

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MURANG'A**  
**HCP & A NO. 1229 OF 2013**

**IN THE MATTER OF THE ESTATE OF SAMUEL NJOROGE  
KURIA.....DECEASED**

**MARGARET JANE WANJIRU WANJIKU.....  
.....PETITIONER/RESPONDENT**

**-VERSUS-**

**VIRGINIAH WAITHIRA NYAGA MARINGA.....  
.....OBJECTOR/APPLICANT**

**RULING**

1. The Application herein was made by Objector/Applicant on 5<sup>th</sup> November 2024. It is premised under **Section 73** of the **Probate and Administration Rules** and seeks the reliefs that the Objector/Applicant that the Applicant's case to be re-opened to allow a witness who was left out to testify and that the costs of this application be in the cause.
2. The Application is supported by the grounds at the face thereof and in the Affidavit of even date sworn by *Virginiah Waithira Nyaga Maringa*, the Objector/Applicant. The Objector/Applicant is an elder sister to the deceased while the Petitioner/Respondent is the deceased's wife. In the Application, the Objector/Applicant urged the Court to exercise its discretion to allow re-opening of her case so as to adduce medical records belonging to the deceased, which records, she claimed, were located after Objector/Applicant had closed her case and demonstrate that the deceased was incapable of contracting a marriage.

3. The Objector/Applicant deposed that the Respondent does not stand to suffer prejudice in the event the doctor who attended to the deceased and the author of the deceased's medical records sought to be adduced is allowed to testify. She annexed the medical records in question to her Supporting Affidavit dated 7<sup>th</sup> October 2024 bearing the letterhead of DR. FRANCIS MUKUI KAMUNGUNA (MBCChB, Mmed, PSYCH (UON)) of postal address P.O. BOX 481 NYERI and the signature and stamp of the author thereto.
4. The Petitioner/Respondent opposed the application vide her Replying Affidavit sworn on 14<sup>th</sup> January 2025 wherein she deposed that she contracted a marriage with the deceased sometimes in 1993 which marriage subsisted until the deceased's demise sometime in 2013. That during the subsistence of aforesaid marriage, the deceased was a salaried employee of the Teachers' Service Commission.
5. She termed the medical report dated 7<sup>th</sup> October 2024 forming the subject of the Application as an afterthought stating that although the deceased was living with mental illness, the illness did not hinder him from discharging his normal duties as a teacher attached to Kiumba Primary School in Murang'a County. She added that the deceased's mental illness was well managed through medication which enabled him to conduct normal duties hence, the deceased's capacity to contract a marriage was never in doubt.
6. Pursuant to Court directions, the subject Application was canvassed by way of written submissions. The Objector/Applicant filed written submissions dated 27<sup>th</sup> June 2025 through her counsel and isolated for determination the issue as to whether the Objector's case should be re-opened to allow the calling of the Doctor who

attended to the Deceased and production of the Deceased's medical documents.

7. Reliance was placed in the holding of the Court in the case of **Patel & another v MJC & Another (Suing as the guardians of PIP) (Civil Appeal 182 of 2019) (2011) KECA 364 (KLR) (4 FEBRUARY 2022) (JUDGMENT)**; and, **Estate of David Omare Kimori (Deceased) (succession Cause 4 of 2020) [2023] KEHC 23286 (KLR) 28 SEPTEMBER 2023) (JUDGMENT)** to anchor the argument that in a suit such as the present one, it is necessary to adduce proof of continuous mental incapacity of the person concerned as well as proof that he/she suffered from mental incapacity at the time of the transaction in question. It was thus submitted that mental incapacity being a medical condition it is important that the doctor who attended to the deceased be allowed to testify.
8. The Applicant submitted that the Respondent does not stand to suffer any prejudice if the reliefs sought herein are granted since the Respondent is yet to present her case. She argues that, in the event the Application is allowed, the Respondent will have the opportunity to cross-examine the Doctor regarding his testimony concerning the Deceased's mental capacity. Reliance was placed on the reasoning of the Court in **Ethics & Anti-corruption Commission v Cherogoe & 3 others (ELC Case 54B of 2021) (2023) KEELC 20430 (KLR) (29 SEPTEMBER 2023) (RULING)**, to support her argument.
9. The Petitioner/Respondent filed written submissions dated 27<sup>th</sup> August 2025 through her counsel restating the averments in her Replying Affidavit dated 14<sup>th</sup> January 2025. urging the Court to exercise its discretion judiciously and ensure the Respondent is not prejudiced by an Order allowing the Applicant to re-open her case.

10. I have carefully considered the parties' pleadings as well as their rival submissions and identified for determination the issue as to Whether the Application for reopening of the Applicant's case is merited having closed her case about a year ago before lodging of the subject Application. I note that the Respondent's case is yet to be heard and that the Applicant seeks to be allowed to re-open her case for purposes of adducing the Deceased's medical records which evidence, she claims, came to her attention after closure of her case.

11. The Court in **Samuel Kiti Lewa -vs- Housing Finance Co. of Kenya Ltd & Another [2015] eKLR**, outlined the basis upon which the Court could exercise its discretion to reopen a case as follows: -

**“The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence.”**

12. Similarly, in **Abdulrahman Abdi vs Safi Petroleum Products Ltd & 6 others [2011] eKLR**, the Court proclaimed as hereunder:

**“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”.**

13. In the Australian case of **SMITH -VERSUS- NEW SOUTH WALES [1992] HCA 36; (1992) 176 CLR 256**, the Court held as follows:

**“If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered. In the latter situations the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised.”**

14. The new evidence which the Applicant is seeking to place before the Court speaks to the mental condition of the Deceased. According to the Applicant, the aforementioned new evidence demonstrates that the Deceased lacked the necessary mental capacity to contract a marriage with the Respondent. In opposing the instant Application, the Respondent argued and submitted that the sole aim of the instant Application is to delay the finalization and conclusion of the main suit and to defeat her interest being the deceased’s wife and beneficiary.
15. The Respondent maintains that she was married to the Deceased for not less than 10 years from 1993 until 2013 when the Deceased died. The Applicant refutes the foregoing contention, arguing that the Deceased, who is her younger brother, lacked the requisite mental capacity to enter into any marriage. The Court is persuaded that the new evidence sought to be introduced through the present Application is relevant as it speaks to the Deceased’s mental capacity to contract a valid marriage.

16. The court takes further cognizance of the fact that the Respondent will have the opportunity during cross-examination to challenge the maker of the medical documents which the Applicant has adverted to in the current Application. In the event, the Court finds and holds that the Respondent does not stand to suffer prejudice if the current Application is allowed.

17. Based on the above, I find that the Application before the Court is merited.

Final Orders :

- i. Application is allowed in favor of the Objector/Applicant as per prayer no. i in the Application dated 5<sup>th</sup> November 2024.***
- ii. Costs to be in the cause.***

**DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS  
18<sup>TH</sup> DAY OF DECEMBER, 2025.**

**HON. T. W. Ouya  
JUDGE**