

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

SUCCESSION CAUSE NO. E010 OF 2021

IN THE MATTER OF THE ESTATE OF STEPHEN KININI

WANG'ONDU (DECEASED)

ELIJAH KININI WANG'ONDU..... 1ST

OBJECTOR

DAVID MWORIA WANG'ONDU..... 2ND

OBJECTOR

VERSUS

SOLOMON MWIHUNGI MAHUGU..... 1ST

RESPONDENT

PETER NYIKA MUCHIRI..... 2ND

RESPONDENT

CHARLES MUCHEMI KARWERU..... 3RD

RESPONDENT

JOSEPH MAHUGU MBARIRE..... 4TH

RESPONDENT

JOSEPH MWIHUNGI..... 5TH

RESPONDENT

JANE WAMUCII WANJUKI..... 6TH

RESPONDENT

DANIEL THIRIKWA KANINI.....7TH
RESPONDENT

JAMES MURAGE.....8TH
RESPONDENT

ESTHER WANGARI KININI.....9TH
RESPONDENT

PAUL KURIA.....10TH
RESPONDENT

MARY WANJIKU WANGAI.....11TH
RESPONDENT

JAMES MWANIKI MUTHIKE.....12TH
RESPONDENT

RULING

1. This is a ruling arising from the Objectors' Application dated 29.1.2026. The Application sought the following reliefs:
 - a) The Objector/Applicant be granted leave to introduce further evidence notwithstanding that hearing has already commenced.
 - b) The new evidence be admitted and considered by this Honourable Court in the determination of the matter.
 - c) That the Respondent be granted leave, if necessary, to file a response to the supplementary evidence within a period to be determined by the Court.

d) That costs of this application be costs in the cause.

2. The Application was supported by grounds on its face as well as the supporting and further affidavit of Elijah Kinini Wang'onde, materially stated as follows:

a) The hearing of this succession matter has already commenced and is part-heard. That subsequent to the commencement of the hearing, the Applicant has come into possession of new evidence which is material and relevant to the just determination of the matter.

b) The evidence obtained by the Applicant was not reasonably available at the time earlier affidavits and documents were filed.

c) The said evidence directly impacts the just and equitable determination of the validity of the will and codicil. The following evidence that directly related to the ongoing succession cause.

(i) Correspondence between the directorate of criminal Investigations and the officer in charge of Nyeri Maximum Prisons.

(ii) Recordings of phone call between the Deceased and myself on various dates attendant to the management and fate of his estate.

(iii) A document examiner report on the authenticity of the signature on the will and the codicil.

d) There no prejudiced to be suffered by the Respondents.

3. The 4th Respondent opposed the Application vide the Replying Affidavit sworn on 3.2.2026 by which or was deposed in material as follows:

- a) The Objectors had come to court with unclean hands.
- b) There were exceptional circumstances to warrant receiving new evidence.
- c) The 1st Objector was guilty of perjury and dishonesty.
- d) The report sought to be produced dated 5th August 2022 has been in the Applicant's custody for almost half a decade yet it has suddenly surfaced.
- e) M/s Ngeri Omitti & Bush Advocates LLP are former Advocates of the Objectors before they changed to M/s. Kamau Kuria & Company Advocates and now S N. W & Co. Advocates LLP and as such the Objectors are estopped from suggesting that this is new evidence.
- f) The deceased had 3 signatures and his 2 Passports and Loan Documents being a Charge confirm this.
- g) The 1st Objector has equally at all material time been aware that he was either in prison on 11th April 2021 13th April 2021 or not and COVID-19 was a pandemic.

4. The 1st, 2nd and 3rd Respondents also filed a replying affidavit jointly sworn on 3.2.2026 by which it was deposed in material thus:

- a) The Objectors pleaded to the cheques B1-B6 as bearing the signature of the Deceased.
- b) The forensic report was made on 5.8.2025 when the 1st 2nd and 3rd Respondents were already administrators.
- c) The documents were obtained unlawfully without leave of the Administrators.
- d) The evidence was not new and the delay obtaining it was not explained.

5. Scholastica Wacuka Wang'ondy also swore her affidavit on 3.2.2026 opposing the Application on the grounds that there was no certificate of electronic evidence, the information was not new evidence and her deceased husband had 2 signatures.

6. The Objectors filed skeleton submissions dated 29.1.2026. It was submitted that this court retains discretion, depending on the reasons and circumstances of the case, to allow a party to present some additional evidence not earlier disclosed provided that no party suffers any prejudice. Reliance was placed inter alia on **Raila Odinga and 5 Others Versus I.E.B.C. and 3 Others** [2013] eKLR.

Analysis

7. This is a fairly straightforward objection to the production of documents. On my perusal of the responses to the Application,

a preliminary question was raised that the information was obtained illegally without the leave of the 1st to 3rd Respondents, who were administrators.

