



In re Estate of Wilson Nziuko Kinyao (Deceased) (Succession Cause 1182 of 2012) [2024] KEHC 4576 (KLR) (26 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4576 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 1182 OF 2012**

**MW MUIGAI, J
APRIL 26, 2024**

BETWEEN

IDA MARGARET NDUMBA 1ST ADMINISTRATOR

MAGDALENA KAMENE NZIUKO 2ND ADMINISTRATOR

AND

PRESTON MWENDWA KATUMO (PERSONAL REPRESENTATION OF THE ESTATE OF JOHN M. KATUMO) INTERESTED PARTY

AND

STEPHEN MUTHIANI NZIUKO APPLICANT

CATHERINE MWENDE NZIUKO APPLICANT

MICHAEL MAITHYA APPLICANT

RULING

1. Vide a petition received on 15th November, 2012, in which the petitioner IDA MARGARET NDUMBI petitioned this Honorable Court for a grant of Letters of Administration intestate of the estate of WILSON NZIOKA KINYAO (deceased) who died on 14th June, 2009 as per death certificate domiciled.
2. As per the Affidavit in support of Petition for Letters of Administration Intestate, the deceased died intestate and left the following surviving him; -
 - a. IDA MARGARET NDUMBI- DAUGHTER IN LAW.
3. The Affidavit in support of Petition for Letters of Administration Intestate further mentioned properties left by the deceased at the date of his death as follows:



- a. MACHAKOS KONZA NORTH BLOCK 1/580
 - b. KIU RANCH 960
 - c. COMMERCIAL PLOT KONZA
 - d. COMMERCIAL PLOT MALILI NO. 244
 - e. MUUMANDU PLOT NO. 407
 - f. 2 ACRE PLOTS IN KONZA RANCH
 - g. KONZA RANCH MEMBERSHIP NO. 357
 - h. MALILI RANCH AGRICULTURAL PLOT NO. 1762
4. The total estimated value of the properties as per the affidavit in support of the said petition was Kshs. 5,000,000/=
 5. Vide the Chief's letter dated 31st October,2012, August, confirmed that WILSON NZIUKO KINYAO had one son, Jonathan Muia Nziuko who married Ida Margaret Ndumbi.
 6. Vide the Gazette notice dated 18th January, 2013, IDA MARGARET NDUMBI, the deceased daughter in law was gazetted for grant of Letters of Administration intestate to the estate of WILSON NZIUKO KINYAO, late who died at Masaba Hospital in Kenya on 14th June,2009
 7. By Grant for Letters of Administration dated 30th May,2013 and issued on 27th May,2013 by this Honorable Court to IDA MARGARET NDUMBI as personal representative of the deceased's estate.
 8. Pursuant to Application for Summons for Confirmation of Grant dated and filed in court on 10th December, 2013, wherein the Applicant sought orders for the grant of letters of administration made and issued on 27th May,2013 to IDA MARGARET NDUMBI be confirmed.
 9. Grant for letters of Administration intestate was confirmed by this Honorable court on 17th January, 2014 vide a certificate of confirmation of grant dated 21st November, 2014 to the said IDA MARGARET NDUMBI.
 10. Summons for revocation and supporting affidavit both dated 2nd August,2019 in which the Applicants sought orders for the annulment of the letters of administration issued on 27/5/2013 together with the certificate of confirmation of grant issued on 17/1/2014 and dated 21/11/2014. The same was determined by this Honourable Court vide its ruling dated 28th June, 2021, wherein Odunga J.(as he then was) directed the following orders;
 - a. that the grant of Letters of Administration issued on the 27th May,2013 together with the Certificate of Confirmation of grant issued on 17th January,2014 and dated 21st November,2014 to Ida Margaret Ndumbi be revoked and/or annulled and a fresh grant of letters of Administration intestate be issued in joint names of MAGDALENE KAMENE NZIUKO and IDA MARGARET NDUMBI.
 - b. The matter be referred to mediation for the purposes of distribution of the deceased's estate.
 11. Vide this court order dated 13th October,2021 and issued on 15th October,2021 John M Katumo was substituted with his personal representative by the name Preston Mwendwa Katumo.



