



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PROBATE AND ADMINISTRATION DIVISION
SUCCESSION CAUSE NO.26 OF 2008
IN THE MATTER OF THE ESTATE OF NGETHE KARUGA (DECEASED)
HANNAH WAIRIMU NGETHE.....OBJECTOR
VERSUS
FRANCIS MUNGAI NG'ANG'A.....PETITIONER/ADMINISTRATOR
JANE WAMBURA BISLEY.APPLICANT/PROPOSED INTERESTED PARTY

R U L I N G

1. There are two applications in this matter. In the Chamber Summons dated 10th July 2015 brought under **section 47** and **rule 73** of the **Law of Succession Act**, Francis Mungai Ng'ang'a (hereinafter the Petitioner) seeks orders that this court do re-open his case and allow him to testify further, call other witnesses and produce further evidence in support of his case. In the Chamber Summons dated 5th October 2015 Jane Wambura Bisley (hereinafter the Applicant) seeks to be joined as an interested party and be granted liberty to participate in these proceedings. She prays to be granted leave to file an affidavit and to testify in these proceedings in support of her inclusion as a beneficiary.

Application dated 10th July 2015

2. The application of 10th July 2015 is supported by the Petitioner's affidavit dated 12th July 2015 and filed in court on 14th July 2015. The Petitioner deposed that this matter proceeded for hearing of his case on 25th November 2014 when he testified under the guidance of Mrs. Njuguna Advocate. That the matter was adjourned on the same date at 2pm for the Judge to attend to matters filed under certificate of urgency. The matter was scheduled for further hearing on 16th February 2015.
3. On the 16th February 2015, the Petitioner proceeded to court ready for hearing but his Advocate did not appear in court to represent him. That despite the Petitioner's request for the matter to be adjourned, to allow him to contact his lawyer, his request was declined due to the protests of the Objector and the age of the case. The court therefore proceeded with the Objector's case with Hannah Wairimu Ngethe giving evidence.
4. The Petitioner further averred that when the firm of Kembi-Gitura & Company Advocates came

into record, they perused the court file and they realized that his former Advocates did not handle his case diligently and neither did they lead him to producing documents in support of his case at the hearing of his case. His Advocate now on record, however, advised him that it would be prudent for him to produce documents in support of his case and that would only be done by making an application to court to re-open his case. That he believes that if the application is allowed, it will not prejudice the Objector as she will have an opportunity to cross-examine him.

5. The Petitioner argues that it is upon the Advocate's advice that he prays for his case to be re-opened so that he can testify further, produce documents and call another witness to enable the court consider all the necessary information in support of his case and to reach a fair and just decision.
6. The Petitioner filed a supplementary affidavit in answer to the Objector's replying affidavit dated 16th October, 2015. He deposed that he is the executor of the deceased's will dated 23rd December 2004. He reiterates that his then Advocates on record Anthony Burugu & Co. failed to appear in court to represent him and as such the matter proceeded without his legal representation on that date. That the matter was adjourned to enable him get legal representation and for cross examination of the Respondent.
7. In answer to the Petitioner's affidavit the Objector filed a replying affidavit dated 16th October 2015 and deposed that the Petitioner has always been represented by counsel from the onset of the case. That on 2nd April 2014 and 25th November 2011 respectively when the matter came up for hearing, the Petitioner was represented by counsel and three witnesses gave evidence on behalf of the Petitioner's side with the Petitioner also giving evidence.
8. The Objector further avers that although the Petitioner alleges that he intended to produce documentary evidence on 16th February 2015, the deposition is untrue as he had already been cross-examined and then re-examined. That no indication was made by counsel for the Petitioner after the Petitioner had been re-examined, for purposes of producing any documents. That on 16th February 2015, what was coming up was the Objector's case. The Petitioner was given up to 11.00 a.m. to avail his advocate to no avail. The matter was adjourned after the Objector had given evidence to avail the Petitioner an opportunity to cross-examine her later. The Petitioner does not indicate what witnesses he proposes to call, what evidence he intends to produce and he seeks to give evidence or call further evidence after the Objector has given her evidence.
9. Mr. Maina Makome, learned counsel for the Objector submitted that the Petitioner has always been represented by counsel from the onset of this case and that he did not indicate that he intended to call more than three witnesses on 25th November 2014. The deposition in his application that he intended to produce documentary evidence on 16th February 2015 is untrue because he had already given evidence and had been cross-examined. What was coming on the 16th February 2015 was the Objector's case and the court gave the Petitioner up to 11.00 a.m. to avail his Advocate to no avail.
10. Mr. Maina further submitted that the court adjourned the matter after the Objector had been examined-in-chief to enable the Petitioner cross-examine the Objector at a later date. Counsel argued that allowing the Petitioner to give further evidence would prejudice the Objector as the Petitioner would seek to fill the gaps in his evidence after hearing the Objector's evidence. Counsel urged the court to disallow the Petitioner's application since he has not indicated the nature of the evidence he intends to call and how the intended witness is relevant in assisting the court in arriving at a finding as to the validity of the will, which is the issue in question.
11. Mr. Maina contended that the Petitioner is being untruthful in his desposition since on 25th November 2014, he had already been cross-examined and re-examined. Mr. Maina relied on the following cases:

