



**REPUBLIC OF KENYA**

**HIGH COURT AT NAIROBI**

**FAMILY DIVISION- MILIMANI LAW COURTS**

**SUCCESSION CAUSE NO. 306 OF 2013**

**IN THE MATTER OF THE ESTATE OF ELIZABETH NDUTA NGORU (DECEASED)**

**BETWEEN**

**ESTHER WAMBUI KANYI ..... 1<sup>ST</sup>  
APPLICANT**

**TERESIA WANJIKU KAMAU ..... 2<sup>ND</sup>  
APPLICANT**

**MATY NDINGU ..... 3<sup>RD</sup>  
APPLICANT**

**AND**

**NJERI NGORU ..... 1<sup>ST</sup>  
RESPONDENT**

**JACINTA WANJIRU NDUNGU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**INTRODUCTION**

The deceased died on 9th September 1994.

The Respondents filed petition for grant of letters of administration which was granted on 16th July 2013 and confirmed on 28th July 2014. The Applicants filed an application under certificate of urgency on 4th March 2016 on revocation of grant. The Respondents filed Replying affidavit on 1st April 2016. The Applicants raised Preliminary Objection on 4th May 2016 on the Affidavit of 1<sup>st</sup> April 2016.

This Ruling relates to the Notice of Preliminary Objection dated 4<sup>th</sup> May, 2016 filed by the 1<sup>st</sup> and 2<sup>nd</sup> Applicants on the grounds that:

***(1) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' joint Replying Affidavit dated 31<sup>st</sup> March 2016 paragraphs***

**4,5,6,45 and Attestation Clause thereof offend the provisions of Order 19 Rule 3 of the Civil Procedure Rules and Section 63 (2) of the Evidence Act Cap. 80, Laws of Kenya.**

**(2) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' joint Replying Affidavit dated 31<sup>st</sup> March 2016 paragraphs 4, 5, 6, 12, 24, 25, 34, 45, Attestation Clause and generally the entire Replying Affidavit offends the provisions of Order 19 Rule 5 of the Civil Procedure Rules and Section 16 of the Oaths and Statutory Declarations Act, Cap. 15, Laws of Kenya.**

**(3) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' joint Replying Affidavit dated 31<sup>st</sup> March 2016 paragraphs 3, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 37, 38, 40, 41, 43, 44 offend the provisions of Order 19 Rule 6 of the Civil Procedure Rules.**

**(4) The entire 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Replying Affidavit dated 31<sup>st</sup> March 2016 offend the provisions of Order 19 Rule 3 (1), Order 19 Rule (4), Order 19 rule 5 of the Civil Procedure Rules and Section 16 of the Oaths and Statutory Declarations Act, Cap. 15, Laws of Kenya.**

### **THE APPLICANTS' CASE**

In their Written Submissions dated 16<sup>th</sup> May, 2016, it was their contention that Section 63 (2) of the Evidence Act is an embodiment of Order 19 Rule 3 (1) of the Civil Procedure Rules and it is otherwise known as the best evidence rule. In that regard, the 1<sup>st</sup> and 2<sup>nd</sup> Applicant relied on the decisions in **GERPHAS ALPHONSE ODHIAMBO VS FELIX ADIEGO, CIVIL APPEAL NO. 352 OF 2005, ALBANY TAYLOR AND WENDY TAYLOR VS STELLA NAFULA KHISA AND CHRISTOPHER TAYLOR, CIVIL SUIT NO. 202 OF 2007, AND ANASTASIA KIOKO MULULU AND ANOTHER VS WINFRED WANJAMA WARUI, T/A WANJAMA AND ASSOCIATES, MISC. CIVIL CASE NO. 70 OF 2012** in support of that argument.

While relying further on **THOMAS MALINDA AND OTHERS VS THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION AND ANOTHER, PETITION NO. 2 OF 2013, AND CAMMILLE VS MERALLI [1966] E.A 411**, it was their further contention that the 2<sup>nd</sup> Respondent has not even executed the said Affidavit on behalf of the 1<sup>st</sup> Respondent as well.