CHAMBER SUMMONS

12. Before this court is a chamber summons dated 12th June 2023 under Certificate of Urgency brought under Section 47 of the Law of Succession Act, Rule 59 and 73 Probate and Administration Rules, wherein the Applicants sought orders that:
 1. Spent.
 2. The Applicants herein Stephen Muthiani Nziuko, Michael Maithya and Catherine Mwendu Nziuko be enjoined as the beneficiaries of the estate of the deceased.
 3. The costs of this application be in issue.
13. The same is supported by an Affidavit dated 12th June 2023 sworn by the 1st, 2nd and 3rd Applicant jointly in which, they deposed that they are the grandchildren of the deceased herein and wished to be included in the Succession Cause that was filed by the 1st administrator, their mother, who inadvertently left them out of the list of beneficiaries of the estate of the deceased as they wish to participate in the mediation sessions that are ongoing.
14. It was deposed further when the matter was slated for mediation on 30/11/2021, the 2nd administrator objected to their participation in the mediation session as she claimed they are not beneficiaries of the estate of the deceased. Lamenting that they were directed by the mediator to file an application so that they can be enjoined as beneficiaries and participate in the mediation sessions and that they wish to participate in the mediation process as their mother is old and is unable to attend the mediation sessions. It was opined that in the interest of justice that they be enjoined so that they can protect their interest and that of their mother.
15. On 12th October 2023, this Court issued orders maintaining the status quo, the 1st Administrator and the 2nd Administrator to each remain on their properties until the matter is heard and determined.

REPLYING AFFIDAVIT

16. The application was opposed by a replying affidavit dated 27th June, 2023 and filed in court on 29th June, 2023 sworn by MAGDALENA KAMENE NZIUKO wherein she deposed that she was the sole lawfully wedded wife to the late Jonathan Muia Nziuko in a monogamous marriage under the African Christian Marriage and Divorce Act and they never divorced till his demise making her the sole beneficiary herein. She indicated that she was opposed to the 1st administrator participating in these proceedings as she is not a lawfully wedded wife to her deceased husband as claims. She deposed that the succession cause was commenced by the 1st administrator behind her back and she had to come in when she learnt of the same and was made an administrator.
17. She deposed that the applicants who are children of IDA MARGARET NDUMBI are not grandchildren to the deceased and that is why their mother (the 1st administrator) never included them in the petition she filed herein and they cannot now purport inadvertence. Further, they have not produced any document to show their relation to the deceased herein and the chief's letter clearly does not mention them. She deposed that she rightly opposed non-parties in this matter from participating in the mediation way back on 30/11/2021. It was deposed further that she had been seeking to have the mediator fix this matter for mediation but it was now going to close to 2 years and he has failed to do so and she indicated that she was no longer comfortable with having the said mediator handle this



matter. She contended that she is of the same age group with the 1st administrator and it is not true that she was unable to attend mediation as she was actually present and participated in the aforesaid session.

