



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1706 OF 2012

IN THE MATTER OF THE ESTATE OF

JOSEPH GITITU MUKUI (DECEASED)

SCHOLASTICA WAHITO WANJEH.....OBJECTOR/APPLICANT

VERSUS

DAMARIS WANGUI GITITU.....1ST PETITIONER/RESPONDENT

SYLVIA WANJIRU GITITU.....2ND PETITIONER/RESPONDENT

BERNARD MUKUI GITITU.....3RD PETITIONER/RESPONDENT

RULING

1. The deceased Joseph Gititu Mukui died intestate on 11th April 2012. A special limited grant limited only to the purpose of accessing Diamond Trust Bank Capital Centre A/c No. [...], Standard Chartered Bank Thika branch A/c No. [...], Ecobank Nyeri Branch A/c No. [...] and NIC Bank Meru Branch A/c No. [...] was granted to the deceased's widow Sylvia Wanjiru Gatitu (the 2nd respondent) on 28th November 2012. The final grant of representation of the estate was made to Silvia Wanjiru Gititu, Damaris Wangui Gititu and Bernard Mukui Gititu on 16th September 2014 and confirmed on 10th November 2015.

2. On 20th November 2015 the applicant filed summons for revocation or annulment of grants seeking for orders that:

- a) the special limited grant issued by this court on 28th November 2012 to Silvia Wanjiru Gatitu be revoked, annulled or set aside;
- b) the grant of letters of administration intestate issued on 16th September 2014 to the petitioners be revoked or annulled;
- c) that Silvia Wanjiru Gatitu be ordered to render a true and accurate account of all monies withdrawn from the estate bank accounts from the time the deceased passed on and all the motor vehicles left by the deceased;
- d) that this court be pleased to consolidate High Court Succession Cause No. 1372 of 2012 Nairobi with the instant cause since they relate to the same estate;
- e) that the applicant be at liberty to apply; and
- f) that the costs of the application be met by the petitioner.

3. The application was supported by the affidavit of the applicant whose case was that she was married to the deceased under Kikuyu customary law and traditions; that prior to the death of the deceased the marriage was blessed with a child; that the deceased had expressly recognized and accepted the child as his own and in respect of whom he had assumed permanent responsibility; that the grant of letters of administration intestate issued by the court on 16th September 2014 was obtained fraudulently by making of false statement and concealment from the court of the fact that the applicant was a widow of the deceased; that the gazzement of 28th September 2012 was defective since it

did not provide for limitation period as to objection which is a mandatory requirement under section 67 of the Law of Succession Act; that she made contributions towards, and participated in the process of development and acquiring of the assets of the estate jointly with the deceased; and that the applicant and her child are unable to access any money from the estate for their upkeep or education since the 2nd respondent enjoys exclusive and unlimited right of access to the deceased's bank accounts and rental income.

4. The application was opposed by the 2nd respondent on the grounds that she was the only widow of the deceased; that the applicant sought to re-litigate issues which had already been determined by competent courts of law; that the claim that the applicant was a wife to the deceased had been settled by the Chief Magistrate Court in Thika in CMCC No. 269 of 2012; that the allegation that the applicant's daughter was the deceased's daughter culminated into a criminal prosecution in Kiambu Chief Magistrate's Case No.984 of 2013 (Republic v Scolastica Wahito Wanjehia) and a verdict reached on 26th June 2015; that the court revoked the special limited grant issued to the 2nd respondent on 28th November, 2012 due to pending objection proceedings; that the gazette notice appeared vide gazette no.5533 on 8th August 2014 and not 28th September 2012, and the full copy of the gazette did provide for a period for objection contrary; and that the present summons do not meet the requirements of **section 76** of the **Law of Succession Act** and should be dismissed with costs.

5. Parties filed written submissions in support of their respective cases.

6. The applicant filed a supplementary affidavit dated 15th January 2016 alleging that the deceased had through a video recording expressed his wishes regarding her marriage to him and his relationship with his child. She attached the digital video disc (DVD). Zacharia Githuku Kagunta swore an affidavit stating that he carried out the video coverage of the deceased.

