**Gichuhi & another v Gichuhi & 2 others (Civil Appeal E632 of 2021) [2022] KECA 818 (KLR) (13 May 2022) (Judgment)**

Neutral citation: [2022] KECA 818 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPEAL E632 OF 2021**

**RN NAMBUYE, A MBOGHOLI-MSAGHA & KI LAIBUTA, JJA**

**MAY 13, 2022**

**BETWEEN**

**GRACE NJERI GICHUHI ..... 1ST APPELLANT**

**GODFREY KIHUHA GICHUHI ..... 2ND APPELLANT**

**AND**

**MOSES MUIRU GICHUHI ..... 1ST RESPONDENT**

**JENNIFFER MUTHONI GICHUHI ..... 2ND RESPONDENT**

**MICHAEL GICHUHI WANJIKU ..... 3RD RESPONDENT**

***(Being an Appeal from the ruling of (Kasango, J.) given at Kiambu on the 28th September, 2021 in Kiambu HCCC No. 4 of 2019 Consolidated with HCCC No.8 of 2019)***

## JUDGMENT

1. This is a family dispute centred on a Will allegedly written by the deceased one Michael Gichuhi Muiru. After the death of the deceased, the appellants lodged succession cause No. 4 of 2019 seeking letters of administration to the estate of the deceased who they alleged had died intestate. Soon thereafter, the 1st respondent filed succession cause No. 8 of 2019 on the ground that he was the executor of the Will left by the deceased and therefore entitled to prove the same.

2. Directions were given by the trial court that the two causes be consolidated under succession cause No. 4 of 2019 with directions that succession cause No. 8 of 2019 be heard first, as it was founded on the disputed Will. The hearing commenced on 23rd March, 2021. The first witness, the advocate who drew the contested Will, testified on behalf of the respondents. Before other witnesses were called by the respondents, the appellants filed an application dated 27th July, 2021 seeking an order of the court to grant them leave to file further documents, to wit the handwriting expert report dated 16th July,

2021 prepared by the Director of Criminal Investigations (DCI) under the hand of Chief Inspector Alex Mwongera together with the attendant documents examined for that purpose.

3. The application was opposed by the respondents on the grounds inter alia that: the application had been filed after an undue delay which had not been explained; the application was intended to fill in gaps that had been identified in the testimony of their first and star witness Mr. Njanja who drew the contested Will and that it was highly prejudicial to the respondents, who would not be accorded an opportunity to recall the witness who had already testified for the appellants' failure to make provision for a corresponding right to be accorded to the respondents to recall their witness for further testimony.

4. In reply, the appellants argued that no prejudice would be occasioned to the respondents since only one witness had testified on their (respondents) behalf as at the time the appellants sought the courts intervention; that the witness could be recalled for further evidence and or cross-examination as deemed fit; that the alleged delay in seeking the court's intervention was not occasioned by any default on their part as sufficiently explained in their supporting documents and, more particularly, that they moved with speed to seek the court's intervention as soon as they were capacitated with the report sought to be introduced.

5. The application was canvassed on its merits through rival pleadings and submissions at the conclusion of which the learned Judge analysed the record in light of the rival arguments before her and declined to exercise her discretion in favour of the appellants, but instead dismissed the application vide the impugned ruling delivered on 28th September, 2021 on the grounds firstly, that it was made after an undue delay which was unexplained. Secondly, that if allowed, it would be highly prejudicial to the respondents.

6. Aggrieved, the appellants lodged this appeal raising eleven (11) grounds of appeal in their memorandum of appeal dated 28th October, 2021, which was subsequently condensed into three (3) thematic issues in their written submissions dated the 28th November, 2021, and which we find prudent to rephrase as follows, whether:

    a. The appellants filed the application for adducing more evidence without delay?

    b. The respondents stood to be prejudiced in any way if the appellants were to be allowed to file and rely on more evidence.

    c. The trial court exercised its discretion judiciously in disallowing the appellants' application.

