



**IN THE COURT OF APPEAL  
AT NYERI  
(BOSIRE, WAKI & VISRAM, J.J.A)  
CIVIL APPEAL (APPLICATION) NO. 196 OF 2009**

**BETWEEN**

- 1. JOHN WAGURA IKIKI**
- 2. TABITHA WANGUI IKIKI**
- 3. LUCY BANCY WANJIKU IKIKI**
- 4. ESTHER WANJIRU IKIKI.....APPLICANTS/APPELLANTS**

**AND**

**LEE GACHUIGA MUTHOGA .....RESPONDENT**

*(An application to adduce additional evidence in an appeal from the judgment of the High Court of Kenya at Nyeri (Kasango, J.) dated 22<sup>nd</sup> October, 2008 in*

**H.C.SUCC. CAUSE NO. 194 OF 2000)**

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**RULING OF THE COURT**

1. The matter that was argued before us on 28<sup>th</sup> October, 2011 was a notice of motion taken out by the appellants in the main appeal (“*the applicants*”), under **rule 29(b)** of the Court of Appeal Rules 2010 (“*the rules*”) for the following orders: -

*“1.That an order be made to take additional evidence pertaining to the alleged Will of the deceased and the signature therein.*

*2.Further that additional evidence to be taken to show that the respondent, executor herein, the witnessing agent one Hezekiel Wang’ombe Gichohi and the beneficiary Mary Wanjiku Ikiki were business partners.*

*3. That the doctor’s report of 02.08.2005 be produced in court.*

*4. That an affidavit sworn by one Gituku Kamaitha and Beth Wangari Wagura, the deceased’s sister be produced in court”*

Those prayers can only make sense if the background to the application is examined, albeit, briefly:

2. **Onesmus Ikiki Waithanwa** (“*the deceased*”) of Mahiga Location in Othaya died from diabetes complications on 4<sup>th</sup> October, 1994 at the age of 77 years. He left behind three widows and twenty

children (10 sons and 10 daughters) as well as considerable moveable and immoveable property valued in excess of Shs.2.5 million at the time.

3. Soon after, on 12<sup>th</sup> October, 1994, **Lee Gachuiga Muthoga** (“*the respondent*”) then and probably still is an Advocate of the High Court of Kenya practicing in the firm of Muthoga, Gaturu & Company Advocates, disclosed to the family that the deceased had left a written Will and the Will was read to the family. The contents thereof elicited furious objections from two of the widows and their children who declared it a nullity and contrary to an oral Will the deceased had apparently made in his lifetime. Two of the sons petitioned the High Court in 1996 for grant of Letters of Administration, intestate, and the court issued and confirmed that grant on 28<sup>th</sup> August, 1996. The grant was, however, revoked and annulled on application by the third wife and the respondent.

4. In June, 2000, the respondent took out a petition for probate of the written Will asserting that he was the named executor of the last Will made by the deceased on 29<sup>th</sup> January, 1993. Upon advertisement of the petition, however, two of the widows, four sons and three daughters objected to the intended grant asserting, among other complaints, that the purported Will was a nullity; that it was influenced by the third widow of the deceased and was skewed in her favour and in favour of her children; that the Will disinherited some of the widows and children of the deceased; that it purported to bequeath and distribute property which did not belong to the deceased; and that the petitioner was a business partner of the deceased and having prepared a defective Will, could not be the executor of the same. The first born son of the deceased, who is the first applicant, cross-petitioned for grant of Letters of Administration intestate.

5. After considerable delay in hearing the matter, the parties on 4<sup>th</sup> March, 2008 drew up and filed the following “agreed issues” for determination at the trial:

- “1. *Whether the Will dated 29<sup>th</sup> January, 1993 is valid.*
2. *Whether the Will dated 29<sup>th</sup> January, 1993 was executed in accordance with the law.*
3. *Whether the Will dated 29<sup>th</sup> January, 1993 was executed by the deceased, Onesmus Ikiki Waithanwa.*
4. *Whether the petitioner/executor and the 3<sup>rd</sup> wife of the testator influenced the making of the Will dated 29<sup>th</sup> January, 1993.”*

6. The matter fell before Kasango J. for hearing and she heard oral evidence from 28<sup>th</sup> April, 2008 when the respondent, the two witnesses present when the Will was executed by the deceased, a handwriting expert, the first applicant, and another son of the deceased, all testified and were cross-examined at length before the case was closed and written submissions filed by counsel on all sides. The learned Judge evaluated the evidence on record and considered the submissions of counsel. In the end she delivered her judgment on 22<sup>nd</sup> October, 2008 dismissing the objections made by the applicants and granting the probate of the Will to the respondent.