The 1<sup>st</sup> and 2<sup>nd</sup> Applicant furthermore placed reliance on the decisions in **DUNCAN GAKUNA KIONGA AND OTHERS VS TIMBOROA HOTELS LIMITED, CIVIL SUIT NO. 300 OF 2008, AND PATOR JOHN CHERUIYOT AND 6 OTHERS VS COUNTY COUNCIL OF BARINGO AND OTHERS, NAKURU HCCC NO. 120 OF 2004 (UNREPORTED)**, in support of their argument that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Replying Affidavit is incompetent.

While maintaining that the Court may order to be struck out from any affidavit any matter which is scandalous, irrelevant or oppressive, the 1<sup>st</sup> and 2<sup>nd</sup> Applicant relied on **JOSEPH GITAU AND OTHERS VS UKAY ESTATE LTD, HCCC NO. 813 OF 2014**, and **BLACK'S LAW DICTIONARY, 7<sup>TH</sup> EDITION**, for the proposition that:

***"the allegations or averments in an affidavit should also not be irrelevant; having no probative value; not tending to prove or disapprove a matter in issue. The averment should be supported by evidence within the affidavit itself or by some other person in the proceedings."***

It was their submission further that paragraphs 19 and 20 of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents Affidavit were scandalous, irrelevant and oppressive as far as relevance is concerned, as they absolutely have no probative value and are simply a narration of the events that transpired.

According to the 1<sup>st</sup> and 2<sup>nd</sup> Applicant, paragraphs 12, 21, 31, and 33 of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Replying Affidavit are argumentative and as such, ought to be struck out as was held in **MBUGUA AND MBUGUA ADVOCATES VS KENINDIA ASSURANCE CO. LTD, MISC. APP. NO. 667 OF 2013**

**AND FACTORY GUARDS LIMITED VS ABEL VUNDI KITUNGI, MISC APP. NO. 621 OF 2014.**

Accordingly, that paragraphs 13, 14, 15, 16, 17, 18, 22, 23, 31, 32, 41 and 44 of the said Affidavit are merely legal opinions and as such ought to be struck out.

In the 1<sup>st</sup> and 2<sup>nd</sup> Applicants' view, paragraphs 29, 30, 38, and 43 of the Respondents' Affidavit are full of conjectures and abuses, while paragraphs 19, 24, 25, 27, 28, 29, 30, 38, and 43 are scandalous, irrelevant and oppressive. They in addition submitted that the impugned Replying Affidavit is so incurably defective that it cannot be salvaged by the provisions of Article 159 (2) (d) of the Constitution and Section 1A, and 1B of the Civil Procedure Act. accordingly, that in the Affidavit, it is only one deponent who placed a thumbprint while the Affidavit cuts across as being pluralized and singularized while at the same time, per paragraph 4 thereof, the 1<sup>st</sup> Respondent is deposing to the facts and to what point the 2<sup>nd</sup> Respondent is deposing to the facts as the use of singular and plural facts is used quite interchangeably. On that basis, they posed the questions thus: who is deposing to a particular fact in a particular paragraph? And who is to be cross-examined to determine the veracity of the facts deposed? From that, it was their argument that the Affidavit is legally untenable and ought to be struck off.

Based on the foregoing, they argued further that in the present circumstances, the Respondents had sufficient time, resources and legal personnel to put in proper Replying Affidavits as a result therefore, it would not be appropriate for the Court to grant them further leave to put in a fresh Affidavit. Accordingly, that doing so, would be to their prejudice. Additionally, that this Court ought not to descend into the arena of the conflict and thereby leave the consequences to the Respondents' advocate.

For the foregoing reasons therefore, the 1<sup>st</sup> and 2<sup>nd</sup> Applicants urged the Court to allow the instant Preliminary Objection.

**THE RESPONDENTS' CASE**

In response to the Preliminary Objection, the Respondents filed Written Submissions dated 9<sup>th</sup> June 2016. The Respondents submitted that this Court has the discretion to strike out a Preliminary Objection that does not meet the threshold required in law, and decline to determine the issues raised in the Preliminary Objection. In that regard, they relied on the decision in **MOSES WANJALA LUKOYE VS BENARD ALFRED WEKESA SAMBA AND OTHERS [2013] ECLR** for what a Preliminary Objection entails. While maintaining that a Preliminary Objection ought to be capable of disposing of a suit in its entirety, it was their contention that the 1<sup>st</sup> and 2<sup>nd</sup> Applicants' have conceded that the paragraphs therein be struck off but the matter proceeds on for hearing. Further, that in any event, even if the Replying Affidavit is struck out, the issues under the main cause will still require submission of evidence, as proof is mandatory under the law of succession. It was their other contention that the practice of impugning evidence and its probative value at the preliminary stage is improper.