7. The appeal was canvassed virtually through written submissions and legal authorities filed by advocates for the rival parties herein in support of their opposing positions, fully adopted and orally highlighted. Learned counsel Kirimi David appeared for the appellant, Daniel Musyoki for the 1st respondent while Peter Njoroge appeared for the 2nd and 3rd respondents respectively.

8. Supporting ground (a), the appellants rely on the following authorities: Trattoria Limited vs. Joaninah Wanjiku Maina [2013] eKLR; Utalii Transport Company Limited & 3 Others vs. NIC Bank Limited & Another [2014] eKLR; and lastly, the case of Gahir Engineering Works Limited vs. Rapid Kate Services & Another [2015] eKLR; for the holdings/propositions which we find prudent to distill as follows:

    i. What amounts to unreasonable delay is dependent on the circumstances of each case;

ii. There is no precise measure of what amounts to inordinate delay;

iii. Inordinate delay differs from case to case depending on the circumstances of each case;

iv. Factors for determining inordinate delay include, but are not limited to the subject matter or nature of the case and the explanation given;

v. Inordinate delay is one which leads the court to the inescapable conclusion that it is inordinate, and therefore inexcusable; and,

vi. Proof of inordinate delay is not per se a ground for denying justice where interests of justice to both parties so demand.

and submits that there was no delay in filing the application giving rise to the impugned ruling. Justification given by the appellants for the above proposition is that the report sought to be introduced dated 26th July, 2021 was obtained on the same 26th July, 2021. The application was filed on 27th July, 2021, pursuant to their letter dated 14th February, 2020, vide which the appellants gave notice both to the court and the respondents that they would be filing further evidence as and when availed to them by the office of the DCI.

9. Secondly, that although the documents released to them by the DCI on 25th May, 2021 could have been filed earlier, they genuinely believed that it would be prudent and fair if both the earlier report and the awaited report were filed simultaneously with a view to saving on the precious judicial time of having to file two separate applications instead of one to introduce them. This Court is therefore urged to find that they have sufficiently explained the circumstances leading to the filing of the application giving rise to the impugned ruling as well as demonstration that the issue of inordinate delay as erroneously propounded by the respondents and sustainable by the trial Judge did not arise in the circumstances of this appeal.

10. In support of ground (b), the appellants rely on the following authorities: J. C. Patel vs. V. D. Joshi [1952] 19 EACA 12; Republic vs. District Land Registrar, Uasin Gishu & Another [2014] eKLR; St. Patrick's Hill School Limited vs. Bank of Africa Kenya Limited [2018] eKLR;Philip Kipto Chemwolo & Another vs. Augustine Kubende [1986] eKLR and Article 159(2)(d) of *the Constitution* of Kenya, 2010 for the holding and propositions which we also find prudent to distill as follows:

i. Relief in an application of the nature appellants presented before the trial court should only be withheld where the court is satisfied that no injustice would be occasioned to the party seeking such relief.

ii. It does not always follow that when a mistake has been made either inadvertently or otherwise the party at default should suffer the penalty of not having his/her case heard on its merit.

iii. Unless there is proof of fraud or intention to overreach against the party at default, there is no error and default that cannot be remedied by an award of costs.

iv. A court exists for the purposes of deciding the right of parties before it and not for the purpose of imposing discipline on real or perceived errant parties.

v. Justice is not dependent on technical procedures, but on doing the right thing.

vi. A fair trial does not exist in a vacuum. It is governed by rules which by themselves ensure that each party is given ample opportunity to present his/her case before court.

vii. The role of the court is to ensure that parties who seek justice from its seat are given a fair opportunity to ventilate issues that arise from their cases.

viii. In exercising judicial authority, courts and tribunals shall be guided by the principle that justice shall be administered without undue regard to technicalities.

and submit that they filed the application giving rise to the impugned ruling to introduce further documents only after one witness had testified on behalf of the respondent namely, Njanja Advocate, who went on record as having drawn the contested Will. They had also explicitly indicated in their supporting documents that they were willing to have the witness recalled for further examination and cross-examination on the contents of the further document which, in the appellants' opinion, was necessary especially when the witness stated on oath that he was not aware of any expert report, meaning that he had not even as at the time of giving his testimony in court, seen nor considered any expert report with regard to the authenticity of the contested Will.

