



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**IN THE MATTER OF THE ESTATE OF TIMOTHY MWANDI MUUMBO (DECEASED)**

**SUCCESSION CAUSE 1673 OF 2015**

**RULING**

**APPLICANTS' CASE**

The Applicants Objectors filed through Counsel Notice of Motion on 2nd February 2017 brought under **Order 51 Rule 1 of CPR 2010; Sections 1A, 1B, 3, 3A CPA, Sections 34,35,36, 50 & 84 of the Evidence Act Cap 80; Articles 159 and 165 (7) of the Constitution** and sought orders granted that;

**a) Evidence adduced by ELIZABETH MUMBI KIETI (PW2) on 1st September 2015 when she testified in CMCC 3773 of 2015 be admitted in these proceedings.**

**b) Evidence adduced by JOHN MUINDE (PW1) on 1st September 2015 when he testified in CMCC 3773 of 2015 be admitted in these proceedings.**

The grounds for the application are that the said Elizabeth Mumbi Kieti is the 3rd widow of the deceased and is conversant with what transpired at the time the deceased wrote the Will but who has since left this Court's jurisdiction and relocated to Norway.

The said John Muinde is the Document Examiner who testified during the proceedings in **CMCC 3773 of 2015**.

The Applicants stated that the parties in the **Chief Magistrate's Court Case 3773 of 2015** are the same parties herein. All parties that testified were cross-examined in the said proceedings and this would save time and cost to avail the witnesses.

The testimony by Document Examiner PW1 is well known by the parties and the trial Court dealt with the burial dispute and left pout determination of the deceased's written wishes-Will due to lack of jurisdiction and the fact that the purported Will was contested.

The Objectors/Applicants appealed against the decision of the Trial Court in the said case but refusal to determine the issue of the Will is not subject to appeal.

**RESPONDENTS' CASE**

The Respondents filed Replying Affidavit on 16th march 2017 and objected to applicants' application in reliance on **Section 34 of Evidence Act** to have evidence of both witnesses admitted directly as part of the Court record.

The grounds of opposition are as follows;

The Applicants have not demonstrated efforts to procure witnesses and therefore their application does not fall within the threshold where Section 34 of Evidence act is applicable.

There are no efforts demonstrated by Applicants to avail the Document Examiner John Muinde PW1 and no reasons were advanced for his absence to testify in this case.

The proceedings of **CMCC 3733 of 2015** were in relation to a burial dispute and different from the matter in this Court which is based on authenticity of Will of the deceased.

In the proceedings of **CMCC 3733 of 2015** the 1st Respondent David Nyenge was not part of the proceedings and he ought to have the opportunity to cross-examine the 2 witnesses.

It is also on record that the Applicants/Objectors appealed against the entire judgment of the Trial Court vide **HCCA 7 of 2016** and they averred that entire proceedings were tainted with gross illegality as shown in the memorandum of appeal attached. To ask this Court to rely on evidence that forms the substratum of appeal by Applicants; nothing will prevent them from raising issue with this Courts reliance of the said evidence that is alleged on appeal to be unprocedural and the Trial Court biased and unfair.

### **DETERMINATION**

The issue for determination is whether this Court should dispense with attendance and direct testimonies of the witnesses and instead have their evidence in **CMCC 3733 of 2015** adopted as part of this Court's record.

**Section 34 of the Evidence Act** provides;

***where a witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the Court considers unreasonable.***

The Applicants have not proved by cogent evidence that Elizabeth Kieti is out of the jurisdiction of this Court. If and when there is communication that she is out of the country and may not be able to attend and testify in these proceedings only then would the Applicant's claim under the threshold of **Section 34 of the Evidence Act Cap 80** and this Court shall exercise judicial discretion under **Sections 1A 1B 3 3A OF CPA** and admit her testimony in **CMCC 3733 of 2015** as part of this Court's record. Therefore the onus remains with the Applicants to provide relevant proof of the whereabouts of Elizabeth Kieti.

This Court in its orders of 15th November 2015 opined that the matter ought to proceed with hearing *inter partes* on the issue of whether the deceased's estate shall be administered through the Will of the deceased as per petition for grant of probate filed by executor on 8th July 2015 or through administrators appointed pursuant to the Objection to making of grant and cross petition for grant of letters of administration intestate filed on 16th September 2015 by the Objectors/Applicants.