The Respondents rebutted the assertions by the 1<sup>st</sup> and 2<sup>nd</sup> Applicants that the impugned Affidavit is a joint affidavit. They argued, in that regard, that a joint Affidavit is one which is sworn by two or more deponents as was stated in the **THOMAS MALINDA AND ANOTHER VS THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION CASE (SUPRA)**. In that context, it was their further argument that only one person has appended a signature at the jurat and as such, it is not a joint Affidavit as alleged. Further, that as all the grounds in the Preliminary Objection are based on that ground, the Court therefore ought to disallow all the grounds therein in *toto*.

The Respondents rebutted the 1<sup>st</sup> and 2<sup>nd</sup> Applicants' assertions that the swearing an affidavit on behalf of another offends the 'best evidence rule' of adducing direct evidence and submitted that the said rule together with the rule against hearsay are not inflexible procedural rules and under the Law of Succession and Civil Procedure Rules, a deponent can swear an affidavit on behalf of another as acknowledged under Order 4 Rule 1 (3) of the Civil Procedure Rules. The Respondents relied further on the decision in; In the **ESTATE OF KIMANI KAGUORA (DECEASED) [2015] ECLR** in support of the foregoing proposition and submitted further that the impugned Affidavit herein has been sworn by a co-administrator on her behalf and on behalf of her co-administrator.

The Respondents maintained that the rules under Section 63 of the Evidence Act and Order 19 Rule 1 (3) of the Civil Procedure Rules have exceptions. While relying further on the decisions in **HARLEYS LIMITED VS RIPPLES PHARMACEUTICALS LIMITED AND ANOTHER [2015] ECLR, IN THE MATTER OF THE ESTATE OF DR. TOMASIO RWAKI MAKONNEN (DECEASED) [2012] ECLR, AND KIPRUTO KANDIE AND ANOTHER VS MIOTONI WEST VILLAS LIMITED AND ANOTHER [2011] ECLR**, it was their argument that an Affidavit is not defective merely because it contains information that is not directly perceived by the deponent therein.

On whether the attestation clause in the impugned Affidavit complies with the provisions of the Oaths and Statutory Declarations Act, the Respondents' position was that the attestation therein conforms to the requirements under the Probate and Administration Rules. Additionally, on whether the depositions are argumentative, they submitted that an argumentative paragraph is fraught with verbose argumentative propositions, expressions of opinion and law, coupled with case-law. That, they alleged was not the case in their Affidavit. Additionally, that the depositions are not scandalous, irrelevant and oppressive as alleged, when assessed against the legal standards outlined in **JOSEPH GITAU AND OTHERS VS UKAY ESTATE LTD., HCCC NO. 813 OF 2004**. Further, that the depositions are not in any way indecent, offensive or abusive as alleged.

The foregoing notwithstanding, the Respondents were of the view that if there is any defect in the Replying Affidavit, the same ought to be treated as a mere technicality and does not as such, justify the striking out of the same and impeding their access to justice. In that regard, they placed further reliance on **SHAFINA MAGRE AND ANOTHER VS AGA KHAN HEALTH SERVICES (K) LIMITED T/A AGA KHAN UNIVERSITY HOSPITAL AND ANOTHER [2015] ECLR** and additionally contended that the Court should be guided by Articles 22 (3) and 159 (2) (d) of the Constitution and overrule the Preliminary Objection and award them costs to the present Application.

#### **THE APPLICANTS' REJOINDER**

In their rejoinder, the 1<sup>st</sup> and 2<sup>nd</sup> Applicant filed further Written Submissions dated 17<sup>th</sup> June, 2016 in which they reiterated their earlier assertions in support of the Preliminary Objection. It was their further submission that the Respondents' submissions are misguided as what is in contention herein is an interlocutory Application as opposed to a substantive suit and that even if this was a substantive suit, the 1<sup>st</sup> yardstick to be proven is whether the present Preliminary Objection is grounded on the law as well as the other matters they had raised in their Written Submissions.

