



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
SUCCESSION CAUSE NO.E159 OF 2023
IN THE MATTER OF THE ESTATE OF ANNA WAKARIMA WACHIRA
(DECEASED)

JANE WANGARI NJANE
PETER NJUGUNA NJANE
ANN WANJIKU NJANE
ELIZABETH NJERI NJANE
JOYCE WAMBUI NJANE.....APPLICANTS/OBJECTORS

-VERSUS-

MARTHA WAIRIMU NJANE.....1ST ADMINISTRATOR/RESPONDENT
MARY NAYIKO NJANE.....2ND ADMINISTRATOR/RESPONDENT
SAMUEL NJENGI NJANE.....3RD RESPONDENT
JAMES NJENGI NJANE.....4TH RESPONDENT

1. The Application before Court is a summons dated 22nd April 2025 filed pursuant to **Article 159 (d) (d)** of the Constitution of Kenya 2010, **Section 47** of the **Law of Succession Act**, **Rules 49 & 73** of the **Probate and Administration Rules** and all other enabling provisions of the law and the applicant craves for the following reliefs:

a) SPENT

b) SPENT

c) That, this Honourable Court be pleased to grant leave to the Administrator/Applicant to adduce additional evidence being a Forensic Document Examination report dated 12th April, 2025.

d) That, the costs of this Application be provided for

2. The Application is premised on the following grounds;

a) That, the Applicant is the only surviving child and administrator intestate of the deceased's estate.

b) That, the Respondent has vide application dated 12th January, 2024 sought to revoke the Applicant's grant on grounds that the deceased left behind a valid will.

c) That, on 24th September, 2024 the alleged will was produced in Court.

d) That, on 13th November, 2024 the Applicant sought the services of a handwriting expert to confirm the authenticity of the deceased's signature in that will.

e) That, the forensic expert delayed in issuing the report and the same was only available on 12th April, 2025.

f) That, the Administrator is yet to close his case and is due for cross examination on 15th May, 2025 thus the urgency.

g) That, no prejudice shall be suffered by the Respondent if the said forensic document is produced as evidence as they shall (if need be) have a chance to examine the forensic expert.

- h) That, locking out this critical evidence will greatly prejudice the Applicant.*
 - i) That, in the foregoing there is sufficient reason to admit the additional evidence stated.*
 - j) That, the Application is made in good faith and it is in the interest of justice that this application is allowed and the orders prayed granted.*
 - k) That, this Application has been made without any delay whatsoever.*
3. The Application is further supported by the annexed sworn affidavit of **Peter Wachira Wakarima** dated 22nd April 2025 and the written submissions dated 15th July 2025.
4. The Court had initially directed the Application be heard orally in open Court however on the hearing date on 15th May 2025, the parties recorded a partial consent including parties being heard by way of filed written submissions.
5. The Respondent's written submissions are dated 17th July 2025 largely agitating on the validity of the written will that is subject to scrutiny and not a pinpointed attack on then Applicants being allowed to file additional evidence.

Applicant's Case & Submissions

6. The Applicant has framed the following issues two issues for consideration by the Court.

a) Whether the replying affidavit is fatally defective thus the application unopposed?.

b) Whether the application to adduce further evidence should be allowed?.

7. On the 1st issue as to whether the replying affidavit is fatally defective thus the application unopposed? The Applicant submits that, the replying affidavit before Court is not properly commissioned and does not disclose the deponent thus wanting in form. An affidavit is an oath and a deponent must indicate that it is an oath before deposing to the facts.

8. That, notably, the said affidavit is commissioned by the firm of **Kirera & Company Advocates**. **Section 2** of the **Oaths & Statutory Declarations Act (Cap 15)** provides for the appointment of persons as commissioner for oaths by the Chief Justice. **Section 3** provides that such a person shall sign a roll upon appointment and **Section 4** provides for their powers which include commissioning of affidavits.

9. That, it is now trite Law that, an affidavit cannot be commissioned by a firm of Advocates as held in **Geoffrey Githinji Mwangi & 2 others v Jubilee Party & 11 others [2018] eKLR** the Court held:

"As we have already seen in the relevant provisions of the Oaths and Statutory Declarations Act, the Chief Justice will

appoint as commissioners individual advocates in practice, not their firms. Such commission is personal to the particular advocate so appointed. The commission is not issued to his firm. An affidavit therefor ought to show that it was taken by an individual advocate and commissioner for oaths, not by a firm of advocates. If affidavits were to be taken by a firm of advocates, what would prevent any member of that firm, be they advocates who have not been appointed commissioners for oaths, or clerks and secretaries, from purporting to take affidavits on behalf of such firm? That would clearly be against the clear provisions of the Oaths and Statutory Declarations Act."

