court of Appeal said of an opinion of handwriting expert *vis-a-vis* an author of a signature -

'We think the duty of the court in weighing the opinion evidence of an expert would be more onerous where such opinion is the only material for consideration, than where there is clear evidence from the author of the handwriting. In this case there was the evidence of the Land Registrar himself who swore that he signed the transfer. The acceptance by the Land Registrar that there were differences between some of his known and specimen signatures and the explanation given by him that he had an injury on his hand when he signed the impugned signature, hence the possible cause of the difference, was not, in our view, a confirmation that the document examiner was right and therefore his evidence ought to be accepted…'

18. The same was adopted in *Re Estate of Daulatkhanu Mansurali Hassanali Dharani (Deceased)* [2018] eKLR where court stated that:

'…In this case Jane Wambui Kihara is available for cross examination if her signature is in doubt and her evidence in my view

would be less onerous, first hand and more direct than that of a handwriting expert. I will also quote the case of Asira vs Republic (1986) KLR 277 at page 228 quoted in the above-mentioned case of Rose Kaiza where the court said; -

"The art of comparing handwriting is no doubt one in which time and thought are given to the formation of letters and words, and therefore expert status may be accorded to a person versed in such comparisons. But as has been accepted in Wainaina's case (Wainaina v R 1978 KLR) such an expert is not able to say definitely that anybody wrote a particular thing. The reasoning is based upon the knowledge that handwritings can very easily be forged. Moreover a person may not write in the same style all the time…" '

19. In the instant cause, the parties called document experts to give evidence on the authencity of the signatures. These two experts gave conflicting evidence.

20. In *Musa Cherutich Sirma vs. Independent Electoral and Boundaries Commission (I.E.B.C) & 2 Others* [2017] eKLR the court held that –

'... As may be discovered from case law on the matter, it is trite law that expert opinion is not binding on the court and in reaching its determination the court is entitled to consider other relevant facts. In cases where opinion of experts conflicts, the court is entitled to resolve the conflict or acquire the evidence of one exert in preference of the other. It is also trite that a person who is offered as an expert must be qualified by presentation of evidence indicating his expertise before his evidence on the facts of the case is accepted as expert evidence.'

21. In *Kenya Ports Authority vs. Modern Holdings [EA] Limited* [2017] eKLR; the Court of Appeal held that: -

'We agree with the learned Judge that in the event of conflicting expert evidence, it is the duty of the court to consider the evidence and form its opinion. However, in so doing, the court must give cogent reasons why it prefers the evidence of one expert over the other." The same adopted in the case of Iskorostinskaya Svetlana & Another vs. Gladys Naserian Kaiyoni [2019] eKLR where court stated that

"…Considering that few documents were available to the experts, it is difficult to entirely rely on their reports. In light of the conflicting reports by the two experts, this court must therefore assess the evidence and form its opinion as to whether the questioned Will was authored by the deceased. The question of the alleged forgery of the impugned Will should therefore be determined by the other evidence adduced by the parties."'

22. The applicant herein alleges that the signatures of the respondent herein and his mother's are forgeries. His witness stated in cross-examination stated those signatures kept changing from time to time. The respondent herein testified and stated that the said signatures belonged to him: the advocate for the applicant did not cross-examine him on the same. His mother, Ranjana Behal, stated in her affidavit, that the said signatures were hers. They also called an expert witness who confirmed the same.

23. From the authorities aforegoing, it is clear the expert evidence has to be weighed against other evidence in the suit and in the case of two conflicting opinions the court is called upon to make a determination considering the circumstances of the case. In this case, the applicant 's expert witness confirmed that he could not conclusively state whether the said signatures were forgeries or not. It should be noted that the examination was done on copies of the said signatures, It also does not appear to add up that the respondents would forge signatures when filing a succession cause that will ultimately benefit them. The respondent gave evidence and stated that the signatures were his and were not a forgery as alleged by applicant. In the face of the evidence of the authors of the alleged signatures, the court ought to consider the said evidence as being true and direct compared to the of the expert witness.

24. In *Rael Mwonjia Gichunge & Another vs. Faud Mohammed Abdulla* [2014] eKLR, the Court of Appeal, when faced with two contradicting expert opinions, held that

'The contradictions in the two expert reports raised an issue of burden of proof. If the two contradictory handwriting expert reports are to be given zero evidential weight and cancel each other, what is left is to determine who has the burden to prove that the sale agreement is a forgery. The legal adage is he who alleges must prove. The appellants allege that the sale agreement is a forgery. We are satisfied that on a balance of probability, the appellants did not discharge this legal burden.'

25. Other than the expert evidence, the applicant did not offer court any other evidence. The respondent on the other hand offered the court cogent evidence that the signatures were his. Further, as stated by the applicant's expert witness, various factors affect the quality of the handwriting. He mentioned that age and health do affect the quality of a signature. In *Simon Peter Gachi Benard vs. Agnes Nungari Muriithu & 2 Others* [2014] eKLR the court observed that "… As to whether the signature on the affidavit supporting the preliminary objection is a forgery is a matter of fact which requires proof. As pointed out, there is no legal requirement confining an individual to one type of signature." The respondents herein did not deny the said signatures, the claimed them stating that they were the makers thereof. As stated in the above case, one can have more than one signatures and there in no law barring that. The applicant herein cannot allege that the respondent forged their own signatures.

26. From the forestated, it is my finding that the applicant has not proved the allegation of forgery and as such his allegations cannot stand. It is my conclusion that the application is misconceived, unfounded and lacking in merit, and I hereby dismiss the same with costs to the respondents. The respondents have twenty-eight (28) days, should they be aggrieved by this decision to challenge it at the Court of Appeal.

PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 11th DAY OF April, 2019

W. MUSYOKA

JUDGE

DELEIVERED, DATED AND SIGNED IN OPEN COURT AT NAIROBI THIS 3rd DAY OF May 2019

A. ONGERI

JUDGE