

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
SUCCESSION CAUSE NO. 119 OF 2015 (CONSOLIDATED)
IN THE MATTER OF THE ESTATE OF SAID BWANA MKUU

—

IBRAHIM SAID BWANAMKUU

..... **..APPLICANT**

VERSUS

MAGRIT SAID **1ST RESPONDENT**

ZAKIA SHEE MZEE **2ND RESPONDENT**

ZAHRA SAID MZEE..... **3RD RESPONDENT**

NADIA SAID BWANAMKUU..... **4TH RESPONDENT**

ABU SAID BWANAMKUU **5TH RESPONDENT**

MOHAMED BWANAMKUU SHELALI..... **6TH**
RESPONDENT

RULING

1. By an application dated 16.1.26, the Applicant seeks the leave of this Court to file a supplementary affidavit introducing new evidence.
2. The Applicant who is the 3rd Administrator of the estate of the deceased herein states that no prejudice will be suffered by the Respondents as they can respond to the affidavit once filed. It was further stated that the new affidavit is necessary to achieve a fair resolution and denying the same would hinder justice. Additionally, the Applicant states that he seeks to file the further affidavit to define controversial issues raised, and to introduce evidence that was not available when he filed his affidavit and statements.
3. The Application is opposed by the 5th Respondent *vide* his replying affidavit sworn on 6.2.26. he averred that the matter has proceeded to hearing by way of *viva voce* evidence. The Application is thus intended to delay, circumvent and defeat the Respondents' evidential documents and testimony in Court. Further, that the Applicant is privy to the Respondents' testimony and documents produced and cannot seek to file a supplementary affidavit in the middle of hearing and after close of pleadings. Additionally, that the Applicant has already

testified, cross examined and closed his case. Any attempt to bring in new evidence will be to the detriment of the Respondents. He urged that the Application be dismissed.

4. The Law of Succession Act does not make provision for leave to file additional evidence. Rule 73 of the Probate and Administration Rules however give the Court wide discretion to grant orders that are necessary for the ends of justice as follows:

Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

5. The power of this Court to admit additional evidence is discretionary. This discretion as in all other discretionary powers of the Court must be exercised judicially. It is well settled that the power of a court to admit fresh evidence should be exercised very sparingly and with great caution. The principles upon which the Court may exercise its discretionary power to determine whether or not to admit additional evidence were expressed by Chesoni, Ag. JA (as he then was) in Wanjie & others v Sakwa & others (1984) KLR 275 as follows:

[T]he principles upon which an appellate court in Kenya in a civil case will exercise its discretion in deciding whether or not to receive further evidence are the same as those laid down by Lord Denning LJ, as he then was, in the case of Ladd v Marshall [1954] 1 WLR 1489 at 1491 and those principles are:

- (a) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;***
- (b) The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive;***
- (c) The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.***

6. It is noted that the Applicant has not disclosed the additional evidence that he wishes to introduce. He has not demonstrated that the evidence is credible and would have an important influence on the result of the case. He has also not stated when the evidence came to his knowledge or the difficulty he had in procuring the same at the time of filing his affidavit and statement. These are factors that would have assisted the Court in determining whether to exercise its discretion in the Applicants favour.

7. While considering this Application, the Court must caution itself against admitting new evidence that will enable the Applicant patch up the weak points in his case and fill up

omissions and make out a fresh case on appeal thereby giving him another bite at the cherry. Chesoni, Ag JA (as he then was) in the **Wanjie v Sakwa** case (supra) went on to state:

As is correctly stated in Mulla on Code of Civil Procedure, 13th Edn Volume 11 page 1606, in a commentary on a similar Indian rule, this rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. ...Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the rule were used for the purpose of allowing the parties make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence.

8. Flowing from the cited decision, additional evidence cannot be allowed where it is intended for the purpose of patching up the weak points of a party's case or removing lacunae and filling in gaps in evidence.
9. The circumstances herein are that the 5th Respondent Abu Said Bwanamkuu has already testified and was duly cross examined by the other parties including the Applicant. The Applicant states that he seeks to file the affidavit to define controversial issues raised, and to introduce evidence that was not available when he filed his statement. It would appear to the Court that the Applicant being privy to the evidence adduced now seeks to fill in gaps and to improve his case by firming up any weak points in his affidavit and statement. To allow the Application at this stage will greatly prejudice the Respondents. It will also give unfair advantage to the Applicant and further prolong the matter which has been pending for 10 years. There must be an end to litigation.
10. In the circumstances I find that the Application dated 16.1.26 is devoid of merit and the same is hereby dismissed. Costs in the cause.

DATED, SIGNED and DELIVERED in MOMBASA this 8th day of May 2026

M. THANDE
JUDGE