The 1<sup>st</sup> and 2<sup>nd</sup> Applicants finally relied on the decision in **GALEB GULAM (SUING AS THE EXECUTOR OF THE ESTATE OF SADRUDIN SHAMSUDIN ESMAIL NURAIN), ELDOMART HOLDINGS LIMITED VS CYRUS SHAKHALAGA KWAH JIRONGO, CIVIL SUIT NO. 393 OF 2003** in support of their argument that provisions in regard to Verifying Affidavits are outlined under Order 19 Rule 3 of the Civil Procedure Rules as opposed to Order 4 therein. They further distinguished the decision in **In the MATTER OF THE ESTATE OF KIMANI KAGUORA (SUPRA)**, relied on by the Respondents, and argued that the same is irrelevant as the issue of affidavits sworn jointly was not an issue *per se* therein. They argued further, on the authority in **KAKIITA MAIMAI HAMISI VS PERSI PESI TOBIKO AND 2 OTHERS, CA NO. 154 OF 2014**, that:

***“Article 159 and Sections 1A and 1B of the Civil Procedure Act are not a panacea nay a general whitewash that cures and mends all ills, misdeeds, and defaults of litigation hence, parties should not take umbrage or pitch tent therein in the hope that it is such.”***

As a result of the foregoing, it was their final position that the Respondents' submissions are completely irrelevant and hold no water and as such, ought to be disregarded.

#### **DETERMINATION**

Having considered the Parties' respective pleadings as reproduced elsewhere above, the key issue for determination is whether the 1<sup>st</sup> and 2<sup>nd</sup> Applicants' Preliminary Objection succeeds. In that regard, a

Preliminary Objection has been defined in the **Mukisa Biscuit Case (supra)** where the Court observed that:

***“...a ‘preliminary objection’ consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”***

Sir Charles Newbold P. added as follows at page 701:

***“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”***

I am duly guided by the foregoing and I do not see any reason to depart from the same. It follows therefore, that I shall base my findings on pure questions of law as raised in the Preliminary Objection. In that regard, it is evident that the key contention is in regard to the form and substance of the Replying Affidavit dated 31<sup>st</sup> March, 2016 Sworn by the 1<sup>st</sup> Respondent. The Applicants’ key argument is that the said Affidavit does not comply with the law as outlined in the Civil Procedure Rules, the Evidence Act and the Oaths and Statutory Declarations Act. In that regard, **Order 19 of the Civil Procedure Rules, titled ‘Affidavits’** specifically provides for the contents of Affidavits. Rule 3 thereof states that:

***1. Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.***

***2. The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents, shall (unless the court otherwise directs) be paid by the party filing the same.***

Rule 4 states that:

***Every affidavit shall state the description, true place of abode and postal address of the deponent, and if the deponent is a minor shall state the age.***

Rule 5 stipulates that;

***Every affidavit shall be drawn in the first person and divided into paragraphs numbered consecutively which shall be confined as nearly as may be to a distinct portion of the subject.***

Rule 6 is to the effect that:

***The court may order to be struck out from any affidavit any matter which is scandalous, irrelevant or oppressive.***

Under Rule 7, it is stated that:

***The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.***

It is thus apparent that the law contemplates that certain rules in regard to the drawing of affidavits must be complied with. At the same time, the Civil Procedure Rules, as reproduced above, grant the courts the discretionary powers to allow any such affidavits regardless of any defects, irregularity or technicality

therein.