7. In reaching those conclusions, the learned Judge reflected on the four issues framed and agreed on by the parties and found that the evidence of the petitioner (*the respondent herein*) and his witnesses was consistent and reliable; the evidence of the 1<sup>st</sup> applicant and his brother **Joseph Ndungu Ikiki** (DW3) could not be relied upon and came across as being untruthful; and that the evidence of the document examiner **Emanuel Kenga** (DW1) was of no assistance to the court as he did not submit his report in evidence. She held that the Will was a valid will of the deceased; that it was executed in accordance with **section 11** of the Law of Succession Act; and that there was no evidence to prove that the making of the Will was influenced by the respondent or the 3<sup>rd</sup> wife of the deceased.

8. The applicants were aggrieved by that decision and they filed this appeal on 14<sup>th</sup> August, 2009. In the meantime they applied and were granted an order by the High Court for stay of issuance of the grant of

probate pending hearing and determination of the appeal. The appeal raises six grounds upon which the appellants pray that:

*“(a) The appeal be allowed with costs.*

*(b) The superior Court be ordered to hear and determine the validity of the alleged Will afresh.”*

It has not been set down for hearing.

9. We may now revert to the application before us. The affidavit in support sworn by the 1<sup>st</sup> applicant lays the basis for seeking the four orders reproduced in paragraph 1 above and states in part as follows:-

*“2. THAT since the delivery of judgment in this case, I have discovered information, which was not in my possession and/or knowledge at the hearing of this case and which information would have had a very adverse bearing on the alleged Will at the hearing of this case in the superior court and I believe would have helped in dislodging of the purported Will.*

*3. THAT the deceased in this case died on 4<sup>th</sup> October, 1994. Prior to his death the deceased was a shareholder in Umoja Service Station Limited.*

*4. THAT the said company had a meeting in September, 2005. On the roll of members, the deceased is listed as member number 10, and he is shown to have attended and he signed the attendance register. This was inspite of the fact that he had died over 10 years previously annexed herewith is a certificate copy of the said attendance book marked “JWI I”*

*5. THAT the signature of the attendance book to the naked eye looks exactly the same as the one in the alleged Will.*

*6. THAT this fact lends credence to the evidence of DW1 Senior ACP Kenya, the fingerprint expert who stated on oath that the signature of the Will was not that of the deceased.*

*7. THAT since the hearing of this case and the delivery of judgment I have come to discover that the deceased, the executor herein one Lee Gachuiga Muthoga, the attesting witness Hezekial Wang’ombe Gichohi and the wife of the deceased Mary Wanjiku Ikiki who was the major beneficiary in the alleged deceased’s Will, were business partners in the said Umoja Service Station and in the aforesaid attendance register of September, 2005 they are listed as follows:*

*.....*  
*8. THAT I also enclose an affidavit marked “JWI III” sworn by Beth Wangari the sister of the deceased and an affidavit sworn by Gituku Kamaita marked “JWI IV” which sheds light as to the authenticity of the alleged Will.”*

The two affidavits referred to were executed on 2<sup>nd</sup> January, 2007 and 7<sup>th</sup> March, 2007 respectively. The 1<sup>st</sup> applicant deponed that he made his best efforts to gather evidence but the new evidence was not within his knowledge before the hearing of the succession cause.

10. In submissions before us, learned counsel for the applicants, Mr. Steve Mwenesi, appreciated the law governing consideration of applications made under rule 29 of the rules as set out in the decision of the predecessor of this Court in **Karmali Tarmohamed & Anor. Vs. I.H. Lakhani [1958] EA 567** where it was held:

**“(i) except on grounds of fraud or surprise, the general rule is that an appellate court will not admit fresh evidence, unless it was not available to the party seeking to use it at the trial, or that reasonable diligence would not have made it so available.”**

Mr. Mwenesi submitted that the evidence intended to be produced could not have been obtained before trial; that it will influence the outcome of the case; and that it is believable. The evidence on membership of the respondent in the same business as the deceased, will not only highlight the conflict of interest, possibly collusion, between the respondent and the third wife of the deceased but also reinforce the evidence of the first applicant which was doubted by the trial court. It will also reinforce the evidence of the document examiner that the deceased never signed the purported Will, as will the doctor’s report confirming that the deceased was too ill to have made any detailed Will. Learned counsel, Mr. Wachira for four other children of the deceased named as respondents 2 to 6, associated himself with Mr. Mwenesi’s submissions.

11. In opposing the application, learned counsel for the respondent, Mr. R.P. Mugambi, submitted that there was no “sufficient reason” established to warrant grant of the application. He contended that the documents intended to be produced were neither unavailable at the time of trial nor were they unavailable with diligence.

In his view, all the applicants were seeking was to be heard afresh on evidence that was not characteristically different from the evidence on record upon which the decision of the High Court was rendered. He referred to various portions of the evidence on record relating to business dealings of the deceased which was considered; the report of the document examiner which was never produced and a finding was made thereon; the two affidavits intended to be produced which were sworn before the trial but were never produced; and submitted that there was no relevance of the intended new evidence to the appeal. Finally Mr. Mugambi submitted that the affidavit in support demonstrated no credibility since the document does not state when the new evidence became available.

