In re Estate of Hihu Kabia alias Hiku Kabia (Deceased) (Probate & Administration E896 of 2023) [2026] KEHC 2367 (KLR) (Family) (2 March 2026) (Ruling)

Neutral citation: [2026] KEHC 2367 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

PROBATE & ADMINISTRATION E896 OF 2023

H NAMISI, J

MARCH 2, 2026

IN THE MATTER OF THE ESTATE OF HIHU KABIA ALIAS HIKU KABIA (DECEASED)

BETWEEN

MARY WANGUI .... 1ST APPLICANT

ESTHER WAMBUI .... 2ND APPLICANT

AND

SAMUEL MAHUGU HIHU .... 1ST RESPONDENT

BETH WANJIRU MWANGI .... 2ND RESPONDENT

RULING

1. The matter placed before this Court for determination is an interlocutory application brought by way of Summons dated 18 February 2026. The Applicant, Mary Wangui, who is a daughter and beneficiary of the late Hihu Kabia, seeks the leave of this Court to substitute a previously listed expert witness. Specifically, the Applicant prays for orders to substitute Dr. Sanji Bassi, a Consultant Adult and Paediatric Neurosurgeon based at the Harley Street Clinic in London, United Kingdom, with a local medical expert, Dr. Eric James Maina, a Consultant Neurologist based in Mombasa, Kenya.

2. The underlying substantive dispute in this cause relates to a fierce contest over the validity of the Last Will and Testament of the Deceased, purportedly executed on 9 July 2022. The Applicant is formally challenging the testamentary capacity of the Deceased at the time the impugned Will was made. It is her averment that the Deceased suffered from cognitive dementia, a neurodegenerative condition that caused him to be forgetful, confused, and disoriented, thereby severely impairing his cognitive and thinking abilities. The Applicant contends that this infirmity rendered the Deceased incapable of taking care of himself, attending to his personal affairs, or comprehending the solemn nature of a testamentary act, as he was not possessed of competent understanding. The disputed Will allegedly

bequeathed the entire share of the Deceased's substantial estate to one child, effectively disinheriting the Applicant and six other biological children.

3. The Application is staunchly opposed by the Respondent and other named beneficiaries and Objectors, primarily through the Replying Affidavit of Naomi Wairimu, sworn and filed on 24 February 2026. The Respondents invite the Court to dismiss the Application with costs, contending that it is mischievous, mistaken, incompetent, unmeritorious, and constitutes a gross abuse of the court process. The cornerstone of the Respondents' objection is anchored on a matrix of procedural and evidentiary technicalities. They argue that the Objectors' case was closed over a year ago in March 2025, and that introducing a new witness at this highly advanced stage is inherently prejudicial and an obvious delay tactic. Furthermore, they challenge the legal mechanism through which the Applicant seeks to introduce the medical evidence, arguing that foreign medical documents cannot be produced by a local doctor without having undergone the rigorous statutory process of consular legalization in both the foreign country and in Kenya. Finally, the Respondents submit that the Applicant is attempting to impermissibly challenge the Deceased's mental state outside the strictures of the *Mental Health Act*, noting that the Deceased actively and successfully ran his estate affairs, including purchasing assets, until 2021.

The Applicant's Case

4. The Applicant's case is fundamentally built on the premise that to successfully discharge the heavy evidentiary burden of proving the Deceased's lack of testamentary capacity, it was absolutely necessary to adduce the expert medical evidence of Dr. Sanj Bassi, the neurosurgeon who initially evaluated the Deceased's cognitive decline in 2008. Through her legal representatives in Kenya, Musinga Advocates LLP, and in the United Kingdom, the firm of Slee Blackwell Solicitors LLP, the Applicant made formal, written overtures to Dr. Bassi on 4 and 6 February 2026. The correspondence explicitly requested Dr. Bassi's virtual attendance in this Court via Microsoft Teams to give oral evidence and provide an expert interpretation of his clinical notes and the corresponding MRI reports.

5. The record reflects that on 10 February 2026, Dr. Bassi, communicating through his Medical Secretary, formally declined to give evidence or author an explicit medico-legal letter tailored for the Court. However, crucially for the rules of evidence, the correspondence explicitly permitted the Applicant to utilize the existing patient notes, stating that they could be "read and discussed by anybody who understands what they mean". Faced with the sudden and absolute unavailability of the primary treating physician, the Applicant procured the services of Dr. Eric James Maina, a highly qualified Kenyan medical practitioner. Dr. Maina's annexed Curriculum Vitae demonstrates specialized expertise in Neurology, holding a Diploma in Neurology from London (2007) and a Master of Medicine in Psychiatry from the University of Nairobi (1991). The Applicant now seeks the Court's leave to call Dr. Maina to read, interpret, and present expert testimony based on the primary clinical notes and radiological data generated by Dr. Bassi and Dr. Connor.