The question then that I must answer is whether the Replying Affidavit in question is fatally and incurably defective and as such, ought to be struck out. In that regard, I have examined the said Affidavit. I note firstly that, the deponent asserts that she is swearing the same in her capacity as a co-administrator and on her behalf and that of the 2<sup>nd</sup> Respondent, the other co-administrator. On that basis, the Court in **THOMAS MALINDA AND OTHERS VS THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (SUPRA)**, was confronted with a question on whether an affidavit that had been sworn jointly by parties in an Election Petition was invalid in light of the provisions of Order 19 Rule 3. The Learned Judge in answering the question made the following observation:

**“[6] The issue to be determined is whether the irregularity alluded to can be cured. To answer the question posed I must consider the purpose of an affidavit. An affidavit basically presents facts. Facts are usually within personal knowledge. It is for this reason that every affidavit must be expressed in the first person. The question I must pose at this point is whether more than one person can swear an affidavit? It is possible for more than one person to swear an affidavit jointly especially so when they are deposing to the same facts. However, cases would differ depending on their circumstances.”**

[7] ...

**[8] Justice ought to be administered without undue regard to technicalities but – the overriding objectives of the Election Rules – is to facilitate a just resolution of election petition. (Vide rule 4(2).**

**[9] Order 19 of the Civil Procedure Rules requires an affidavit to be drawn in first person form. Allowing a plural affidavit like the one deposed herein will be doing an injustice to the Respondents. The mischief cannot be cured by Article 159 (2) (d) of the Constitution. This would call for striking out of the affidavit.”** (Emphasis added)

The Court however did not strike out the Affidavit because of the greater public interest and for the substantive determination of the election petition in question. What however emerges from the decision is that a question on a challenge to affidavits needs to be examined on a case by case basis and the Court ought to consider the circumstances of each case.

I am duly guided by the foregoing holding and I do not see any reason to depart from the reasoning therein. In that regard, it is notable that the impugned Affidavit in the present case has been sworn by a co-administrator on her behalf and on behalf of another co-administrator and my perusal of the same reveals further that the depositions largely deal with matters pertaining to the Estate of Elizabeth Nduta (Deceased), the subject matter of the present proceedings. The deponent and her sister are administrators of the deceased's estate and therefore are seized of pertinent facts regarding the said estate. Where the information is from a different source, they stated the source and have attached the relevant documents, e.g the Chief's letters, the documents relating to the suit properties that comprise of the deceased's estate. It therefore follows that the aim of the Affidavit should be to present nothing more than the factual basis of the matter. It is possible and legal for one to swear an affidavit on behalf of a co-administrator in Succession matters as in the instant case they have both been issued with a grant by the Court as administrators of the deceased's estate.

**Section 16 of the Oaths and Statutory Declarations Act** is to the effect that:

**“Every affirmation shall be as follows: “I, A.B., do solemnly, sincerely and truly declare and affirm,” and then proceed with the words of the oath prescribed by law, omitting any words of imprecation or calling to witness.”**

Does the failure to affirm as so said in the Replying Affidavit render the same a nullity? My answer to that is in the negative. I say so because, the Affidavit evidence is not conclusive and a party is still at

liberty to call in a deponent for cross-examination on the depositions therein. Furthermore, in my view, the defect herein in regard to affirmation is a curable defect in light of **Order 19 Rule 7**.

Additionally, in light of **Order 19 Rule 6**, this Court is vested with powers to strike out from any Affidavit any matter which is scandalous, irrelevant or oppressive. In that context, the Court in **TERMCO TANK KENYA LTD VS NYORO CONSTRUCTION CO. LTD, CIVIL SUIT 129 OF 2004** pointed out thus:

***“A pleading is scandalous if it alleges indecent, offensive or improper motives against the opposite party which are unnecessary in the proof of the action pleaded. It is frivolous or vexatious when it lacks seriousness and tends to annoy. A frivolous claim is ex post facto vexatious as nobody can fail to be annoyed by a baseless allegation against him...”*** (Emphasis added)

Can it then be said that paragraphs 3, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 37, 38, 40, 41, 43 and 44 of the Replying Affidavit are scandalous, irrelevant or oppressive? I have considered the said paragraphs. In my view, weighed against the above pronouncement in the **TERMCO TANK KENYA case**, I find that it is only **paragraphs 37 & 38** that are offensive by casting aspersions that the Applicants hid the title deeds and they are greedy and malicious as such, I hereby strike out the same. As for the remaining paragraphs, to my mind they are a representation of the Respondents’ assertions in regard to the matter at hand and I do not find them scandalous, irrelevant or oppressive as contended by the 1<sup>st</sup> and 2<sup>nd</sup> Applicant.