11. Further, that the respondents stood to suffer no prejudice in the circumstances portrayed above as their witness most suited to comment on the evidence intended to be introduced by them, namely a Mr. Kenga, who had prepared a document examiner's report on their (respondents) behalf, was yet to testify. They had also sufficiently demonstrated, firstly, that the issues in controversy at the trial touching on a contested Will that the respondents claim was made by the deceased while the appellants claimed that it was a forgery involving family members. Lastly, that, even if there was any delay, which is denied, the trial Judge in the circumstances portrayed above could have invoked the inherent power of the court to grant the application for the ends of justice to be meted to both parties.

12. On issue number (c) the appellants have invited this Court to adopt the position taken by the High Court in the case of Francis Githinji Karobia vs. Stephen Kageni Gitau [2014] eKLR in which the High Court allowed a party to introduce evidence with a corresponding leave to the opposite party to adduce evidence in rebuttal.

13. On the totality of the above submissions, this Court is invited to be guided by the principle of fair hearing enshrined in Article 50 of the *Constitution of Kenya, 2010* and the court's own inherent power to find and hold that the learned Judge in the circumstances exercised her judicial discretion injudiciously when she declined to accede to the appellants' request to adduce a further crucial document necessary for the just determination of the issues in controversy herein, interfere with the exercise of that mandate, set aside the impugned order and allow the application.

14. Opposing the appeal, the 1st respondent as supported by the 2nd and 3rd respondents identified three issues for determination in the 1st respondent's written submissions dated 28th January, 2022, which we also find prudent to rephrase as follows, namely whether:

i. The appeal as laid is competent.

ii. The trial court's finding that the appellants were guilty of unreasonable and unexplained delay in filing the application giving rise to the impugned ruling was well founded on both in law and facts and, therefore, sustainable.

iii. There is no basis for the appellants' invitation for this

Court to interfere with the exercise of discretion by the Superior Court which, according to them, was well founded both in law and on the facts.

15. On the competence of the appeal, the respondents rely on the case of Tropicana Hotels Limited vs. SBM Bank (Kenya) Limited (formerly known as Fidelity Commercial Bank Ltd [2020] eKLR, and submits that the record of appeal as placed before this Court offends the prerequisites in Rule 87(1) (g) & (h) of this Court's Rules for want of inclusion of a certified copy of the decree or order appealed against, and invites this Court to vitiate the appeal as laid on that ground.

16. On issue (ii), the respondents submit that the determination of this interlocutory appeal turns on the issue as to whether the learned Judge wrongly or rightly exercised her discretion in refusing to allow the appellants to file further documents after the hearing had commenced and only one of the respondents' critical witnesses had fully testified. It is the respondents position that in order to succeed on their appeal, the appellants must sufficiently demonstrate to this court that in exercising her discretion, the Judge misdirected herself and/or was clearly wrong and, as a result, they have suffered injustice, a position not borne out by the content of the record as analysed by the trial Judge, based on the basis of the sequence of events that transpired at the trial as more particularly set out in the 1st respondent's submissions, there was sufficient basis for the Judge declining to exercise her discretion in favour of the appellants.

17. They rely on the decision in the Supreme court case of *Parliamentary Service Commission vs. Martin Nyaga Wambora & Others* [2018] eKLR in which the Supreme Court was categorical that judicial discretion is a very powerful tool which in the Supreme Court's view should be exercised with abundant care and fairness. It should be used judiciously and not whimsically to ensure that the principles enshrined in *the Constitution* are realized, a position the respondents contend was well appreciated by the learned trial Judge as borne out by the reasons the Judge gave for declining to exercise her judicial discretion in favour of the appellants.

18. They also submitted that the appellants had failed to disclose in their submissions that upon dismissal of their applications namely, that giving rise to the impugned ruling and the one for stay of proceedings, pending appeal the trial proceeded, three more witnesses gave evidence on behalf of the respondents and their case closed. The matter was therefore pending for the taking of appellants' evidence and subsequently judgment, with the next hearing date then fixed for 23rd February, 2022.

