



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
HIGH COURT CIVIL CASE NUMBER 2 OF 2009
(SUCCESSION CAUSE NO. 947 OF 1994 & SUCCESSION CAUSE NO. 1094 OF 1990)

BETWEEN

NYOIKE MATHU.....APPLICANT

AND

LILIAN WAMBUI MATHU & 4 OTHERS.....RESPONDENTS

RULING

INTRODUCTION

This matter was scheduled for hearing on 27th October 2016. Dr Kamau Kuria learned Counsel for the Applicant, indicated to this Court that he was ready to proceed with the hearing by taking the evidence of the Doctor based on the medial reports.

RESPONDENT'S CASE

Mr Kariuki Kingori learned Counsel for the Respondents informed this Court his client was sick and not in Court but was ready to proceed. However, he raised a Preliminary Objection as filed on 13th April 2016 as follows:

It was his case that the Supplementary List of documents filed on 20th January 2016 that is:

- a) Letter from Dr Warshaw dated 3rd February 1988
- b) Letter from Dr. Warshaw dated 16th August, 1989
- c) Dr Warshaw's medical Report of Mr. Eliud Mathu dated 2nd April ,1990

They were filed without leave from Court.

His concern as he contended was that this matter had progressed to hearing over a long period. At the commencement of the hearing the parties filed documents and exchanged the same and then closed pleadings and hence the matter proceeded for hearing.

The Supplementary list of documents did not comply with the provisions of **Orders 3, 7 Rule 5 and 11, and Rule 7** of the **Civil Procedure Rules, 2010**. At least 15 days must be given to the other party upon filing the documents to forestall other parties being ambushed.

Learned Counsel informed this Court that since the documents were filed without leave then the same should be expunged from the Court record and the Applicant to file the same if need be with leave of the Court.

APPLICANT'S CASE

The Applicant through learned Counsel opposed the Preliminary objection on the following grounds:

- That from the Court record, Hon Justice Rawal when she presided as Judge in the Family court granted parties leave to file any other affidavits. These orders were granted before the advent of the **Civil Procedure Rules, 2010**. Therefore the filing of the Supplementary list of documents is based on the orders of Hon. Justice Rawal and not the **Civil Procedure Rules, 2010**.
- Pursuant to the said orders the Applicant filed additional affidavits for the witnesses who have testified. Dr Warshaw was called to testify and produce additional documents.
- There is no element of surprise as these documents have been in the Court file and served to the Respondents for 9 months. These documents can and will be challenged as part of the hearing of evidence by Dr Warshaw who has not testified. the Respondents should wait and object at the time.
- These are medical documents and are based on expert opinion and it is not the Applicant's position to produce medical documents. The Court may allow the Respondent's alternative expert opinion.
- The Doctor's evidence should be presented to court for just resolution of the dispute as envisaged in the overriding objective prescribed by **the Civil Procedure Act** under **Sections 1A, 1B and 3A**.

Learned Counsel for the Respondents reiterated that although Hon. Justice Rawal granted these orders, the Supplementary list of documents was filed subsequent to the **Civil Procedure Rules 2010** being operational. Therefore, the Applicant to comply with the present legal requirements.

ISSUE

Should the Supplementary list of documents be expunged from the court record?

DETERMINATION

This Court has perused the Court record, and confirms that this being a matter that has been in Court over the years, the multiple files have been kept in safe custody and only the current Ct file is available to this Court. The said orders by Hon. Justice Rawal cannot be confirmed without browsing the entire Court proceedings housed in various Court files.

Be that as it may, is the Supplementary list of documents properly filed and properly placed before Court? A cursory glance at the cited provisions confirms as follows;

Order 3 of the **Civil Procedure Rules, 2010** prescribes frame and institution of suits and does not allude specifically to the issue of filing pleadings during the hearing.

Order 7 Rule 5 of the **Civil Procedure Rules, 2010** stipulates;

The defence and counterclaim filed under Rule 1 and 2 shall be accompanied by;

a) an affidavit under Order 4 Rule 1(2) where there is a counterclaim

b) a list of witnesses to be called to the trial

c) written statements signed by witnesses except expert witnesses

d) copies of documents to be relied on at the trial

Provided that statements under sub-rule (c) may with leave of the Court be furnished at least 15 days prior to the trial conference under Order 11.