At the crux of these proceedings is the authenticity and validity of the Will of Timothy Mwandu Muumbo (deceased). The Applicants have employed expert evidence to prove this issue through Document Examiner John Muinde (PW1)

**Litigation Skills for South African Lawyers** by Chris Marnewick SC pg 237 states;

***An expert is a person who by virtue of his or her qualifications, experience or research or combination of all of them is able to give relevant evidence in the nature of information and opinions not generally available to the public....***

***Judges draw inferences from facts that are proved in the case before them. Expert witnesses are used to explain subject's outside the Court's normal experience and to express opinions on inferences to be drawn from those facts.***

The thrust of the above quote is to emphasize the crucial role of an expert witness to court proceedings moreso in the instant case in determining the authenticity and or validity of the Will of the deceased.

Therefore whereas it is expedient to admit PW1 John Muinde's evidence in these proceedings; it is important to have his expert opinion on the Will of the deceased to facilitate the Court determine the issue at hand in light of all evidence on record.

Secondly; the Applicant's have not explained any circumstances or challenges that the Document Examiner will have in attending Court to testify. Therefore his situation if any does not fall within the threshold of Section 34 of the Evidence Act.

Thirdly in light of the matter to be heard and determined his evidence is crucial to determination of the validity of the Will. This Court did not hear and see the witness testify on the authenticity of the Will and therefore would be greatly disadvantaged to assess the said evidence with a view to arriving at an informed decision on the validity of the Will.

Fourthly, the evidence sought to be admitted in these proceedings is challenged in **HCCA 7 of 2016** where the Objectors/Applicants raised 59 grounds of appeal against the judgment of the Trial Court delivered on 13th January 2016. The appeal has not been heard and determined as of now. Among the grounds raised include that the Trial Court failed to;

***record, consider and evaluate evidence; selectively admitting and /or applying evidence adduced by parties and generating and cooking up evidence.***

Clearly, the Applicants are not satisfied by the evidence as recorded by the Trial Court and hence it is subject to the pending appeal. To ask this Court accept the contested evidence as part of this Court's record without direct evidence and its veracity tested by cross examination would be to determine the issue (s) on unreliable evidence.

In the case of;

***CAPTAIN MOSES KARIUKI WACHIRA vs JOSEPH MUREITHI KANYITA AND 3 OTHERS  
HIGH COURT CIVIL CASE NUMBER 423 OF 2009 (NAIROBI) COMERCIAL DIVISION  
HON JUSTICE HAVELOCK stated as follows***

***The Court therefore in following the provisions of Article 165(7) [COK 2010] as read with sections 1A, 1B and 3A of CPA and Section 34 (1) and (d) of Evidence Act is empowered to make directions it considers appropriate in ensuring fair administration of justice as postulated under Article 159(2) [COK 2010] This Court in exercising inherent powers under Section 3A and discretion under Sections 1A and 1B, may give directions it considers appropriate to ensure just, expeditious proportionate and affordable dispensation of matters.....However, the power of the Court to grant such orders should not be used whimsically or capriciously or to the detriment of either or all parties to the suit.....I recognize the fact that the 2nd 3rd and 4th defendants having not been involved in the proceedings in the Court below, have not had a chance to cross examine any of the 14 witnesses. It seems to me only just and fair that they should allowed to do so.***

This position is adopted in the instant case; that the 1st defendant herein who was not party to the proceedings in CMCC 3733 of 2015 be allowed to cross examine the 2 witnesses so as to be fair and just to all parties.

## **DISPOSITION**

- a. The application filed on 2nd April 2017 is only granted on condition of confirmation of the whereabouts of Elizabeth Kieti who is alleged to be out of this Court's jurisdiction.**
- b. John Muindi PW 1 Document Examiner shall testify in these proceedings due to the fact**

**that his expert opinion is crucial to determination of the authenticity of the deceased's Will which is the crux of these proceedings at this stage.**

**c. The parties shall set down the matter for *interpartes* hearing through *viva voce* evidence on a date to be obtained from the Registry.**

**d. The Costs shall be in the Cause.**

**DATED SIGNED & DELIVERED IN OPEN COURT ON 5<sup>TH</sup> MAY 2017.**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**