



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Anne Njeri Kinyanjui (Deceased) (Succession Cause
78 of 2023) [2024] KEHC 1787 (KLR) (28 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1787 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
SUCCESSION CAUSE 78 OF 2023
AC MRIMA, J
FEBRUARY 28, 2024**

IN THE MATTER OF: THE ESTATE OF ANNE NJERI KINYANJUI (DECEASED)

BETWEEN

SARAH WAMBOI MAINA ADMINISTRATRIX

AND

JOHN MASHOHIA KINYANJUI OBJECTOR

RULING

Background:

1. John Mashohia Kinyanjui, the Objector/Respondent herein, instituted the Summons of Revocation of Grant dated 13th January 2021. He sought to revoke the Grant of Letters of Administration issued to Sarah Wamboi Maina, the Administratrix/Applicant herein, on 16th June 2016 and rectified on 29th September 2016 claiming that it was obtained fraudulently.
2. It was his case that the Administratrix made false statements and deliberately concealed material facts crucial to the case and as a result obtained the grant which he used to transfer to herself the land comprised in Title No. Trans-Nzoia/Kapomboi/4 belonging to the Estate of his grandmother, Njeri Kinyanjui Kamau. It was the Objector's case that the Administratrix misrepresented to Court the fact that Njeri Kinyanjui Kamau and Anne Njeri Kinyanjui are one and the same person when in fact Njeri Kinyanjui Kamau is the mother to Anne Njeri Kinyanjui.
3. The Objector, therefore, asserted that as a result of the misrepresentation of facts, the Administratrix had transmitted to herself the only asset belonging to Njeri Kinyanjui Kamau thereby disinheriting him and his siblings of their only inheritance.



The Application:

4. Before the application by the Objector for Revocation of the Grant of Letters of Administration was fully heard, the Administratrix instituted another application by way of Notice of Motion dated 4th November 2022 (hereinafter referred to as ‘the application’).
5. The application was supported by the Administratrix’s Affidavit deposed to on a similar date.
6. The application is the subject of this ruling.
7. In the main, the application sought the following orders: -
 1. Spent
 2. That this Honourable Court be pleased to expunge from the Court record the Objector/ Respondent’s document, a Death Certificate bearing B. No. 861265 and entry No. 7500208 registered in Trans-Nzoia District Rift Valley annexed and marked as JMKI in the Objector/ Respondent’s Affidavit in support of the Application dated 13th January 2021.
 3. That this Honourable Court be pleased to strike out the Objector/Respondent’s application (Summons for Revocation of Grant) dated 13th January 2021.
 4. That costs of this application be in the cause.
8. In the grounds in support of the application, the Administratrix/Applicant asserted that the application for Revocation cannot proceed because the Death Certificate relied on as was a forgery and was also obtained fraudulently as confirmed by the Births and Deaths Registry.
9. The Applicant pleaded that once the Death Certificate was expunged from the record, the Summons for Revocation application ought to be accordingly struck out for want of evidence of death.
10. The Applicant further contended that she will suffer irreparable loss and damage if the orders prayed for were not granted.
11. In her further disposition, the Applicant posited that she was the only child of Anne Njeri Kinyanjui and that the name appearing on the Death Certificate entry No. 7500208 was superimposed.
12. The Applicant urged this Court to allow the application as prayed.

The Response:

13. John Mashohia Kinyanjui, the Objector, challenged the Application through his Replying Affidavit deposed to on 9th January 2023. It was his case that Application was misconceived and bad in law since Notice of Motion applications are a foreign procedure under the *Law of Succession Act*.
14. He deposed that Sections 1A, 3, 3A and 64(e) of the *Civil Procedure Act* are inapplicable to the *Law of Succession Act*.
15. He further argued that his case was presented to Court and documents produced as exhibits without objection including the Death Certificate of his late mother Njeri Kinyanjui Kamau.
16. He also averred that there was no law that allowed an exhibit to be expunged from the record. He deposed that it was only pleadings that could be struck out from the record before the case has been heard. He further deposed that the Court shall decide on the evidential value of the Report dated 30th



November 2021 filed in Court by F.C.M Kataka the County Coordinator Civil Registration Services Trans-Nzoia, when the witness testifies.

17. The Objector wondered that the request by the Applicant to have witness summons issue to the Registrar of Births and Deaths to testify on the Report of 30th November 2021 contradicted the Applicant's prayers as sought in the application.
18. It was the Objector's position that the Application will only serve to further delay the finalization of this matter to the detriment of the surviving children of Njeri Kinyanjui Kamau. He urged that it be dismissed with costs.

Submissions:

19. The Applicant and the Objector filed their respective written submissions dated 2nd and 26th May 2023 respectively.
20. The arguments advanced thereon are appreciated in the analysis section of this Ruling.

