



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 792 OF 2017

IN THE MATTER OF THE ESTATE OF DAULATKHANU MANSURALI HASSANALI DHARANI

JAMIL NAVAZ DOSSA1ST APPLICANT

JASMYN NAVAZ DOSSA2ND APPLICANT

JAMIL NAVAZ DOSSA

suing as Next Friend of JIHANARA NAVAZ DOSSA.....3RD APPLICANT

VERSUS

RASHIK KANTARIA1ST RESPONDENT

HASSANALI ALIMOHAMED DAMJI.....2ND RESPONDENT

PYARALI GULAMHUSSEIN NANJI.....3RD RESPONDENT

R U L I N G

1. Before court is an application dated 11th July 2018 brought pursuant to **Sections 3 & 3A of the Civil Procedure Act, Sections 47 & 70 of the Law of Succession Act and Rule 24(1) of Probate and Administration Rules** seeking for 4 orders as follows:

(i) That the Court directs Diamond Trust Bank Limited to forward the original Cheque number 00080 that was issued by the deceased to the Forensic Document Examiner or any other agency that the Court may deem just to direct for purposes of confirming if the signature appearing thereon is similar to or was made by the same person who executed the Will dated 31st July, 2015.

(ii) That the court do direct the Forensic document Examiner or any other authority or agency that the Court may deem just to direct to ascertain if the signature appearing on the affidavit sworn by Jane Wambui Kihara dated 16th April, 2018 and filed in court on 19th April 2018 and the one appearing on the will dated 31st July, 2015 which she allegedly signed as a witness were executed by one and the same person.

(iii) That the Forensic Documentary Examiner or any other authority or agency that the Court deems fit to order do prepare and submit a confidential report confirming his findings to the court.

(iv) That costs of the application be in the cause.

2. The application is supported by the affidavit of one of the Applicants **Jamil Navaz Dossa** stating that he has good reason to doubt the authenticity of the deceased's Will which he says bears a signature which is at variance with a signature appearing on a copy of a cheque issued by the deceased to his father and due to the suspicion, he consulted a forensic examiner whose report is annexed to the application. In addition, he stated that a cursory look at **Jane Wambui Kahara's** signature on her affidavit dated 16th April, 2018 and the one witnessing the Will discloses marked differences.

3. For the above reasons the Applicant believes that it is imperative that the original cheque and affidavit of Jane Wambui Kihara be made available for comparison in order to settle any doubts on the authenticity of the will.

4. The application was objected to by way of affidavits as follows; one, affidavit of **Hassanali Alimohamed Damji** dated 13th August, 2018, the deponent is an advocate of the High Court of Kenya, who prepared the will and witnessed the executor and the witnesses sign the same. He submitted that the application was a way of delaying confirmation of the grant, and expanding grounds upon which the Will is being challenged, further the deponent raised several technicalities challenging the application.

The second affidavit is by **Jane Wambui Kihara** dated 13th August, 2018. The deponent affirms that she witnessed the Executor sign the will and she appended her signature as such, further she stated that she has not alleged forgery of her signature, does not see the need to have an expert verify whether she witnessed the will or not and is available to testify before court in person.

Third affidavit was sworn by **Rahmi Mansurali Hassanali Dharani** a son to the deceased and a beneficiary of the estate, who stated therein that there is no allegation of forgery of the deceased Will and the application is therefore a waste of time, he also raised technicalities stating that the application is defective and abuse of the court process.

5. At the hearing of the application counsel for the Applicant submitted that the request for original documents is so that the Forensic Examiner can make a report based on original documents other than copies to avoid likely error and to be able to get a conclusive report. Further that the report will resolve one aspect of the objection and pave way for the Applicants application for reasonable provision pending hearing.

6. In opposing the application Mr. Dhamji reiterated the response in his replying affidavit confirming that he prepared the Will upon instructions from the deceased and witnessed the deceased execute and the witnesses appending their signatures and that against his affidavit there would be no need for a forensic examiner's report. Further he argued that the application is meant to delay confirmation of the grant, the objection to the issuance of grant was field out of time and therefore the will cannot now be challenged.

7. Having considered the application, responses and submissions by counsel the issues for determination are:

i. Whether or not to direct Diamond Trust Bank Limited to forward original cheque No. 00080 to a Forensic Document Examiner for purposes of comparing whether the signature on the same is similar or made by the same person as the executor of the Will dated 31st July, 2015.

ii. Whether or not to direct the Forensic Examiner or any other agency to ascertain if the signature appearing on the affidavit of one Jane Wambui Kihara and the one appearing on the Will mentioned above were executed by one and the same person.

iii. Whether or not to direct a Forensic Document Examiner to file a report in court.

8. For now, I will confine myself to the application seeking for examination of documents without looking at the merit or lack of the same as relates to the objection to making of a granting. I will also not consider the technical objection raised by the Respondents.

9. However, in arriving at a decision it is necessary to look at the issues raised in the objection filed in court on the 23rd of October 2017 which are as follows:

i. The testamentary capacity of the deceased at the time of executing the will

ii. Undue influence upon the deceased by the two named beneficiaries.

iii. Missing assets of deceased in the Will.

iv. No provision for some dependants and beneficiaries of the estate.

10. Clearly forgery or fraud was not raised in the objection. It is therefore a non-issue and featuring for the first time.

11. Secondly there is already a report of a handwriting expert filed with this application. The examiner did not complain, neither did he express inability or difficulties working with the copies, neither did he indicate that his report was not conclusive for failure to use original copies.

12. Thirdly Jane Wambui Kihara is available as a witness to be cross examined if need be and to shed light on any issue that may arise.

13. In the case of **Rose Kaiza versus Angelo Mpanju Kaiza 2009 eKLR** the Court of Appeal had this to say 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 on 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.....”

14. 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....”

15. For the reasons above given namely; that forgery was not raised in the objection, Jane Wambui Kihara is available to testify, and thirdly there is already a handwriting expert report in possession of the applicants, I decline to grant the application.

Costs of the application will abide the outcome of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 7th DAY OF December, 2018.

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ALI-ARONI

JUDGE