The Respondents' Case

6. The Respondents vehemently oppose the substitution and the reopening of the evidentiary phase. Naomi Wairimu deposes that the Application is incompetent, mischievous, and unmeritorious. The core of the Respondents' objection is bifurcated into procedural prejudice and evidentiary technicalities.

7. First, on the procedural front, the Respondents highlight that they formally closed their case in March 2025, approximately one year prior to the filing of this Application. They submit that introducing an entirely new expert witness at this twilight stage of the trial is an obvious delay tactic that will occasion

insurmountable prejudice to their case. They further submit that the Applicant has failed to proffer any valid, justifiable reason for the delay or the failure to secure an alternative expert well before the close of pleadings and the conclusion of the trial phase.

8. Second, on the evidentiary front, the Respondents mount a formidable challenge to the admissibility of the medical records themselves. They argue that the documents generated by Dr. Sanj Bassi, Dr. Steve Connor, and the Harley Street Medical Centre are foreign private documents. According to the Respondents, these documents cannot be recognized or admitted by a Kenyan Court because they have not undergone the mandatory statutory process of cross-border legalization and authentication from the foreign country to Kenya. Consequently, the Respondents argue that Dr. Eric Maina, being a local practitioner who did not author the documents, cannot legally produce or rely upon an unauthenticated foreign document to ground his expert opinion. Finally, the Respondents challenge the substantive relevance of the evidence, arguing that the Applicant is attempting to unlawfully challenge the Deceased's mental state without invoking the *Mental Health Act*, and reiterating that the Deceased possessed sufficient capacity to actively manage his estate and purchase assets as late as the year 2021.

9. The Application was canvassed by way of oral submissions.

Re-opening the Case and Substitution of a Witness

10. The first hurdle the Applicant must surmount is purely procedural, yet it strikes at the very heart of the administration of civil justice. The Respondents note, correctly and with justifiable concern, that their case was closed in March 2025. Allowing a party to substitute a witness and introduce new expert testimony at this advanced stage of the trial fundamentally touches upon the doctrines of fair trial, the equality of arms, and the public policy requirement for the finality of litigation.

11. The overriding objective of the *Civil Procedure Act*, as encapsulated in Sections 1A and 1B mandates the Court to facilitate the just, expeditious, proportionate, and affordable resolution of civil disputes. In service of this objective, Order 18 Rule 10 of the Civil Procedure Rules grants the Court the wide latitude to recall and examine a witness at any stage of the suit, subject to the law of evidence. Order 18 Rule 10 states: "The court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force; put such questions to him as the court thinks fit.".

12. However, the Court is acutely aware that the substitution of an initially listed witness with an entirely new expert after the close of the opponent's case is a far more drastic procedural measure than merely recalling a witness who has already testified. In Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others eKLR, the Supreme Court firmly established that while procedural rules are handmaidens of justice, flagrant abuses of court processes and timelines without seeking prior leave or demonstrating good cause will not be entertained.

13. Conversely, this Court's exercise of discretion must be heavily tempered by the constitutional imperative found in Article 159(2)(d), which commands that in exercising judicial authority, courts shall administer justice without undue regard to procedural technicalities. When procedural rigidity threatens to obscure the substantive truth, *the Constitution* demands flexibility.

14. The specific jurisprudential threshold for introducing new evidence or allowing the substitution of a witness at a late stage was comprehensively outlined in the persuasive decision of Zinj Limited vs Attorney General eKLR. The Court in that instance delineated several factors to be balanced when considering such applications.

15. The Court takes judicial notice of the fact that the Applicant did not sit indolently on her rights, nor does the substitution appear to be an ambush born of bad faith. The correspondence annexed to the Supporting Affidavit reveal a frantic attempt in February 2026 to secure the attendance of the UK-based doctor. When Dr. Bassi unequivocally declined to participate in the judicial proceedings —either virtually or via a written report—the Applicant was left legally stranded. The refusal of a foreign medical practitioner to submit to the jurisdiction of a Kenyan court constitutes a supervening impossibility. To deny the substitution in the face of such impossibility would be to penalize the Applicant for circumstances entirely beyond her control, thereby occasioning a severe miscarriage of justice.

16. The Respondents' argument that allowing the substitution is a calculated delay tactic is noted and appreciated. However, the scales of justice lean heavily in favor of allowing all substantive, material evidence to be tested on the floor of the Court. The alternative is to shut the door on a litigant seeking to prove a severe cognitive impairment simply due to the uncooperative nature of a foreign witness. The procedural prejudice suffered by the Respondents by the delay in concluding the trial can be adequately and justly compensated by an appropriate award of costs. Therefore, guided by Article 159(2)(d) of *the Constitution* and the inherent powers of the Court to manage its own proceedings to ensure justice is done, the Court is inclined to allow the reopening of the Applicant's case for the limited purpose of substituting Dr. Sanj Bassi with Dr. Eric Maina.