8. In such matters of unlawfully obtaining communication, it should first be established the procedure through which the information was obtained to discern whether it was obtained through an infringement of a right. In my view, the evidentiary burden of proof as to illegally obtained evidence has not yet shifted to the Objectors.
9. It is the Respondents or any of them alleging that they should have demonstrated how the documents were illegally obtained. What I understand the Objectors to state is that the documents were obtained from the bank and phone records. The Objectors have a stake in the estate, and nothing would prevent them from accessing information necessary for asserting their entitlements. There is no rebuttal to this assertion. Therefore, I find that the evidence was not illegally obtained as alleged by the Respondents.
10. On the test as to what constitutes an illegally obtained information, In the case of **Nicholas Randa Owano Ombija vs Judges & Magistrates Vetting Board** [2015] eKLR the Court of Appeal stated as follows:

“What does the law state regarding illegally obtained evidence” In the case of *Karuna, Son of Kaniu v The*

Queen [1955] AC 197 which was an appeal to the Privy Council on a criminal conviction anchored on an illegally procured evidence, the Privy Council held that “the test to be applied both in civil and in criminal cases in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how it was obtained” In that case the Privy Council decision was supported by the decision in *Reg v Leatham* (1861) 8 Cox CCC 498 which was referred to in the judgment. In *Re v Leatham* (supra), it was said “it matters not how you get it if you steal it even, it would be admissible in evidence” In *Olmstead v United States* (1928) 277 US 438 the Supreme Court of the United States of America opined that “the common law did not reject relevant evidence on the ground that it had been obtained illegally.” In *Helliwell v Piggot-Sims* [1980] FSR 356 it was held that “so far as civil cases are concerned, it seems to me that the judge has no discretion. The evidence is relevant and admissible. The judge cannot refuse it on the ground that it may have been unlawfully obtained in the beginning.”

11. No material was placed before the court to demonstrate that the information was inadmissible as a matter of evidence.

12. I now turn to the substance of the Application. Should this court grant leave to the Applicant to adduce evidence at this juncture? In the case of **Mohamed Abdi Mohamud v. Ahmed Abdullahi Mohamad & 3 Others [2018] eKLR**, the Supreme Court stated the circumstances under which new evidence may be taken on appeal, thus:

(a) The additional evidence must be directly relevant to the matter before the court and be in the interests 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 must be shown that the evidence 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) it must be capable of removing any vagueness or doubt over the case and have 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) if the evidence discloses a strong prima facie case of willful deception to the Court;

(h) the evidence must be needful and should not be for the purposes of removing lacunae and filling gaps in evidence.

(i) the evidence is not intended to enable an unsuccessful party at the trial to make a fresh case on appeal, fill up omissions or patch up the weak points in his or her case.

(j) 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.

13. Therefore, the guiding principle in determining whether to grant leave to adduce new evidence on appeal is the proportionality and prejudice of allowing the additional evidence.

14. This court is tasked 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.

15. Despite the foregoing, the Court may only allow additional evidence on a case-by-case basis and, even then, sparingly, with abundant caution,

16. The new Evidence sought to be adduced by the Objectors relates to the following parameters:

- (i) Correspondence between the Directorate of Criminal Investigations and the officer in charge of Nyeri Maximum Prisons.
- (ii) Recordings of phone call between the Deceased and 1st Objector on various dates attendant to the management and fate of his estate.
- (iii) A document examiner's report on the authenticity of the signature on the will and the codicil.

17. The Respondents' position is also that the same information was in the knowledge of the Objectors and cannot be said to be new evidence.

18. The court has to consider whether the Objectors have attained the conditions for granting leave to adduce new evidence at this level.

19. This court is cautious not to detail the probative value of the evidence sought to be adduced by the Objectors as to

prejudice and embarrass the trial. The court notes that the purpose of adducing the evidence is to support the Objection. Suffice it to note that the named documents are of decisive character to these proceedings. They do not just assist the Objector but this court in arriving at a reasoned conclusion on whether the Objection has any merit. The 1st to 3rd Respondents also attached a bundle of documents to their affidavit, which they apparently would like to file in rebuttal to the documents sought to be adduced herein. they can go ahead and do so.

20. Therefore, the Objectors have satisfied the conditions for adducing new evidence, and I allow their application. The question of the probative value of any documents sought to be introduced will be addressed through cross-examination. It is common ground that the deceased was in prison at the time of the writing of the impugned will. It is therefore imperative that the court receive all evidence and weigh it before making an informed decision.

21. Pursuit of expedience will never override the pursuit of the truth. It is in the interest of the parties that the application be allowed. It is also noted that the applicants have not closed their case.

Determination

22. The upshot of the foregoing is that I make Orders as follows:

- (a) The Objectors are granted leave to introduce further evidence notwithstanding that the hearing has already commenced.
- (b) The Objectors shall file a Further List and Bundle of Documents within 10 days of this ruling.
- (c) That the Respondents are granted leave to file their corresponding Further List and Bundle of Documents, if any, within 10 days after service.
- (d) A date for further hearing shall be immediately fixed after this Ruling.

DELIVERED, DATED and SIGNED at NYERI on this 19th day of March, 2026. Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE
JUDGE

In the Presence of:

Ms. Mwangi for Ndegwa for the 1st Objector /Applicant

M/s Njenga and Mr. Kiroki for the Applicant

Mr. Karweru for 1st - 3rd Respondents

Mr. Anjika for Abdiaziz for 4th -12th Respondents

Mr. Peter Kwenjera for Scholastica Wacuka - Protestor

Ms. Muthoni Kibaara for Munyiri

Court Assistant - Michael / Martin

ORIGINAL