19. The respondents have also invited this court to be persuaded by the High Court cases of Macharia Mangi & Another [2021] eKLR; David Sugut & Another vs. Marcela Cheptoo Chuma [2016] eKLR; and Samuel Kuti Lewa vs. Housing Finance Co. of Kenya Limited & Another [2015] eKLR, in all of which the High Court declined to grant relief to allow the applicants therein reopen their cases and introduce additional evidence on the ground that, in doing so, the court would have allowed the applicants therein to adduce additional evidence to fill in gaps in their evidence to the detriment of the opposite parties therein who had already tendered evidence, conduct the court in the cited cases explicitly said should not be condoned nor sanctioned by a court of law. The applicants in the cited cases had also failed to explain sufficiently as to why the evidence sought to be introduced was not available as at the time they gave evidence in the first instance. The respondents therefore submit that, in their opinion, the only inescapable conclusion to be drawn from the appellants' conduct of belatedly seeking the court's intervention after the respondents' crucial witness had testified was to fill in the gaps in their case, which they were unable to fill during the cross-examination of Mr. Njanja.

20. On issue (iii), the respondents rely on the case of *Edward Sergent vs. Chotabha Jhavarbhat Patel* [1949] 16 EACA 63; *Mbogo & Another vs. Shah* [1968] E.A 93; and *United India Insurance Co. Limited vs. East African Underwriters (Kenya) Limited* [1985] KLR 898 as approved in the case of Kridha Limited

vs. Peter Salai Kituri [2020] eKLR, all for the parameters within which an appellate court has mandate to interfere with the exercise of judicial discretion by a court appealed from and invites this court to dismiss the appeal in its entirety for reasons that the Judge gave sound and plausible reasons for the conclusion reached.

21. Learned counsel Mr. Peter Njoroge on behalf of the 2nd and 3rd respondents adopted fully the submission of the 1st respondent. What counsel added orally was merely a reiteration of what the 1st respondent's counsel had already laid out above. We therefore find it prudent not to replicate the same.

22. In reply to the respondents' submissions, Mr. Kirimi submitted that the respondents' invitation to this Court to vitiate the appeal for lack of competence through submissions does not lie as in law they ought to have raised that objection within thirty (30) days upon service upon them of the record of appeal pursuant to Rule 84 of this Court's Rules.

    Secondly, the appellants' failure to comply with the said rule in the manner complained of by the respondents is not fatal to the validity of the appeal as there is on record a certified copy of the impugned ruling. Thirdly, they still maintain that no prejudice will be suffered by the respondents if the appeal were allowed as prayed. This Court is therefore invited to be guided by the overriding objective principle enshrined in sections 3A and 3B of the *Appellate Jurisdiction Act* for ends of justice to be met to the parties herein, especially when it is not in dispute that as at the time they sought the Court's intervention to introduce further documentary evidence, only one witness had testified on behalf of the respondents, hence their failure to mention the stage at which the proceedings had currently reached which in their opinion is not a bar to their request for the appeal to be allowed as this Court has mandate to give directions not only for expedition of the trial, but also with directions for recalling of the respondents' witnesses as appropriate.

23. This is a first appeal arising from the trial court's exercise of judicial discretion declining to grant leave to the appellants to introduce further documentary evidence. The parameters for the exercise of our mandate in an appeal of this nature are as enunciated by the predecessor of the court and crystallized by this Court itself in numerous pronouncements. We take it from the case of *Edward Sergeant vs. Chotabha Jhavarbhat Patel* [supra] in which the predecessor of the court was explicit that an appeal does not normally lie from the exercise of a trial court's discretion, but that where one does arise, an appeal court will interfere only if it be shown that the discretion was exercised injudiciously. The predecessor of the court went further and delineated clearer boundaries in the case of *Mbogo & Another vs. Shah* [supra] where at page 96, it was stated as follows:

> " An appellate court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice."