10. That, similarly, in **David Wamatsi Omusotsi Constituency & 2 others, High Court Kakamega Election Petition No. 9 of 2017 [2017] KLR**. The Returning Officer Mumias East It was held that:

"It is clear from the provisions of the said Act that affidavits cannot be commissioned by a firm of advocates as happened in this case. An affidavit can only be commissioned by a commissioner for oaths and other officials of the Court allowed to do so under the Act..."

11. That further, in **Mohamed v Judicial Service Commission [2023] KEELRC 2983 (KLR)** the Court held:

"The issue therefore was whether, on the face of the document itself, the affidavit in Issue was taken by a

commissioner for oaths, duly appointed. It clearly was not. The affidavit showed on the face of it that it was taken by Bwonwonga & Co Advocates & Commissioner for Oaths, not by any Bwonwonga, Advocate who could well have been a duly appointed commissioner for oaths. Bwonwonga & Co Advocates could not have been appointed commissioner for oaths under section 2(1) of the Act. Such appointment could only be of an advocate in practice, not a firm of advocates."

12. The Applicant submits that the replying affidavit before Court is fatally defective and ought to be struck-out and the application proceeds as unopposed.

13. On the second issue as to whether the application to adduce further evidence should be allowed the Applicant contends that, Section 47 of the Law of Succession Act gives this Court wide powers, stating as follows:

"The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient"

14. That **Rule 73** of the **Probate and Administration Act** provides as follows:

"Nothing in these Rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be

necessary for the ends of justice or to prevent abuse of the process of the Court."

15. That in the matter beforehand, the Applicant is yet to close his case. He only wishes to produce a forensic report which shall help the Court in solving the dispute beforehand. The Applicant has made it clear that document in question was only made available to him on 12th April, 2025 and he could not have filed it earlier. He sent the document for examination on 24th September, 2024 but there were delays in concluding the investigations before a report being compiled.
16. The Applicant urges to be allowed to adduce the forensic report as the Respondent's counsel shall have the liberty to poke holes and on it and even examine the maker. The Applicant relies on the view of the Court of Appeal in the case of **Wadhwa (As Legal Representative of the Estate of Deshpal Omprakash Wadhwa) v Mohamed & 4 others [2022] KECA 25 (KLR)** where it was held:

"From the cited law and cases, it is clear that Courts have power to allow adduction of additional evidence, even at the appeal stage. The Evidence Act stipulates that the Court may in all cases permit recalling of witnesses. It is therefore not too late for the high Court and Courts of equal status to allow such an application, if in exercise of its discretion it is judicious to do so, even where the case has been concluded but before Judgment."

17. That further, Justice Olga Sewe in **Kenya Power & Lighting Company Limited v Spedag Interfreight Kenya Limited [2023] KEHC 2052 (KLR)** stated as follows:

"Thus, where a justifiable cause has been shown, the Court retains the discretion to grant leave for the filing of additional statements and documents even after the pre-trial conference has been held and the matter proceeded with to hearing, so long as judgment is yet to be pronounced in the matter."

18. The Applicant submits that, the Respondents have not shown how they shall be prejudiced if the Application is allowed and pray that the Court exercises its discretion and allows the production of the said document.

Respondent's Case Submissions

19. The Respondents elected to file submission in support of the validity of the last Will and Testament of **Anna Wakarima** (deceased) dated 23rd July, 2020 whose authenticity has been challenged by the Petitioner/Applicant, specifically on the question of the deceased's signature. The Respondent opposed the application of the petitioner/applicant on his Application dated the 22nd April, 2025 through filling a replying affidavit dated the 11th May, 2025.
20. Through the replying affidavit the Objector/Respondent cited the Application sought by the Applicant as an abuse of the Court process that should be dismissed. Accordingly, the Respondent submits that

the will is validly executed in accordance with the applicable law and that the authenticity of the testator's signature having not been challenged prior to the commencement of the trial cannot now be impugned belatedly as such objection ought to have been raised at the earliest opportunity.

21. That, the sole issue for determination before this Court is whether the signature on the Will dated 23rd July, 2020 was lawfully and validly appended by the deceased in compliance with the requirements of the law.
22. It is the Objector/Respondent submissions that, **Section 11** of the **Law of Succession Act** provides that, no written will shall be valid unless it is signed by the testator, the signature is made or acknowledged in the presence of two or more competent witnesses and that the witnesses attest the signature in the presence of the testator.
23. That the petitioner avers that the signature of the testator is invalid and produces a report in support of his application challenging the signature on the will dated the 23rd July, 2020. In response the objector /Respondent would humbly respond as follows;
24. That the first issue is to address the stipulation of the law in regard to the burden of proof where a signature has been contested. **Section 107** of the **Evidence Act** stipulates that:

"Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

25. In the case of **Stephen Gitonga M'Murithi v Faith Ngugi [2015] eKLR** it was cited that

"Forgery is a serious allegation which must be strictly proved. The Court cannot set aside a will based on suspicion or conjecture."

