



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Ngure (Deceased) (Probate & Administration  
60 of 1997) [2026] KEHC 3069 (KLR) (6 March 2026) (Ruling)**

Neutral citation: [2026] KEHC 3069 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
PROBATE & ADMINISTRATION 60 OF 1997  
MA ODERO, J  
MARCH 6, 2026  
IN THE MATTER OF THE ESTATE OF WATHUKU NGURE (DECEASED)**

**RULING**

1. Before this Court are two applications for determination both dated 24<sup>th</sup> March 2025.
2. The first application seeks the following orders;-
  - “(1) Spent.....
  - (2) That the court be pleased to enlarge the time for filing the Petitioner’s second affidavit in support of the petition.
  - (3) That the petitioner’s second further affidavit filed alongside this application be deemed as duly filed.
  - (4) That costs be in the cause.”
3. The Application was premised on the following grounds:
  - (a) That when the matter came up for mention before the Honourable Justice Maureen Odero on 17/09/2024 that the Hon. Judge fixed the matter for hearing on 05/11/2024 and indicated that parties were at liberty to exchange any documents they wished to file.
  - (b) That the hearing was later rescheduled to 27/11/2024 on the Court’s own motion.
  - (c) That the petitioner was yet to file his second further affidavit addressing and responding to the issues of law and fact raised on the affidavits and documents filed by the Objectors and Interested Parties and prays that the court enlarges the time for filing the affidavit and deem the same as duly filed.
  - (d) That the delay in filing was occasioned by the voluminous documents filed by the objectors.



- (e) That the Petitioner's ill health and permanent disability contributed to the delay as he has mobility challenges.
  - (f) That the application has been brought without undue delay and in good faith.
  - (g) That the application will not prejudice any of the parties to the petition.
  - (h) That should the orders be denied the petitioner will be gravely prejudiced at his right at fair hearing.
4. The second application also dated 24<sup>th</sup> March 2025 was filed by the same Applicant and sought the following orders:-
- “(1) Spent.
  - (2) That the court be pleased to admit the testimonies given by Michael Wahome Wakangangi, Herman Kairu, Simon Njogu Ichawairu, Michael Kariuki and Lydia Wanjira Chomba (all now deceased) in the initial hearing of this petition and in the hearing of Nyeri CMCC No. 496 of 1996 as part of the petitioner's evidence in the instant proceedings.”
5. The application was premised upon the following grounds:-
- (a) That Michael Wahome Wakangangi, Herman Kairu, Simon Njogu Ichawairu, Michael Kariuki and Lydia Wanjira Chomba (all now deceased) gave evidence at the commencement of the hearing of the petition and in the hearing of Nyeri CMCC No. 496 of 1996 where the petitioner was the Plaintiff and the objectors the Defendants.
  - b) The aforementioned deceased persons gave evidence which is crucial to the conclusive resolution of the petition and thus the petitioner wishes to rely on their evidence.
  - c) That the principal parties in the current proceedings are the same as those in the initial proceedings.
  - d) That the objectors had the right and opportunity to cross-examine the deceased witnesses in the initial proceedings and in the burial dispute.
  - e) That the questions in issue and in the initial hearing and current Proceedings are substantially the same as the current proceedings are a retrial of the petition against the objectors following an order of the court of appeal in Civil Appeal No. 259 consolidated with Civil Appeal No. 337 of 2002.
  - f) That the issue in the burial dispute are also substantially the same as the issues in the current proceedings.
  - g) That the application will not prejudice but will in fact interest of justice by ensuring all relevant evidence including testimony of dead witnesses is considered.
  - h) That the petitioner will be greatly prejudiced if the orders herein are not granted if denied to rely on the testimonies of the aforementioned deceased persons.
6. Both Applications were supported by affidavits sworn by the Petitioner/Applicant Charles Wanjohi Wathuku.



7. The 1<sup>st</sup> Objector/Respondent Symon Ngure Githinji filed Grounds of Opposition dated 11<sup>th</sup> May 2025 in which he opposed the application seeking to have the testimonies of several individuals who testified in Nyeri CMCC No. 496 of 1996 admitted.
8. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated 14<sup>th</sup> October 2025 whilst the Respondent relied upon his written submissions dated 27<sup>th</sup> October 2025.

### **Background**

9. This succession cause relates to the estate of the late Waithuku Ngure. This matter has a long history and has gone all the way to the Court of Appeal and was remitted back to the High Court for hearing. This court was preparing to hear the application dated 10<sup>th</sup> July 1997 when the two applications in question were filed.
10. The Applicant submitted that the objector had filed voluminous documentation that required a lot of time to peruse. That he was ill and suffered impaired mobility at the time thus was not able to file a response in time. The Applicant states that a second further affidavit will not prejudice the 1<sup>st</sup> Objector.
11. The Objector in opposing the applications argued that the Court of appeal in Civil Appeal No. 259 of 2002 found that the pleadings leading up to the confirmation of the Grant were defective and thus set aside the evidence given by the witnesses which the Applicant now seeks to rely upon. The Objector further stated that in Nyeri CMCC 496 of 1996 the parties were not the same, the subject matter was completely different from the subject matter in the present case and the 1<sup>st</sup> Objector had no opportunity to cross-examine the witnesses whose evidence the Petitioner now seeks to rely on.