24. That position was crystallized by this Court in the case of *United India Insurance Co. Limited vs. East African Underwriters* (Kenya) Limited [supra] as hereunder:

> " The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established:

first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

25. We have applied the above parameters to the totality of the record as assessed above. The issues that fall for our consideration in the disposal of this appeal are the same as those identified for determination by the appellants and the 1st respondent in their respective written submissions highlighted above. Our position thereon is that issue (a) in the appellants' submissions is similar to issue (ii) in the 1st respondent's submissions and will therefore be addressed as one. Likewise issue (b) in the appellants' submissions is similar to issue (iii) in the 1st respondent's written submissions and will likewise be dealt with as one. The rest will be dealt with separately. In light of the position we have taken above, we find it prudent to rephrase issues for our determination in the disposal of this appeal as whether:

1. The appeal is competent as laid before us.
2. The learned trial Judge exercised her discretion injudiciously when she declined to grant the appellants the relief sought from her seat of justice vide the application that gave rise to the impugned ruling.
3. The respondent stands to suffer great prejudice should the appeal herein succeed.
4. Which party should bear the costs of this appeal.

26. The first issue arises from the 1st respondent's submission and as supported by the 2nd and 3rd respondents' oral submissions that the appeal is incompetent for want of compliance with Rule 87(1) (g) & (h) and (3) of this Court's Rules firstly, for want of inclusion in the record of appeal of a certified copy of the order and decree appealed against. Secondly, for the failure to apply to either the Judge or the Registrar of this Court within fifteen (15) days of the lodging of the record of appeal to introduce the said documents. Rule 87(1) (g) & (h) and (3 of this Court's Rules provides as follows:

> "(1) For the purpose of an appeal from a superior court in its original jurisdiction, the record of appeal shall, subject to sub- rule (3), contain copies of the following documents –
>
> .....
>
> g. the Judgment or order;
>
> h. the certified decree or order;
>
> .....
>
> 3. A judge or registrar of the superior court may, on the application of any party, direct which documents or parts of documents should be excluded from the record and an application for such direction may be made informally."

27. The appellants' response thereto is that this is a technicality curable under Article 159(2)(d) of *the Constitution* of Kenya, 2010. Secondly, that the respondents' objection to the appeal as laid is belated and therefore does not lie as it ought to have been raised within thirty (30) days from the date of service

upon them of the record of appeal, pursuant to the prerequisites stipulated in Rule 84 of this Court's Rules. It provides:

> " A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.
>
> Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be."

28. Thirdly, it is curable by the inclusion of a certified copy of the impugned ruling in the record of appeal.

29. We have considered the record in light of the above rival submissions of the respective parties herein on want or otherwise of the record of appeal as laid before us. Our position thereon is that indeed Rule 87(1) (g) & (h) require that certified copies of the order and decree appealed from should be included in the record of appeal. Rule 87(3), on the other hand, provides for safeguards for rectification of the default, namely the defaulting party applying either formally or informally before a Judge or the Deputy Registrar of this Court within fifteen (15) days of the lodging of the appeal for rectification of the default.

30. Non-compliance with the above prerequisite is what ushers in the operation of rule 84 of this Court's rules. Our view on the construction of this rule is that it explicitly provides that an objection based on want of competence of either a notice of appeal or a record of appeal has to be raised within thirty (30) days of service upon the party objecting to the impugned process. In this case, we have not been given the exact date when the record was served on the respondents. But one thing that is clear to us from the record is that there is nothing on the record to oust the appellants' assertions that the objection is belated and does not therefore lie. Lastly, they also rely on Article 159(2)(d) of *the Constitution* of Kenya, 2010, which enjoins courts to render justice without undue regard to procedural technicalities.