Order 11 Rule 7 of the **Civil Procedure Rules, 2010** prescribes the process of a pre-trial Conference to agree on the Trial process.

The Court states as follows; regarding the cited provisions; they are legal requirements of civil proceedings. However, the Pre-Trial process of this case ought and may have been undertaken before the advent of Civil Procedure Rules 2010. The Court record confirms the matter started in 2009 before the said rules were operational.

Secondly on 11th December 2014 the matter took off and *interpartes* hearing proceeded on the substantive issues pertaining to the Succession Cause. To date this Court has taken evidence of 5-6 witnesses. At no time were pre-trial issues raised or challenged by either party. This Court proceeded with full hearing presumably on the basis that these issues had been canvassed before and determined.

Thirdly, this being a Succession Cause; it is bound by the **Law of Succession Act, Chapter 160** of the Laws of Kenya and the **Probate and Administration Rules**, specifically **Rule 63(1)** mandates;

Save as is in the act or in these Rules otherwise provided, and subject to any order of the Court or Registrar in any particular case for reasons to be recorded, the following provisions of Civil procedure rules, namely Order V,X,XI,XV,XVIII,XXV, XLIV & XLIX, together with the High Court (Practice & Procedure) Rules shall apply so far as relevant to the proceedings under these Rules.

From the above, these proceedings are not bound by **Orders 3, 5 and 11 of the Civil Procedure Rules, 2010**. Therefore compliance of the said provisions is not mandatory as the Succession cause is not strictly Civil Case with a defence and Counterclaim. It is also not subject to the Pre-trial Process and if so it ought to have been raised and or undertaken before the hearing of this matter commenced. No objections were raised at the onset of the hearing to bring to the fore the said Pre-trial process.

This Court is persuaded that the parties to these proceedings are entitled to justice through the hearing process. The matter at hand is the filing of the Supplementary list of documents without leave of the Court. This is based on the fact that the other party would be prejudiced by the ambush.

To alleviate any threat of ambush and therefore prejudice; the law mandates that any filing of documents after commencement of the hearing shall be by obtaining leave of the Court. In this instant the leave of court was not sought.

The Court relies on the provisions of **Article 159 2 (d) the Constitution, 2010** which is supreme law that binds all persons and organs. The matter shall not be heard and determined on the basis of undue regard to technicalities but on the substantive issues for determination. Therefore, although the leave of court was not obtained before filing the Supplementary list of documents; as explained by the Applicant; that the former Presiding Judge allowed parties to file further affidavits, this Court finds no prejudice occasioned between the parties except ensuring that due process is followed.

Section 2 of the Evidence Act, Cap 80 (revised 2014) stipulates that the Act shall apply to all judicial proceedings in or before any Court other than Kadhi's Court, but not to proceedings before an arbitrator.

Therefore with regard to the instant application; **Section 35 of the Evidence Act** relates to admissibility

of documentary evidence as to facts in issue. That avails the Respondents opportunity and safeguard in challenging the admissibility of documents during hearing of the matter.

The parties are allowed by **Section 112** of the Evidence Act to prove any fact especially within their knowledge and the burden of proving or disproving the same is on the party with special knowledge.

The sum total of the various provisions cited is to ensure that each party's rights to fair trial are safeguarded. The fact of filing the supplementary List of Documents will not prejudice any party. More so because the court record confirms filing and service of the document was in January 2016 and the Respondents had access to the documents for more than 9 months. The Respondents are at liberty to challenge evidence emanating from the said documents if need arises.

DISPOSITION

From the submissions of both learned counsel and various legislative enactments and provisions considered; this Court holds;

The Preliminary Objection on Filing of Documents without leave of Court is compromised by:

- 1) The Supplementary List of documents is now deemed filed and served with leave of Court.**
- 2) The Respondents are granted leave to file a reply or seek alternative expert document and file and serve to the Applicant.**
- 3) The Doctor shall testify and rely on the said medical records on a date to be obtained from the Registry.**
- 4) No orders as to costs.**

DELIVERED, SIGNED & DATED IN OPEN COURT ON 10th NOVEMBER, 2016

M. W. MUIGAI

JUDGE

IN THE PRESENCE OF;

Karanja Munyori for the Applicant

Mwangi holding brief for Kingori for the Respondent