The Evidentiary Admissibility of Hearsay Medical Records

17. The Respondents advance a formidable evidentiary argument: that Dr. Maina cannot physically produce or rely upon the medical records because he is not the author of those records. They contend that without the original maker taking the stand to produce the documents and face cross-examination, the records amount to inadmissible hearsay.

18. The general rule of evidence in Kenya, as strictly enshrined in Section 63 of the *Evidence Act*, is that oral evidence must, in all cases whatever, be direct. If a document is produced to prove the truth of the contents asserted therein, the maker of the document must generally be called as a witness. This rule is grounded in the necessity of cross-examination to test the veracity, memory, and perception of the witness, and to allow the Court to observe their demeanour.

19. However, the law is not blind to the practical realities of human existence and international borders. It recognizes pragmatic, statutory exceptions to the hearsay rule, crafted meticulously to balance the necessity of vital evidence against the circumstantial probability of its trustworthiness. Part IV of the *Evidence Act* specifically governs statements made by persons who cannot be called as witnesses.

20. Section 33 of the *Evidence Act* is the primary anchor for these exceptions. It provides that statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in certain specific circumstances. Section 33(b) dictates that such statements are admissible when the statement was made by such person in the ordinary course of business, or in the discharge of a professional duty.

21. Furthermore, section 35 of the *Evidence Act* specifically governs the admissibility of documentary evidence as to facts in issue in civil proceedings. Section 35(1) states that a statement made by a person in a document tending to establish a fact shall be admissible if the maker had personal knowledge of the matters dealt with, and if the maker is called as a witness. However, the critical proviso to section 35(1)(b) explicitly dispenses with the strict requirement to call the maker of the document if

that person is dead, cannot be found, is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable. Section 35(2) further grants the Court the wide discretion, at any stage of the proceedings, to admit such a statement in evidence even if the original document is not produced, provided a certified copy is availed, if undue delay or expense would otherwise be caused.

22. The application of these statutory exceptions to foreign medical reports was decisively and conclusively settled by the Court of Appeal in the recent, binding decision of Dr. Rafique Parkar & another v NQ & 2 others [2023] KECA 908 (KLR). In the Parkar case, the High Court trial judge had admitted into evidence highly contested medical reports prepared by South African doctors in a medical negligence lawsuit, without calling the makers of the reports as witnesses. The trial judge cited the unreasonable expense and delay of procuring the attendance of the foreign doctors. The appellants in Parkar challenged this admission at the Court of Appeal, arguing forcefully that it violated the strict rule against hearsay and fundamentally breached their constitutional right to a fair hearing and the right to cross-examine adverse witnesses under Article 50 of *the Constitution*.

23. The Court of Appeal comprehensively rejected the appellants' arguments and upheld the trial judge's exercise of discretion. The Court affirmed that the statutory safeguards embedded within Sections 33 and 35 of the *Evidence Act* operate as legally sufficient and constitutionally sound exceptions to the hearsay rule. The Court clarified a vital principle of Kenyan evidence law: the right to cross-examination is not an absolute, unyielding right when practical, geographic, or financial constraints render the attendance of a foreign witness virtually impossible. The Court observed that where documents are created in the ordinary course of a professional duty (such as a doctor examining a patient and recording clinical notes), there exists a "circumstantial probability of trustworthiness" that satisfies the demands of justice when the maker cannot be brought before the court.

24. Applying the binding ratio decidendi of Parkar to the factual matrix of the present dispute, the parallels are striking. Dr. Sanj Bassi and Dr. Steve Connor are foreign medical practitioners situated outside the territorial and subpoena jurisdiction of the Kenyan Court. Dr. Bassi has explicitly stated in writing that he will neither draft a custom medico-legal report nor attend the court virtually to give oral evidence. The Applicant possesses no legal mechanism under Kenyan civil procedure or private international law to forcibly compel a British citizen, residing and practicing in the United Kingdom, to abandon his practice and testify in a Kenyan civil succession trial.

25. The clinical notes, the diagnostic conclusions, and the MRI reports were contemporaneously created in November and December 2008. They were not created in anticipation of litigation; they were created in the ordinary, routine discharge of Dr. Bassi's professional duties as a Consultant Neurosurgeon at the Cromwell Hospital and Harley Street Clinic, and Dr. Connor's duties as a Radiologist.

