

**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 621 OF 2015**

**IN THE MATTER OF THE ESTATE OF RICHARD KANAMPIU**

**NANCHU (DECEASED)**

GRAHAM MUGENDI KITHAE.....APPLICANT

VERSUS

MERCY KARIMI NYAGA.....1<sup>ST</sup> RESPONDENT

HUMPREY NGAI WAKITHAE.....2<sup>ND</sup> RESPONDENT

**RULING**

1. This ruling is in respect of the Application dated 9<sup>th</sup>

July 2025 seeking the following orders: -

- i. That the honorable court do grant leave for the Petitioner to file Mercy Kathambi's witness statement within seven days.

ii. That the honourable court do grant leave for the Petitioner to file a further list of documents within seven days.

2. The Application is founded on the grounds set out on its face and on the supporting affidavit of Graham Mugendi Kithae one of the administrators in the estate of the deceased.

3. He deposed that he resides in the United Kingdom and his time conflicts with Kenyan court hours. That being the only witness alongside Martin Mutuma he seeks that the evidence of Mercy Kathambi who can physically attend court be admitted to court when the matter comes up for hearing of the Protestor's case. He stated that no prejudice will be occasioned to the Protestor should the evidence of the said Mercy Kathambi be admitted.

4. This Application was opposed through the sworn affidavit of Mercy Karimi Nyaga one of the

Administrators of the estate of the deceased. She stated that the supporting affidavit of Graham Mugendi Kithae is fatally defective and invalid because it contravenes the Oaths and Statutory Declarations Act and should be struck out for the following reasons: -

i. The supporting affidavit was sworn at Murang'a yet the Applicant stated that he lives in the United Kingdom which fact was corroborated in open court by his counsel on record.

ii. The supporting affidavit was commissioned in Chuka, Tharaka Nithi County thus the Commissioner for Oaths could not possibly have verified that the deponent appeared before him as he was physically located in the United Kingdom.

iii. That the Supporting affidavit is undated making the jurat clause ambiguous, inaccurate or misleading.

5. She averred that the Applicant has never attended any court proceedings since the year 2015 as he has been out of the country for ten years and his permanent location outside Kenya, unavailability and lack of interest or participation in the suit makes him unsuitable as an administrator of the estate of the deceased.

6. She also deposed that the Application was frivolous as it was served a night before the hearing, a strategy meant to prolong the legal proceedings. Secondly, that the time difference between UK and Kenya is two hours and the Applicant can make virtual appearance. Thirdly, that the proposed witness cannot take his place to either defend his sworn testimony or give testimony similar to his

testimony on record. Fourthly, that the court is unable to determine the value of Mercy Kathambi's witness statement as there is no attached draft statement. Lastly, the proposed witness Mercy Kathambi has never been a party to this suit.

7. It was also stated that it has been 21 months since pleadings were closed and the said Mercy Kathambi was present when the testimonies of three of the Respondent's witnesses were heard and cross examined in court raising major concerns about potential prejudice to the Respondents' case.

### **Brief background**

8. Before delving into the Application, it is important to state the background to these proceedings.

9. The estate of the late Richard Kanampiu Nanchu was survived by: -

First house

- i. Prudence Gatune- 1<sup>st</sup> Widow (deceased)
- ii. Joyce Kangai- Daughter
- iii. Humphrey Ngai Wakithae
- iv. Adiel Njagi (deceased) survived by Loice Njagi (spouse)
- v. James Muriungi

#### Second house.

- i. Edith Mukwaiti- 2<sup>nd</sup> widow
- ii. Mercy Karimi Nyaga- Daughter

#### Third house

- i. Julia Muthoni - 3<sup>rd</sup> Widow (deceased)
- ii. Graham Mugendi Kithae-son
- iii. Robert Kimathi-son
- iv. George Gitonga (deceased) survived by two spouses Eunice Nguta and Elishipa Nga'ng'a and the children being Julie Gitonga, Karen Gitonga, Vanessa Gitonga and Richard Munene Gitonga.

- v. Lucy Gatwiri (deceased) survived by her children being Martin Mutuma, Mitchell Wanjiru and Jones Mwangi.
  - vi. Lucyline Mukwanjeru survived by one child Nickson Murithi.
10. Julia Muthoni the third widow (now deceased) Petitioned the court for letters of administration which grant was revoked upon the Application of Humphrey Ngai Wakithae. Subsequently, letters of administration were issued to Humphrey Ngai Wakithae and Mercy Karimi Nyaga on 14<sup>th</sup> November 2019 and confirmed on 8<sup>th</sup> March 2022. The Applicant herein together with Martin Mutuma objected to the grant and the court directed that Humphrey Ngai Wakithae, Mercy Karimi Nyaga, Graham Mugendi Kithae and Martin Mutuma file for letters of administration jointly or separately.