a. Mombasa HCCC No. 545 of 1999 Gachuma Gacheru vs Maina Kabuchwa

Where the court refused to allow the application to reopen a case to produce a document or call further evidence, after the counsel had failed to produce evidence when he had the opportunity to do so.

(b) Malindi HCCC No. 56 of 1999 Hassan Hashu Shirwas Shirwas vs Swalahudin Mohamed Ahmed where the court said:

“....re-opening a case is not an impossibility but there must be urgent reasons for re-opening and not because a party has suddenly had a brain wave and spotted a loophole in its case, which it can now seal by re-opening the case.....”

Mombasa HCCC No. 37 of 2007 Samuel Kiti Lewa –vs- HFCK Ltd James M. Kagete

In the above matter, the Applicant sought to re-open his case to rebut the Defendants evidence.

The court in refusing the application stated as follows:

“....in my view if the Plaintiff was allowed to re-open his case so as to prove it, it would amount to allowing the Plaintiff to fill the gaps in his evidence. That would be prejudicial to the Defendant.....”

Application dated 5th October, 2015

- 12.The application is premised on the grounds that this succession cause relates to the land parcel that was originally known as L.R. Ol Ochoro Onyoro 53. That the moneys expended in legal fees and other related disbursement in recovery of the portion of land that was eventually awarded to the deceased by court was given by the Applicant. The Applicant states that it has come to her knowledge that she is named as a beneficiary in the will that forms an integral part of these succession proceedings. That both the Petitioner/Administrator and the Objector have conducted these proceedings without the participation of the Applicant and that any order and/or judgment or ruling made herein without her participation is likely to affect and/or prejudice the Applicant’s interest in the suit land.
- 13.The Applicant reiterated her grounds in her affidavit in support of the application. She deposed that over a period of time she extended financial support to the deceased while he was in the company of Francis Mungai Ng’ang’a, as fees for legal proceedings in respect of L.R. Ol Ochoro Onyoro 53. She attached receipts, some in form of cash and others in paid by vouchers through Game trackers (K) Ltd where she is a shareholder showing the amounts advanced to the deceased.
- 14.The Applicant averred that there was an agreement between her and the deceased in the presence of Francis Mungai Ng’ang’a, Margaret Wairimu Ng’ethe, Teresia Wambui and two elders, Kimani Kariuki and Alfred Mungai Gichuhi that the deceased would repay the amount advanced to him by hiving off two acres of his land Ol Ochoro Onyoro 53 in her favour. That the deceased made a will through M/s. Mwicigi Kinuthia & Company Advocates in which he named the Applicant as one of the beneficiaries. She argued that failure by the Petitioner and Objector to call her to participate in these proceedings as a witness is in bad faith and against her wishes and that of the deceased. That the Applicant’s participation in these proceedings will occasion no prejudice to the parties.
- 15.Hannah Wairimu Ngethe (herein after the Objector) in answer to the Applicant’s application filed a Replying affidavit also dated 16th October, 2015. She deposed that the Applicant was her neighbour and that during the burial arrangement of the deceased, any person who had a claim against the deceased was requested to bring it up. No claim was made by the Applicant. That

although the Applicant has given the Objector a ride several times in her car, she has never mentioned anything about any agreement between her and the deceased with respect to the said property.