26. Consequently, the Court finds as a matter of fact and law that the attendance of Dr. Bassi cannot be procured without unreasonable delay and expense—indeed, given his explicit refusal, his attendance cannot be procured at all. The medical records are, therefore, highly admissible under the clear exceptions provided in section 33(b) and section 35(1) of the *Evidence Act*. The rule against hearsay cannot and must not be weaponized by the Respondents to exclude contemporaneous, professionally authored clinical records simply because the healthcare professional who authored them operates beyond the coercive power of the Kenyan judiciary. The documents cross the threshold of admissibility.

27. The critical and determinative factor in the present Application is that the Applicant is not seeking to introduce the medical records through a layperson, a police officer, or a relative. The Applicant has engaged Dr. Eric Maina, whose Curriculum Vitae demonstrates profound and specialized

qualifications in the specific field of Neurology. Dr. Maina holds a Diploma in Neurology from London and a Master of Medicine in Psychiatry from the University of Nairobi.

28. Therefore, the substitution of Dr. Bassi with a local, highly qualified expert is both legally sound and practically necessary. Dr. Maina will not be testifying to the facts of the 2008 physical examination —as he was not in the room in London—but he will provide an expert opinion on the medical and legal implications of those recorded facts. He acts as an expert of opinion, not an expert of fact. The Respondents' objection on this ground fails.

Relevance of the Evidence to Testamentary Capacity and the Burden of Proof

29. The final, and perhaps most substantive, legal dimension concerns the relevance of the proposed medical evidence to the core substantive dispute: the testamentary capacity of the late Hihu Kabia. The Respondents argue that the Applicant is attempting to stealthily challenge the Deceased's mental state outside the strictures of the *Mental Health Act*. They further emphasize that the Deceased actively managed his complex estate affairs, including purchasing assets, until the year 2021.

30. This argument betrays a fundamental misapprehension of the nature of a probate dispute. Testamentary capacity is a highly specific legal construct governed exclusively by the *Law of Succession Act*, not the *Mental Health Act*. A person may have capacity to perform certain daily tasks but lack the specific capacity required to execute a Will, and vice versa. Section 5(3) of the *Law of Succession Act* establishes a powerful statutory presumption of sanity:

> Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he was doing.

31. Consequently, under section 5(4) of the *Law of Succession Act*, and the general principles in Section 107 of the *Evidence Act*, the evidentiary burden of proving that the testator lacked testamentary capacity lies squarely and heavily upon the person challenging the Will—in this case, the Applicant.

32. It is not the role of this Court, at this interlocutory stage, to conduct a mini-trial to decide whether the 2008 medical records are ultimately sufficient to invalidate the 2022 Will. That is the ultimate, substantive question reserved for the final judgment after all evidence is weighed. The Court's current mandate is solely to determine whether the Applicant should be permitted to lay this highly relevant foundational evidence before the Court for consideration. Given that the burden of proof initially rests heavily on the Applicant to dislodge the statutory presumption of capacity under section 5(3) of the *Law of Succession Act*, denying her the opportunity to present her medical expert would severely prejudice her constitutional right to a fair hearing and her ability to mount a defence against the Will.

33. However, the Court is acutely and sympathetically aware that this Application comes a full year after the Respondents formally closed their case. The late introduction of a new, highly specialized expert witness undeniably disrupts the established trial timetable. It forces the Respondents to retreat from their closing posture, re-engage medical experts of their own, and prepare for complex, unanticipated medical cross-examination. This procedural prejudice is real and tangible. It must be remedied, not by shutting out the evidence, but by an appropriate and punitive order for costs against the Applicant, who must bear the financial consequences of this late disruption.

34. Accordingly, having weighed the overriding objective of justice against the prejudice to the Respondents, I make the following orders:

i. The Application dated 18 February 2026 is hereby allowed.

ii. Dr. Eric James Maina is hereby formally substituted in place of Dr. Sanj Bassi as an expert medical witness for the Applicant.

iii. Dr. Eric Maina is permitted by this Court to rely upon, produce, and offer expert interpretive testimony regarding the private medical records and MRI reports dated 28 November 2008 and 2 December 2008, authored by Dr. Sanj Bassi, Dr. Steve Connor, and the Harley Street Medical Centre.

iv. The Applicant shall file and serve the comprehensive Expert Witness Statement and/or Medico-Legal Report authored Dr. Sanj Bassi, Dr. Steve Connor, and the Harley Street Medical Centre upon the Respondents and the Court within 14 days of the date of this Ruling.

v. The Respondents are hereby granted leave, if they so wish and are advised, to file a rebuttal expert medical report and/or recall their own witnesses to address the new medical evidence, within 21 days of being served with the Applicant's expert report.

vi. To mitigate the substantial prejudice caused by the late substitution of the witness, the costs of this Application shall be borne by the Applicant and awarded to the Respondents in any event.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF MARCH 2026

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

For the Petitioners/Applicants: Mr Musinga

For the Objectors/Respondents: Ms Oteyo

Court Assistant: Lucy Mwangi