11. Consequently, Graham Mugendi Kithae and Martin Mutuma filed for confirmation of grant of letters of administration. Humphrey and Mercy Karimi protested citing that the proposed mode of distribution by both Graham and Martin did not reflect the wishes of the beneficiaries.

12. The court directed that the Protest proceeds by way of viva voce evidence relying on the affidavits. The hearing was set down and three witnesses testified for the Protestors with one witness remaining. It was at this point that the Applicant Graham Mugendi Kithae instituted the instant Application.

### **Submissions**

13. The Application was canvassed by way of written submission. The Applicant filed his submissions dated 22<sup>nd</sup> July 2025 raising the following issues for determination: -

- i. Whether this honourable court should dismiss the Application dated 9<sup>th</sup> July 2025.
- ii. Whether this honourable court ought to allow the evidence of Mercy Kathambi.

14. The Respondents filed written submissions dated 24<sup>th</sup> July 2025 raising the following issues for determination: -

- i. Whether the affidavit sworn by Graham Mugendi Kithae is proper in law.
- ii. Whether the Applicant's application has merit.

15. From the pleadings, affidavits, and rival submissions, the following issues arise for determination:

- i. Whether the supporting affidavit sworn by Graham Mugendi Kithae in support of the Application is valid

and compliant with the Oaths and Statutory Declarations Act.

ii. Whether the Application is meritorious.

16. The starting point is the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya, particularly **Sections 5 and 8**. Section 5 of the Act provides that: -

**“Every Commissioner for Oaths before whom any oath is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”**

17. On the other hand section 8 of The Act states :-

**“A magistrate or commissioner for oaths may take the declaration of any person**

**voluntarily making and subscribing it before him in the form in the Schedule.”**

18. It therefore follows that the role of a commissioner for oaths is to attest the details of the deponent and such a deponent must personally appear before the commissioner for oaths.

19. The Applicant submitted that while his supporting affidavit remains undated, the same is not a mistake so fatal to warrant dismissal of the Application. He argued that the court should take judicial notice that we live in a Tec-Savvy where documents can be transmitted online and signatures appended and send back for commissioning. Further, that the authenticity of his signature was not challenged hence swearing at Mura'nga and commissioning at Chuka does not qualify for it to be struck out. He urged the court to accommodate the

supporting affidavit guided by Article 159 (2) of the Constitution.

20. The Respondents on their part submitted that the supporting affidavit was falsely authenticated on grounds that the deponent was in the United Kingdom at the time therefore the commissioner for oaths could not possibly have physically verified that the deponent personally appeared before him, swore to or affirmed the truth of the affidavit's contents and signed it. They relied on the case of **Dardanelli & 6 Others v Tilito and 3 Others [2025] KEELC 392 KLR** where Njoroge Mwangi J struck out the supporting affidavit which was purportedly signed in Kenya while the deponent was not in Kenya as at the swearing date. The Respondents stated that if an affidavit is transmitted to the deponent online, executed and returned and downloaded then commissioned, then a certificate under Section 106B

of the Evidence Act is required. They urged the court to find that the supporting affidavit contravenes Section 5 of the Oaths and Statutory Declarations Act and also falls short of the requirements under Section 106B of the Evidence Act.

21. In **Gideon Konchellah vs Julius Lekakeny Ole Sunkuli & 2 Others (2018)** eKLR, the Supreme Court held that: -

**“As regards the 1<sup>st</sup> Respondent, upon embarking on consideration of his ‘Replying Affidavit’, it came to the notice of the Court that the said affidavit is not signed, dated or commissioned. This posed the question to the Court: what is the effect of an affidavit that is not signed by the person who is said to be the deponent, not dated and/or commissioned by a**

**Commissioner for Oaths/or magistrate?**

**The making of affidavits is governed by the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya. Section 5 of the Act provides, thus ““Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”**

**Further, Section 8 states:**

**““A magistrate or commissioner for oaths may take the declaration of any person voluntarily making and subscribing it before him in the form in the Schedule.”**

**Hence, an affidavit must clearly state the place and date where it was made and it must be made before a Magistrate or a Commissioner for oaths.**