26. It is the Respondent's humble submission that, the Applicant has failed to prove his case in regard to the contested signature.

27. That the second issue to address is the issue of leave in verifying a disputed signature on will. Under **Section 68** of the **Law of Succession Act, Cap 160**, and **Order 11 Rule 3** of the **Civil Procedure Rules, 2010**) the Petitioner/ Applicant ought to have sought the leave of the Honorable Court to grant leave for the engagement of a qualified and independent forensic handwriting expert to examine and verify the authenticity of the signature appearing on the will dated the 23rd July, 2020, the leave to be granted access to any original documents containing the deceased's known signatures, including but not limited to identification documents, bank records, and official correspondences, for the purpose of the expert examination and that the Court should have given directions on who would undertake the forensic in regard to the disputed signature. It is the objector/ respondent's assertion that the legal rules were not followed by the applicants as he overlooked the powers of this Court and thus the petitioner applicant's application should be dismissed.

28. The Respondent's relies on the assertion of the Learned Judge in the case of **Estate of G.K.W (Deceased) [2014] eKLR** that cites as follows...

"Where the objector casts doubt on the signature or execution of the will, the Court is enjoined to examine the matter closely, and if need be, permit forensic analysis to aid in resolving the dispute".

29. That this averment has also be cited in the case of **Peter Ndungu Njenga v Sophia Watiri Ndungu [2000] eKLR** where the learned Judge asserts that:

"The Civil Procedure Rules under Order 11 empower Courts to manage evidence and allow expert testimony where appropriate. The discretion of the Court must be exercised judiciously to ensure Justice."

30. Similarly, in **JMM v GNJ (Civil Appeal (Application) E014 of 2022) [2023] KECA 99 (KLR)** Discretion is that freedom or power to decide what should be done in a particular situation.

31. That the general meaning of the word "discretion" includes analysis, appraisal, assessment, choice, consideration, contemplation, designation, determination, discrimination, distinction, election, evaluation, examination, free decision, free will, freedom of choice, liberty of choosing, liberty of judgment only to mention but some. Judicial discretion then is the exercise of judgment by a Judge or Court based on what is fair under the circumstances and guided by the rules

and principles of law and every discretion be it judicial and judicious must be based on prudence, rationality, sagacity, astuteness, considerateness and reasonableness. There is no hard and fast rule as to the exercise of judicial discretion by a Court because if it happens then, discretion will become fettered.

32. That in essence, the Courts are vested with the power to order for forensic evidence in line with **Order 11 Rule 3** of the **Civil Procedure Rules** and as cited by the learned Judge in the case of **Estate of Julias Muli Musyoka (Deceased) [2019] eKLR** where Court directed parties to avail the will for forensic examination after forgery allegations for the interest of Justice.
33. It is the Respondent's humble submission that the Will in question was properly signed by the deceased in the presence of two independent and credible witnesses, whose evidence remains unshaken. The Petitioner/ Applicant failed to discharge the burden of proving forgery. Allegations of forgery must be supported by credible evidence, which is lacking in this case
34. That merely seeking a forensic report from questionable sources would not amount to a proper way of undertaking the forensic analysis but rather a way of derailing the judicial process. As cited in the case of **Alfred Omondi Obuondo v Aurella Oyoo Okoth [2022] eKLR** the Court is empowered by Order 11 to issue case management directions, including allowing or rejecting requests for expert evidence.

35. Similarly, in the case of **Uhuru Highway Development Limited vs Central Bank of Kenya & 2 Others [1996] eKLR** the Court of Appeal expresses itself as follows;

"... Where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

36. The Respondent's maintain that, the Petitioner/ Applicant ought to have raised the issues prior to the commencement of the application raised by the objector's case dated 12th January, 2024 or in the alternative sought the leave of the Court in seeking to bring in a forensic with leave being granted to the Objector/ Respondent to engage the original will and/ documents to a government or an unquestionable forensic expert for analysis. The Objector's opine that the allegations are a mere suspicion and conjecture, without sufficient factual or expert proof to

overturn the presumption of regularity with an aim of delaying the objector's case whereby the Petitioner/ Applicant is expected to testify.