Analysis:

21. From the reading of the application, the response, the written submissions, the decisions referred to therein and the record at large, the main issue that arises for determination is whether the application be allowed.
22. There was, however, a preliminary issue raised as to whether the Civil Procedure Act and the Rules made thereunder apply to succession matters.
23. In urging the point, the Respondent challenged the Application on the basis that Notice of Motion applications are foreign under the Law of Succession Act. It was his case that even Sections 1A, 3, 3A and 64(e) of the Civil Procedure Act could not come to the Applicant's aid.
25. Succession disputes are governed by the Law of Succession Act and Probate and Administration Rules. To that end, this Court's attention is drawn to Rule 59 of Probate and Administration Rules which provides as follows: -
 59. Form of proceedings
 - (1) Save where otherwise provided in these Rules every application to the Court or to a registry shall be brought in the form of a petition, caveat or summons as may be appropriate.
27. Rule 63 of the Probate and Administration Rules allows the application of Civil Procedure Rules and High Court (Practice and Procedure) Rules in the following manner: -
 - (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the Court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.
28. Therefore, in sum, the Civil Procedure Rules, [particularly under Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.)], together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), apply to succession matters so far as relevant to proceedings under the succession cause. Further any other provision of the Civil Procedure Act and the Rules may also apply to succession causes if it is so provided for under the Law of Succession Act or in the Rules or when a Court or the



- Registrar makes an order, for reasons to be recorded, that a particular provision of the *Civil Procedure Act* and the Rules do apply to specific succession proceedings.
29. The subject application is premised on Sections 1A, 3, 3A and 63(e) of the *Civil Procedure Act* and Order 10 Rule 11 of the *Civil Procedure Rules* being its substantive procedural foundations.
 29. The Applicant cited Order 10 Rule 11 of the *Civil Procedure Rules* which provides for setting aside of judgments in the following manner: -
 11. Where judgment has been entered under this Order the Court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.
 30. Whereas Order 10 of the *Civil Procedure Rules* is applicable in succession matters, the circumstances of this case do not align with the requirements that would make one invoke that Order. The reason being there is no Judgment which this Court is called upon to set aside or vary. What the instant application seeks to do is stop the further progress of the Objector's application for Revocation of the Grant dated 13th January 2021. That said, there is no justification for the Applicant herein to invite this Court to strike out the impugned Death Certificate by virtue of Order 10 Rule 11 of the *Civil Procedure Rules*.
 31. Having said so, the Court now turns to the question as to whether the Application can be cured by the Overriding Objective Principle in Civil litigation as provided for in Sections 1A, 3, 3A of the *Civil Procedure Act*.
 32. The above provisions are not among those provided for under Rule 59 of Probate and Administration Rules. There is also neither an order of this Court nor that of the Registrar allowing Sections 1A, 3, 3A of the *Civil Procedure Act* to apply in these proceedings. However, since the said provisions are majorly on the Court's overriding objective, this Court will, nevertheless, consider the Applicant's arguments based on the said provisions.
 33. The starting point will be what Court's have rendered on the provisions.
 34. As was observed by the Court of Appeal in Civil Application No. Nai 293 of 2009 *Kariuki Network Limited & Another v Daly & Figgis Advocates*, the aim of the principle is to confer Court considerable latitude in interpretation and application of law and rules made thereunder. It enables Courts to achieve fair, just, speedy, proportionate time and cost saving disposal of cases before it.
 35. In Civil Appeal (Application) No. 228 of 2013, *Nicholas Kiptoo Arap Korir Salat -vs- Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR, the Court of Appeal, in reference to its earlier decisions, comprehensively discussed Section 3A and 3B of the *Appellate Jurisdiction Act* alongside Article 159(2)(d) of the *Constitution* as follows: -

The enactment of Sections 3A and 3B of the *Appellate Jurisdiction Act*, Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of the *Constitution* of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the *Constitution* makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by



the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion.

36. In the above case, the Court of Appeal made further reference to *Caltex Oil Limited versus Evanson Wanjibia* Civil Application No. Nai 190 of 2009 (UR) where it was observed: -

The Oxygen principle does not cover situations aimed at subverting the expeditious disposal of cases or appeals, mistakes or lapses of counsel, or negligent acts, or dilatory tactics or acts constituting abuse of the court process (See the case of *Kenya Commercial Bank v Kenya Planters Co-operative Union* Nai Civil Application No.85 of 2010 (UR)62 of 2010."

37. The above Courts have well-spoken and I say no more.
38. Turning to the matter at hand, the instant application aims to strike out a document that was produced in evidence when the Objector testified in respect of his Revocation application. The Applicant herein is yet to testify in the said revocation application.
39. The Applicant, therefore, still has an opportunity to test the veracity, and authenticity of the impugned Death Certificate since the revocation application is pending. She may even call witnesses to that end.
40. As such, this Court finds that the instant application was not necessary at this point in time.
41. Going forward, the following orders do hereby issue: -
- a. The Notice of Motion dated 4th November 2022 is hereby dismissed.
 - b. Costs thereof shall be in the Summons for Revocation dated 13th January 2021.
 - c. The Summons for Revocation shall be forthwith fixed for further hearing on a date to issue today.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 28TH DAY OF FEBRUARY, 2024.

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Miss. Mukamo for Mr. Ambutsi, Learned Counsel for the Administratrix/Applicant.

Mr. Kiarie, Learned Counsel for the Objector/Respondent.

Chemosop/Duke – Court Assistants.