In conclusion, it must be noted that as early as 2004, the Court in **PETER KIMONYE AND OTHERS VS BARCLAYS BANK OF KENYA LIMITED AND 2 OTHERS, HCCC NO. 403 OF 2004**, it was acknowledged thus:

***“...A document that goes counter to an express statutory requirement is invalid. An invalid document must be struck off the record of the Court...”***

Such a position, however, ought to be only taken in extreme circumstances, while having in mind the provisions of **Article 48 of the Constitution** which entitles this Court to ensure access to justice for all, and **Article 159 (2) (d)** therein which asserts that justice ought to be administered without undue regard to procedural technicalities.

In **ABDIRAHMAN ABDI ALSO KNOWN AS ABDIRAHMAN MUHUMED ABDI VS SAFI PETROLEUM PRODUCTS LTD. AND 6 OTHERS, CIVIL APPLICATION NO. 173 OF 2010**, although the Court of Appeal addressed its mind to the question of striking out a notice of appeal that was allegedly served out of time without leave of the Court, the dicta rendered by the Court is equally applicable in the present matter thus:

***“The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice...”***

***In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the***

**prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion.**” (Emphasis added)

I must reiterate that striking out the Replying Affidavit in the present circumstances would be prejudicial in that it would impede access to justice for the Respondents, a right guaranteed under **Article 48 of the Constitution**. Proper pleadings aid parties and the Court in expeditious disposal of cases, it is equally important to facilitate all parties an opportunity to canvass and ventilate their case in Court and the matter determined on the substantive issues without the technical and procedural issues overriding this process. This Court cannot shut its eyes to the injustice that would be occasioned in locking out the Respondents in the determination of the Petition at hand in regard to the Estate of Esther Wambui Kanyi (Deceased).

In the case of **M’NKIRIA PETKAY SHEN MIRITI VS RAGWA SAMUEL MBAE AND 2 OTHERS, ELECTION PETITION NO. 4 OF 2013**, although an Election Petition, the dictum in regard to verifying the contents of affidavits is relevant to this case. The Learned Judge made the observation that:

**“[42] In relation to the allegations that the affidavits are bad in law for being false, I take the view that as section 109 of the Evidence Act provides, the burden of proof of particular facts lies on the person who alleges those facts. The applicant contends that he did not commit the election offences cited by the Petitioner in his affidavits and that the testimony that has been set out by the Petitioner’s witnesses is not to be believed. He contends that these witnesses have since recanted their evidence and attaches affidavits in this regard. There is therefore on the record of the court two conflicting sets of facts. The veracity of the contents of affidavits can only be tested when the witnesses of either side take the stand. This makes the issue unsuitable for determination at the preliminary stage as the court has not had an opportunity to hear the witness evidence. The Applicants are therefore asking the court to make a decision on the basis of untested evidence which this court cannot do. As was noted by Kimondo J in Nairobi Election Petition 2 of 2013 Steven Kariuki v. George Mike Wanjohi & Others at page 16: Ideally, cases should be determined on tested evidence at a full hearing.”**(Emphasis added)

**Article 50 (1) of the Constitution** mandates this Court to accord every person a fair hearing. The Article states that:

***“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. “***

In order for this Court to conclusively and substantively address the issues in the present matter, I am inclined to invoke **Order 19 Rule 7 of the Civil Procedure Rules** and accept the Replying Affidavit with the necessary modifications striking out the offending paragraphs.

## **DISPOSITION**

**1. In light of consideration of the above provisions of law and case-law and the pleadings in question, I allow the Preliminary Objection dated 4<sup>th</sup> May, 2016 only to the extent of expunging from the affidavit the offending paragraphs 37 & 38 and dismiss the rest of the Objection.**

**2. Each party shall bear their own costs to the present Preliminary Objection Application.**

**DELIVERED DATED AND SIGNED IN OPEN COURT AT NAIROBI THIS 5<sup>TH</sup> DAY OF SEPTEMBER, 2016.**

**M. W. MUIGAI**

**JUDGE**

*In the presence of:*

**Ms. Wambugu holding brief for Ms. Muchira for the Respondent.**