12. We have given anxious consideration to the application, principally because the matter involves a fairly expansive estate of the deceased which in the last 17 years since his death has generated raw emotions and split the family. Nevertheless, the application calls for the exercise of the court’s discretion, and like all discretions exercisable by the court, it cannot be based on whim and caprice but on sound reasoning and legal principles or put differently, judicially. The starting point is the requirements of **rule 29** which in relevant part states: -

**“29. (1) On any appeal from a decision of a superior court acting in the exercise of it’s original jurisdiction, the Court shall have power –**

**(a) to re-appraise the evidence and to draw inferences of fact; and**

**(b) in its discretion, for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court or by a commissioner.”**

The discretion of the court is therefore not unfettered since the applicant must demonstrate “*sufficient reason*”. “*Sufficient reason*” as stated by the predecessor of this Court “*may not be as stringent a requirement as “special reason” but adequate reason must still be shown before this Court can exercise its discretion*” – see the **Commissioner of Transport v The Attorney General of Uganda & Anor. [1959] EA 329** at page 333.

13. Further principles were enunciated in the ***Tarmohamed case*** (supra) which was considered by this court in **The Administrator, HH The Aga Khan Platinum Jubilee Hospital v Munyambu [1985] KLR 127** where it was held: -

**“1. In exercising its discretion to grant leave to adduce additional evidence under rule 29 (1) (b) of the Court of Appeal Rules, the Court of Appeal will generally give such leave if the evidence sought to be adduced could not, with reasonable diligence, have been obtained for use at the trial, if it will probably have an important influence on the result of the appeal, and is apparently credible though it need not be incontrovertible. Such Evidence will be admitted if some assumption basic to both sides has been clearly falsified by subsequent events and where to refuse the application would affront commonsense or a sense of justice.”**

It was further stated that “*all along, the principal rule has been that there must be exceptional circumstances to constitute sufficient reason for receiving fresh evidence at this stage*”.

14. With those guiding principles in mind, we must test, firstly, whether it has been shown that the intended evidence was not available at the time of the trial or could not with reasonable diligence have been procured, even before we examine whether it would have an important influence on the result of the appeal or is credible. As stated above four pieces of evidence were identified for production afresh. One is evidence on business shareholding in Umoja Service Station Ltd which had a meeting in September, 2005 and a register of members was available listing the deceased as one of the participants despite his death ten years earlier. Evidently the fact that the respondent and the deceased were business associates was not a new matter as it was known to the 1<sup>st</sup> applicant as early as 11<sup>th</sup> December, 2000 when he swore an

affidavit responding to the petition for grant of probate and stating in part thus: -

**“5. That he was, for a long time a lawyer to the deceased and the said executor’s father (now deceased) was a business associate of the deceased ONESMUST IKIKI WAITHANWA in Kenya African Bus Union and Umoja Service Stations Limited Companies.”**

The document intended to be produced was in existence in the year 2005, long before commencement of the trial on 28<sup>th</sup> April, 2008. The applicants do not disclose when it was discovered or how, which was their duty to do. The consequence is that there is no demonstration that the evidence was not available at the trial or could not have been availed with diligence. It is also not a new matter.

15. The other reason for intending to produce the register of members of Umoja Service Station Ltd was to show that the signature appended against the deceased’s name was similar to the signature appended on the disputed Will which fact would strengthen the evidence of the document examiner. The evidence of the document examiner was doubted because he had failed to produce a report he stated he had prepared and only produced the source documents submitted to him. It is submitted that the record shows that the report was indeed produced in evidence but is not in the records of the court. If that be so, it would not be additional evidence. The filing of a supplementary record of appeal would redress the problem. Secondly, if it was additional evidence, the applicants would have annexed a proof or copy of it with the application herein but did not do so. There is no basis therefore for considering the piece for evidence or exercising any discretion thereon.

16. The third piece of evidence is a doctor’s report dated 2<sup>nd</sup> August, 2005 which is neither mentioned in the affidavit in support of the application nor exhibited with the motion. At all events the report was in existence long before the trial commenced and there is no explanation as to when it was discovered or why it was not produced in evidence when the issues agreed on by the parties clearly called for such kind of evidence.

Finally the two affidavits sworn by two of the deceased’s sisters on different dates in the year 2005. Again these predate the hearing of the cause and there is no explanation about their non-production in evidence or why they could not with due diligence have been produced.

17. The totality of that analysis is that there was no demonstration of sufficient reason to warrant the grant of the application before us. We note one of the prayers made in the appeal is for an order for rehearing evidence on the validity of the Will, and we must leave that order for consideration by the appellate court. In our judgment no exceptional circumstances have been demonstrated, and we therefore find no merits in the application. It is dismissed accordingly but the costs shall abide the result of the main appeal.

*Dated and delivered at Nyeri this 2<sup>nd</sup> day of December, 2011.*

**S.E.O. BOSIRE**

.....  
**JUDGE OF APPEAL**

**P.N. WAKI**

.....  
**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**