31. The parameters for the invocation and application of this Article have now been delineated by this Court and crystallized by the Supreme Court. We take it from *Jaldesa Tuke Dabelo vs. IEBC & Another* [2015] eKLR; *Raila Odinga and 5 Others vs. IEBC & 3 Others* [2013] eKLR; *Lemanken Arata vs. Harum Meita Mei Lempaka & 2 Others* [2014] eKLR; *Patricia Cherotich Sawe vs. IEBC & 4 Others* [2015 ]eKLR among numerous others for the principles/propositions, inter alia, that: "the exercise of the jurisdiction under Article 159 of *the Constitution* is unfettered especially where procedural technicalities pose an impediment to the administration of justice save that Article 159(2)(d) of *the Constitution* is not a panacea for all procedural ills. Secondly, that the principle unclutches the court from being subservient to procedural technicalities."

32. In light of the above crystallized position in law, we find that faulting the appeal merely for want of inclusion in the record of appeal of a certified copy of an extracted order and/or decree when it is evident that a certified copy of the impugned ruling is undoubtedly included in the record of appeal would in our view be tantamount to denying justice based on undue technicalities. It is also our position that the record of appeal, being a court process, cannot, in our view, be faulted based on a mere submission by a party in that party's written or oral submissions. The rules under which the record was filed provide a clearly stated process vide which an aggrieved party can move the court to address his/her concerns. That process is none other than that which has been alluded to by the appellants, namely as stipulated for in Rule 84 of this Court's Rules. We have revisited it as already highlighted above. We find nothing therein to suggest that submission is one of the modes of raising such objection. In the

premises, we reject the respondents' invitation for us to fault the record of appeal along those lines. We, therefore, find that the appeal is competent as laid before this Court. We now proceed to pronounce ourselves thereon on its merits.

33. On issue number 2, the undisputed position on the record is that the issue in contest in the proceedings at the trial is the deceased's Will, fronted by the respondents as the deceased person's last Will validly executed by the deceased under the hand of a Mr. Njanja an advocate of the High Court of Kenya. The Will is contested by the appellants who allege that it is nothing but a forgery. In view of the contest on the validity of the Will, it became necessary for either party to call expert evidence to confirm whether the signature on the Will is indeed that of the deceased or otherwise. The record is explicit if we have appraised it properly that Meoli, J. gave directions on 26th September, 2019 giving the rival parties herein sufficient time within which to file documents they intended to rely on in support of their opposing positions. It was pursuant to those directions that the appellants wrote a letter dated 14th February, 2020 expressing a desire to avail a second or additional handwriting expert report through the Director of Criminal Investigations Department (DCI). It took over a year for the DCI to avail its report dated 16th July, 2021 to the appellants. That report was received by the advocates for the appellants on 26th July, 2021. The application giving rise to the impugned ruling was filed on 27th July, 2021 a day after the report sought to be introduced had been received by the appellants' advocate.

34. It is also a common position that the trial commenced on 23rd March, 2021. It, therefore, means that as at the time the appellants filed the application that resulted in the impugned ruling four (4) months had elapsed since the commencement of the trial. It is also common position that, as at the time the said application was presented, only one witness a Mr. Njanja the advocate who drew the contested Will had testified, extensively cross examined and re-examined.

35. It is against the above background that the appellants have contended that the trial Judge acted injudiciously in declining to exercise her discretion in their favour. It is their position that they moved with speed to file the application for leave to introduce the subject document as soon as capacitated. The issue of inordinate delay in seeking the court's intervention did not therefore arise in the circumstances. Secondly, the surrounding circumstances portrayed herein are those that would demand that, in the interests of justice to both parties, considering the substratum of the litigation, namely a contested Will of the deceased and involving family members, the learned Judge should have invoked the inherent power of the court in exercise of her discretionary mandate to grant the relief sought.

36. In rebuttal, the respondents cumulatively contend that they will suffer great prejudice should the decision of the trial Judge which, in their view, was correctly arrived at as submitted above be interfered with by this Court. They have given two reasons for taking this position, firstly, their main witness Mr. Njanja accused of forging of the Will by the appellants had already given evidence. Secondly, the appellants have failed to disclose in their submissions before this Court that the trial proceeded after their application for stay of proceedings was dismissed. Thirdly, the appellants did not seek both in the application giving rise to the impugned ruling nor in their prayers in their memorandum of appeal to have the matter reopened from where the same had reached for adduction of further evidence in order to allow the respondents recall their witnesses to test the veracity and/or truthfulness of the evidence intended to be introduced.