### **Analysis And Determination**

12. I have carefully considered the two applications before the court the replies filed thereto as well as the written submissions filed by both parties.
13. The Applicant has prayed for an extension of time within which to file a second further affidavit.
14. Rule 67 of the Probate and Administration Rules provide for the Enlargement of time and it states that;

“Where any period is fixed or granted by these Rules or by an order of the court for the doing of any act or thing, the court upon request or of its own motion may from time to time enlarge such period notwithstanding that the period originally fixed or granted may have expired.”

15. Rule 63 of the Probate and Administration Rules allows the application of Order 50 of the Civil Procedure Rules that deals with enlargement of time. Order 50 (6) Civil Procedure Rules provides:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of time appointed or allowed.”



16. In the case of Mwangi -vs- Kenya Airways Ltd [2003] eKLR the Court of Appeal held as follows:-

- “(4) Matters which the Court takes into account in deciding whether or not to grant an extension of time are:-
- a. the length of the delay.
  - b. the reason for the delay.
  - c. Possibly, the chances of the appeal succeeding if the application is granted, and
  - d. the degree of prejudice to the respondent if the application is granted.”

17. In this matter the Court had issued directions on 17<sup>th</sup> September 2024 that parties file and exchange documents. The Applicant states that since the documents filed by the objectors were voluminous he needed time to peruse them. The period of delay is six (6) months and nine (9) days. This in my view is rather inordinate no matter how voluminous the documents filed by the objector were.

18. Further in this further second Affidavit, the applicant seeks to rely on /cite the evidence of one Simon Njogu Ichawairu who is said to be deceased. Therefore the determination of this application seeking extension of time is intricately linked to the second application seeking inclusion of evidence of witnesses now said to be deceased.

19. The applicant prays that the testimony of- Michael Wahome Wakangangi- Herman Kairu- Simon Njogu Ichawairu- Michael Kariuki- Lydia Wanjira Chomba all of who testified in Nyeri CMCC NO. 496 of 1996 and all of whom are now deceased, be admitted as evidence in the present case.

20. Evidence in previous proceedings can only be admitted under the provisions of section 34 of the Evidence Act (Chapter 80 of the Laws of Kenya) which provides as follows;

34. Admissibility of evidence given in previous proceedings

- (1) 1) Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances –
- (a) Where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable, and where, in the case of a subsequent proceeding –
  - (b) the proceeding is between the same parties or their representatives in interest; and
  - (c) the adverse party in the first proceeding had the right and opportunity to cross-examine; and
  - (d) the questions in issue were substantially the same in the first as in the second proceeding.



- (2) For the purposes of this section – (a) the expression “judicial proceeding shall be deemed to include any proceeding in which evidence is taken by a person authorized by law to take that evidence on oath; and
- (b) a criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused. [Own emphasis]
21. In *Jane Wambui Weru v Overseas Private Inv. Corp & 3 others* [2012] KEHC 1977 (KLR) the court made a distinction of the admissibility of evidence under Section 34 of the *Evidence Act* in two scenarios. The Learned Judge GV (Odunga) (as he then) was, stated thus:-
- “In my view the four conditions in subsection 1(a), (b), (c) and (d) are to be read conjunctively and not disjunctively. The provisions apply to two circumstances. The first case scenario is where evidence is sought to be used in subsequent proceedings in which case all the four conditions must be fulfilled. The second scenario is where the said evidence is sought to be used at a later stage in the same proceeding. In that case only the first condition needs to be fulfilled.” [Emphasis my own]
22. This matter started off in the Lower Court as Nyeri CMCC No. 496 of 1996. The matter went all the way to the Court of Appeal and vide a judgment delivered on 27/10/2021 it was ordered that the suit be remitted to the High Court for hearing. As it transpires some of the witnesses who had testified in the first suit before the Magistrates Court have now passed on. (Pages 156 - 160 of the application are copies of their Death Certificates). The Applicant now seeks to have the evidence which was adduced by those deceased witnesses in the first suit be adopted as the evidence in this hearing.
23. Section 34 (a) (b) of the *Evidence Act* sets out the Conditions all of which must be met in order for evidence recorded in a previous case to be adopted in a subsequent suit involving the same case. Section 34(b) provides that such previous evidence is only admissible in a case where the subsequent proceedings “between the same parties or their representatives.” The plaintiff in CMCC No. 496 of 1996 was Wanjohi Gathuku, the Defendants were Adreano Ngure Gachima, Gerald Githinji Ngure and Gichuki.
24. In the present suit before the High Court the Petitioner is Charles Wanjohi Wathuku whilst the objectors are Simon Ngure Githinji and Charles Mwangi Gitundu. There is nothing to show that the objectors herein are the representatives of the Defendants in the Lower Court case. Furthermore the dispute in CMCC 496 of 1996 involved a burial dispute whilst the present suit is a succession cause.
- As such the conditions set out in Section 34 (b) have not been met.
25. I find that the application to have the evidence of the Deceased witnesses imported in this case is not merited. The Respondent will be prejudiced as they will not have any opportunity to cross-examine the said witnesses. The application fails as not all the conditions set out in Section 34(a) and (b) of the *Evidence Act* have been met.
26. Accordingly I hereby dismiss both applications dated 24<sup>th</sup> March 2025. Each party to bear its own costs.

**DATED IN NYERI THIS 6<sup>TH</sup> DAY OF MARCH 2026**

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**MAUREEN A. ODERO**

**JUDGE**