7. During the hearing of the matter on 12th March 2018, PW2 Zacharia Githuku Kagunta attempted to produce the DVD as evidence but Mr. Muigai counsel for the 2nd respondent raised an objection to the production on the grounds that the production did not meet the requirements stipulated under **Section 106 (B)** of the **Evidence Act**. It was his submission that the conditions set out under **section 106(B)(4)(a-d)** were not met; that there was to be a certificate setting out various listed matters which the witness had to sign but he did not; that the particulars of the evidence were required to be given yet it was not done; that the certificate did not mention that the DVD was produced by a computer during a regular course of action and by persons with lawful control over the use of the computer; that the certificate did not mention that the information in the DVD was regularly fed into the computer; and that there was no mention that throughout the process the computer was operating properly. He relied on the case of **County Assembly of Kisumu & Others vs Kisumu County Assembly Services Board & 6 Others, 2015 eKLR**.

8. In response, the applicant submitted that since a statement in respect of the DVD and certificate by Zacharia Githuku Kagunya were filed in court on 18th January, 2017 and served upon the administrators through their advocates on the same date, the administrators have neither filed nor served any document in opposition to the supplementary affidavit or the DVD or the certificate and the statement; that the existence and the contents of the DVD are within the knowledge of the administrators, specifically the 2nd administrator; that the DVD that is intended to be produced sheds light regarding the deceased's wishes not only about the objector and her child but also on his entire family including the 1st widow and her children; that since the maker of the video is available, he should be allowed to proceed with his evidence and that the administrators will have an opportunity to test such evidence by way of cross-examination so that substantive justice can be done to the case as opposed to taking undue advantage of technicalities; and that the court of appeal decision relied upon is distinguishable since unlike in that decision where the parties objecting to the admissibility of a DVD had no prior knowledge of the contents of the same, in the instant case, the administrators had knowledge of the DVD and had previously interacted with it in Thika Law Courts.

9. **Section 106A of the Evidence Act (Cap 80)** provides that the contents of electronic records may be proved in accordance with the provisions of **section 106B**. **Section 106B** deals with the admissibility of electronic records in the following terms:

“Notwithstanding, anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as a computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.”

10. The conditions to be satisfied are provided in **sub-section (2)** as follows:

a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;

b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

c) throughout the material part of the said period the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

11. Under **sub-section (4)**, where a party seeks to give evidence by virtue of **section 106B** he has, among other things, to tender a certificate

dealing with any matters to which the conditions above relate. The certificate should further:

- a) identify the electronic record containing the statement and describing the manner in which it was produced; and
- b) give such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer.

The certificate has to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities.

12. **Section 106B** of the **Evidence Act** states that electronic evidence of a computer recording or output is admissible in evidence as an original document “if the conditions mentioned in this section are satisfied in relation to the information and computer.”

13. In the case of **REPUBLIC .V. BARISA WAYU MATUGUDA [2011] eKLR** the court observed that:

“This provision makes it abundantly clear that for electronic evidence to be deemed admissible it must be accompanied by a certificate in terms of section 106B (4). Such certificate must in terms of S.106B (4)(d) be signed by a person holding a responsible position with respect to the management of the device.... Without the required certificate this CD is inadmissible as evidence.”

14. To begin with, the applicant has not attached the certificate referred to in **Section 106B**. Even if it were to be taken that the PW2’s affidavit is a certificate, the applicant has to show that it meets the conditions in subsection (2) and in (a) and (b) of subsection (4).

15. PW2 stated that the video coverage was carried out using his personal video camera (Panasonic GS320), but said nothing about its working condition. There was no evidence regarding the computer used, its condition or reliability. There was no evidence to show that PW2 was the one who owned, operated and managed the computer. The particulars of the computer were not given. The averments in that affidavit themselves did not meet the above stated threshold of **sub-section 106B (2)** of the **Evidence Act**. Those averments therefore fell short of the required certificate. In the circumstances, the electronic evidence of Zacharia Githuku Kagunya is inadmissible.

DATED and SIGNED at NAIROBI this 9TH day of MAY 2018

A.O. MUCHELULE

JUDGE

DATED and DELIVERED at NAIROBI this 10TH day of MAY 2018

W. MUSYOKA

JUDGE