37. In response to the foregoing respondents' cumulative concerns, the appellants assert that this Court is not devoid of its inherent power which it can invoke to give appropriate directions on disposal of the proceedings before the trial court, including an order for reopening the matter.

38. We have taken into consideration the above rival positions in light of the principles of law that guide this Court in the exercise of its mandate in an appeal of this nature. It is our position that the substratum of the litigation before the trial court is the validity of a deceased person's Will, which is crucial on the mode of distribution of the deceased person's estate in the pending succession proceedings. It is also evident from the record that the litigation has pitched family members against each other over the contested Will. The overriding objective principle in litigation of this nature in our view is for a court seized of such a matter to try as much as possible not to tear parties apart nor to discipline either of them or both, but to provide a platform for the warring family members to try as much as possible to resolve the dispute as peacefully as possible.

39. On the issue of inordinate delay in seeking the court's intervention, we adopt principles of law that guide a court of law when confronted with a complaint of this nature as distilled above. Our position thereon in light of the record assessed above is that the issue of inordinate delay does not arise in the circumstances of this appeal as the appellants took remedial action as soon as capacitated. Only one witness had testified as at that time. In fact, the respondents' own handwriting expert witness had not tendered evidence as at that point in time. Lastly, we agree that the trial court had a ready tool namely, its inherent power to do justice to the parties and not to chastise the appellants, especially after they had sufficiently demonstrated that they gave notice that they would be calling for an additional expert report. They had no control over the manner of discharge of duty by the DCI and had sought the court's intervention as soon as capacitated.

40. Turning to issue number 3, namely the prejudice to be suffered by the respondent should the application be allowed, the respondents major concern is the failure of the appellants to seek both in their application giving rise to the impugned ruling and their prayers in the memorandum of appeal to recall their main witness, a Mr. Njanja in the first instances and the rest of the witnesses who have testified on their behalf, considering that their case is already closed. They assert that, in the absence of such a provision, they will be disadvantaged as they will have no way of testing the veracity and or truthfulness of the evidence intended to be introduced by the appellant. We have given due consideration to the respondents' concerns. It is our view that the concerns expressed above by the respondents do not in themselves preclude the court from admitting the evidence sought to be admitted and recalling the respondents' witnesses if deemed necessary and for ends of justice to be met to both parties. The court has the power to so order under section 146 (4) of the *Evidence Act*, Cap 80 Laws of Kenya. It is therefore our finding and holding that denying the appellants the relief sought would be tantamount to impeding the conditions of fair hearing required to be accorded to both parties which, in our view, are within reach of both parties herein considering the nature of the dispute involved.

41. It is also our finding that the evidence sought to be introduced was not in the possession of the appellants as at the time the trial commenced. Neither was it deliberately withheld. As we have already held, adducing this evidence will aid the court in making the right decision. On the totality of the facts that were laid before the trial court as the basis for considering the application before it in light of our assessment and reasoning on the said facts set out above, we are inclined to interfere with the discretion of the learned Judge with a view to meeting the ends of justice to the rival parties herein.

42. In the result, we make orders as follows:

    1. The order issued in the ruling of the High Court dated 28th September, 2021 be and is hereby set aside and substituted for an order allowing the appellants' application dated 27th July, 2021.

    2. The High Court be and is hereby directed to reopen the respondents' case, admit the evidence sought to be introduced by the appellants in the application dated 27th July, 2021.

3. There is liberty granted to either party to recall the respondents' witnesses either to adduce further evidence or for further cross-examination as deemed fit.

4. Thereafter parties to proceed according to law.

5. Each party shall bear their own costs of this appeal.

**DATED** AND **DELIVERED** AT **NAIROBI** THIS **13TH** DAY OF **MAY, 2022.**

**R. N. NAMBUYE**

**.....**

**JUDGE OF APPEAL**

**A. MBOGHOLI MSAGHA**

**.....**

**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

**.....**

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**