16. The Objector avers that the Applicant has all along been aware of the succession cause herein as admitted in her affidavit at paragraph 7 that she has attended court in respect of this. She has not however explained why she has failed to seek to be enjoined as a party to the cause for the last seven (7) years. That the documents that the Applicant and the Petitioner intend to produce in court are the same to a large extent, and the application by the Applicant is an attempt by the Petitioner to introduce new evidence after having failed to produce it when he had the opportunity to do so.

17. M/s. Ameka Advocates submitted on behalf of Jane Wambura Bisley that her exclusion from the active participation of these proceedings is likely to result in denial, violation, infringement or threat to a fundamental right to own property as enshrined in the Constitution. That neither the Petitioner nor the Objector have sought to have her testify yet she is directly affected. M/s. Ameka referred the court to the case of *Prisca Nyareso Okinyi vs Justus A.M. Sigah*, Succession Cause No. 248 of 2013 High Court of Kenya at Kisii wherein the court allowed the County Government of Nyamira when they sought to be enjoined to the Succession proceedings.

18. M/s. Ameka further submitted that in the case of **Meme vs Republic (2004) 1 KLR 637**, the court considered other factors that may lead to joinder of a party as follows:

- i. Joinder of a person because his presence will result in the complete settlement of the questions involved in the proceedings;
- ii. Joinder to provide protection for the rights of the party who would otherwise be adversely affected in law; and
- iii. Joinder to prevent a likely course of proliferated litigation.

19. Learned counsel in response to the application dated 5th October 2015 by the Interested Party, submitted that the application should be refused for reasons that it was made seven years after the onset of the case, and the court should not aid her on account of her indolence. That the Objector has already given her evidence and what is remaining is her cross-examination. Learned counsel argued that enjoining parties at this stage would unsettle the Objector's case and she would not have an opportunity to respond to the issues being raised by the new party. That both the Interested Party's and the Petitioner's applications are an attempt by the Petitioner through the proposed Interested Party to call further evidence after having failed to do so in his case.

20. After a careful consideration of the twin applications, the depositions in support and in reply and the submissions thereto, I find that although filed separately they both seek to be allowed to adduce more evidence in support of the Petitioner's position. Indeed the reopening of a case is not a new or novel thing but cogent reasons must be advanced for asking the court to do so. As stated in *Malindi HCCC No. 56 of 1999 (supra)* that:

“...re-opening a case is not an impossibility but there must be urgent reasons for re-opening and not because a party has suddenly had a brain wave and spotted a loophole in its case, which it can now seal by re-opening the case...”

His witnesses testified on 2nd April 2014. The Petitioner testified a year and a half later on 25th November 2015. It is suspicious that he has had this sudden brain wave only after the Objector has testified.

21. This court has not been told that the Petitioner has come upon or discovered some new and important evidence which after the exercise of due diligence was not within his knowledge. It is noted that the Petitioner has always had the advantage of counsel from the inception of this case.

22.The court has also not been told where the Applicant has been for the last eight years since this cause was filed yet she was aware of it according to the Objector and has even had occasion to attend court in that regard.

23.In my view this is an attempt by the Petitioner to have a second bite at the cherry. If he is allowed to re-open his case so as to prove it this would amount to allowing him to fill the gaps in his evidence after having heard the Objector's case. That would be prejudicial to the Objector. - See Mombasa **HCCC No. 37 of 2007 Samuel Kiti Lewa vs HFCK Ltd James M. Kagete.**

In the premise it is my considered view that allowing any of the two applications set out above would not only be prejudicial to the Objector but would also amount to an abuse of the court process.

Both applications are therefore declined.

SIGNED DATED and DELIVERED in open court this **8th day of February 2016.**

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L. A. ACHODE

JUDGE