**We have no hesitation in finding that the purported Replying Affidavit filed by the 1<sup>st</sup> Respondent is fatally defective as the same contravenes all the legal requirements for the making of an affidavit. Hence it has no legal value in the matter before us. We have checked all the eight copies of the Replying Affidavit as filed in the Court Registry and confirmed that none of the copies was signed, commissioned and dated.**

**Consequently, as the same is defective, it is deemed that there is no Replying Affidavit on record filed by the 1<sup>st</sup> Respondent. A Replying Affidavit is the principal document wherein a respondent's reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. Absence this foundational pleading, the Replying Affidavit, it follows that even the Written Submissions purportedly filed by the 1<sup>st</sup> Respondent on 17<sup>th</sup> August, 2018 are of no effect."**

22. In the present case, the record shows that the Applicant deposed to living in the United Kingdom yet the affidavit purports to have been sworn at Murang'a and commissioned in Chuka. No

explanation was offered as to how he appeared before the Commissioner for Oaths while residing abroad. This inconsistency strikes at the integrity and authenticity of the affidavit. Section 5 mandates that the Commissioner states truly the place and date of swearing. The discrepancy raises serious questions about the authenticity of the jurat.

23. The affidavit does not demonstrate that the deponent personally appeared before the Commissioner. Personal appearance is fundamental to ensure verification and accountability. The Applicant's argument that technological advancements permit electronic commissioning is valid. However, the same must comply with Section 106B of the Evidence Act Cap 80 which requires a certificate of authenticity. No such certificate has been produced.

24. I am also persuaded by the finding in **Elena Darnadelli & 6 Others v Pasquale Tilito KEELC 392 KLR** as cited to me by the Respondent where Mwangi Njoroge J held as follows: -

***“In the instant digital era many things could be done virtually. Even the requirement of court attendance could be fulfilled virtually. However, the contents of an affidavit were statements under oath which may lead to the offence of perjury if care was not taken; it was not surprising that affidavits were usually required to be commissioned when a deponent was present and was satisfied that the contents were correct. The commissioner too needed know if the deponent understood what he was swearing to.*”**

***In legal practice as in other sectors, shortcuts may have been adopted to make work easier, but that did not give them the stamp of propriety. In respect of swearing of affidavits certain fundamental issues sprung from the commissioning of an affidavit whose deponent did not appear before the commissioner for oaths.***

***a. The deponent may not have confirmed to the commissioner that he approved of and owned up to all the statements made in the document. If at any point after the purported commissioning the deponents who never appeared before commissioners ever disputed the veracity of the statements in affidavits filed in legal proceedings or the signatures thereon and***

***the court upheld their objections thereto, there may be a lot of backpedaling that may occasion, contrary to public policy, the deleterious effect of bloating the backlog of cases before court.***

***b. In view of the provisions of section 5 of the Oaths and Statutory Declarations Act, the commissioner in affixing his stamp in the absence of a deponent while stating at the place and on what date the oath or affidavit was taken or made would be in effect uttering a falsehood.”***

25. I have given due consideration to the provisions of Article 159(2) (d) of the Constitution. However, it is to be remembered that statutory and procedural law create a level playing field for parties before the court who must adhere to mandatory statutory requirements.

26. In the premise, I find that the supporting affidavit of Graham Mugendi Kithae is invalid and is struck out. With the supporting affidavit being struck out, the Application dated 9th July 2025 lacks evidentiary support and has no legs to stand on.

27. As I pen off, I make the observation that the reason given for the requested substitution is that the Applicant resides in the UK and it is not logistically possible for him to attend court. From the material before me, the orders would still not have stood for reasons that:-

- i. That the Applicant has not disclosed who the said Mercy Kathambi is in relation to the parties to the suit and/or her relevance to the suit.
- ii. That there is no draft witness statement annexed to the application which would aid the court as to the probative value of her evidence.

iii. That courts have adopted virtual hearings in which the Applicant would be accommodated at a hearing. There is no explanation as to why that option has not been considered.

28. Consequently, the application dated 9<sup>th</sup> July 2025 lacks merit and is dismissed. Costs shall abide by the outcome of the suit.

**Ruling delivered, dated and signed at Chuka this 13<sup>th</sup> day of November, 2025.**

.....

**R. LAGAT-KORIR**

**JUDGE**

**Ruling, delivered in the presence of Ms Wambui for the Applicant, and Ms Wambui for the Respondent.  
Muriuki (Court Assistant)**