37. The Objectors/Respondent's contend that the Will dated 23rd July, 2020 was validly executed in accordance with **Section 11** of the **Law of Succession Act (Cap 160)**, that the objections raised by the Applicant's application dated 22 April, 2025 lack merit and should be dismissed in their entirety and that the Court should uphold the validity of the Will and allow the judicious process of the objector's case proceed.

Analysis & Determination

38. Having considered the pleadings for and against the Application the sole issue at play is whether this Court should exercise its discretion to allow the Applicant to introduce Additional evidence?

39. It is explicit that the Respondent ignored defending the validity of its replying affidavit which is not commissioned by a commissioner of oaths but rather by a law firm by the name of Kirera and Company Advocates,

40. **Section 2** of the **Oaths & Statutory Declarations Act (Cap 15)** provides for the appointment of persons as commissioner for oaths by the Chief Justice. **Section 3** provides that such a person shall sign a roll upon appointment and **Section 4** provides for their powers which include commissioning of affidavits.

41. The Affidavit by **Mary Wanjira** dated 12th May 2025 explicitly contravenes **Sections 2, 3** and of the **Oaths & Statutory Declarations**

Act (Cap 15) and the same is inadmissible and untenable as a response and the same is accordingly struck-out.

42. It thus follows that the Application is for all intents and purpose undefended, the written submissions are not substantive pleadings but I have nonetheless considered them.

43. The Respondent's written submissions are premature and irrelevant, as the validity of the deceased will is still under consideration

44. In **Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamad & 3 others [2018] eKLR** the Supreme Court established the principles for admission of additional evidence by Appellate Courts by holding that:

“We therefore lay down the governing principles on allowing additional evidence in appellate Courts in Kenya as follows:

- a) the additional evidence must be directly relevant to the matter before the Court and be in the interest of justice;***
- b) it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;***
- c) it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;***

- d) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;***
- e) the evidence must be credible in the sense that it is capable of belief;***
- f) the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;***
- g) whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;***
- h) where the additional evidence discloses a strong prima facie case of willful deception of the Court***
- i) The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.***
- j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.***
- k) The Court will consider the proportionality and prejudice of allowing the additional evidence.***

This requires the Court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together

with any prejudice that might arise from the additional evidence on the other.

[80]We must stress here that this Court even with the Application of the above-stated principles will only allow additional evidence on a case-by- case basis and even then sparingly with abundant caution.”

45. The Court of Appeal in **Attorney General v. Torino Enterprises Limited [2019] eKLR** also considered the principles underpinning production of additional evidence as follows:

“Before this Court can permit additional evidence under rule 29, it must be shown, one, that such evidence could not have been obtained by reasonable diligence before and during the hearing; two, the new evidence would probably have had an important influence on the result of the case if it was available at the time of the trial, and finally, that the evidence sought to be adduced is credible, though it need not be incontrovertible.”

46. Guided by the above principles, the Court has assessed the motion against the following issues;

- a. whether there is additional evidence;*
- b. whether the additional evidence would have influenced or impacted upon the outcome of the case;*
- c. whether the Applicant has demonstrated that he could not, with reasonable diligence, have obtained the evidence for use at the trial at an earlier time; and*

d. whether the Respondent will be prejudiced if the production of the additional evidence is allowed.

47. The Court notes of the Applicants sought the services of a handwriting expert on 13th November 2024 and the report was finally prepared and dated 12th April 2025, this Court is of the view that such is the only evidence that may discredit the validity of the will and shutting the same out without consideration shall not be in the interests of justice.
48. No palpable prejudice shall be occasioned upon the Respondents and that the relevancy of the evidence will assist in determination as to whether the succession is testate or intestate.
49. The Court is satisfied that the Applicant moved Court in a timely fashion, no mischief is detected and the evidence sought to be introduced goes to the core of the ongoing hearing.
50. That the validity of the deceased will is a question ongoing adjudication and the Applicant received the evidence midstream the trial and on his feet. I am alive to the fact that the Respondent whilst presenting their case never had the benefit of the forensic report and as such shall be availed sufficient opportunity to interrogate the same.
51. The Court finds merit in the Application dated 22nd April, 2025 and accordingly allows the same, the Applicant is granted leave to adduce, further evidence in the nature of adducing additional evidence being a Forensic Document Examination report dated 12th April, 2025.

52. Any Party Aggrieved with this ruling has leave to 45 days leave Appeal which period shall act as stay.

53. Parties shall bear their own costs.

It is so Ordered.

Signed, Delivered Virtually on Teams platform

On this 24th October 2025

Mohochi S.M

JUDGE