APPLICANT'S SUPPLEMENTARY AFFIDAVIT

18. In a supplementary affidavit dated 7th October, 2023 and filed in court on 9th October, 2023, sworn by STEPHEN MUTHIANI NZIUKO, the first applicant herein, wherein he deposed that he has the authority of the 2nd and 3rd Applicants (his brothers) to swear this affidavit on their behalf. He deposed that it is not in dispute that the 2nd Administrator was married to the late Jonathan Muai Nziuko under the African Christian Marriage and Divorce Act but she was not the only wife as the late Jonathan Muai Nziuko had married the 1st Administrator in the year 1973 under the Kamba Customary Law. According to the 1st Applicant, the 2nd Administrator was married as a second wife in the year 1975 but parted ways in the year 1978 and until their father's death in the year 2011, the 2nd Administrator had never set foot at their father's home and only resurfaced after their father's death and threatened to take over their home. He deposed that a woman married under customary law is regarded as a wife regardless of whether the husband contracted a previous or subsequent monogamous marriage since marriage under customary law deemed to be potentially polygamous.
19. He deposed further that the 1st Administrator, their mother is equally entitled to administer the estate of the deceased herein just like the 2nd Administrator and the fact that the 2nd Administrator was married through wedding does not make her any superior or more entitled than the 1st Administrator and the only reason why the 2nd Administrator was not included at the commencement of these proceedings is that the 2nd Administrator had separated from their father and went away for many years and the 1st Administrator was not aware of her whereabouts.
20. It was opined that it is not true that the Applicants are not grandchildren of the deceased herein, as they are legitimate children of the late Jonathan Muai Nziuko who was the only son of the deceased herein. It was contended that their father recognized the Applicants as his children and at no time had the late Jonathan Muai Nziuko or any other person questioned their paternity during his life time and the deceased herein recognized them as his grandchildren and they lived with him and even cared for and nursed him until the time of his death.
21. The Applicant contended that he was unable to provide their birth records since the same went missing after their home was raided by persons they believe might have been under the instructions of the 2nd Administrator. The incident was reported to Muumandu police station and booked as OB NO. 03/21/09/2023 and police are still conducting investigations.
22. He deposed that he is advised by his advocate that children taken in by the deceased and whom he has expressly recognized or in fact accepted as children of his own are regarded as children for purposes of succession and have an equal entitlement to the deceased's estate and to participate in the succession proceedings just like any other children of the deceased. According to the 1st Applicant, they are entitled to participate in the mediation and in these succession proceedings. He deposed that in the event that the 1st Administrator is found to be incapable of continuing with administration of the deceased's estate, his siblings and him would be entitled to be appointed in her place to continue with administration in conjunction with the 2nd Administrator since the succession herein involves a polygamous family and each house has to be represented.

SUPPLEMENTARY AFFIDAVIT

23. The 2nd Administrator filed a supplementary affidavit dated 1st November, 2023 on 7th November, 2023 wherein she deposed that her marriage with Jonathan Muia Nziuko was Monogamous while he



was clearly a bachelor and herself as a spinster as clearly executed and witnessed in their marriage certificate. When she married her husband there was no prior marriage and they followed the procedure fully, nobody blocked their marriage and there has been no complaint to date. There is no proof of the purported marriage except the aforesaid purported affidavit allegedly signed in 1995 which cannot purport to create a non-existent marriage allegedly conducted 22 years earlier and no evidence whatsoever of the alleged Kamba Customary marriage has been tendered herein.

24. The 2nd Administrator contends that once a monogamous marriage takes place, it remains so until death do them part and their marriage has been in force until he died. She said the 1st Applicant signed an affidavit out of hearsay as he was born in 1985, 13 years after the purported marriage of the 1st Administrator and one cannot testify about an event that they did not witness. In addition, she said that there was no evidence that she has separated from her husband.
25. She denied there being a marriage between Jonathan Muia Nziuko and Ida Margaret Ndumba and in fact her husband used to refer to the 1st Administrator as “a business partner”.
26. It was her contention that the Applicants have failed to attach not only their identity cards herein but also their birth certificates intentionally to conceal the truth. That there are details in those birth certificates which they are trying to conceal or alter, for example the identity card of Michael Maithya reads Michael Maithya Kitele that Michael has always intentionally left his last name herein to conceal his identity in the very pleadings. She alleged that the applicants want to hide under this allegation so that they can obtain other birth certificates with the name Nziuko it is unbelievable that the 1st, 2nd and 3rd applicants being adults that they all kept their national identity cards and birth certificates under one roof.
27. She deposed that the applicant does not substantiate which house was broken into and if she is a suspect she has never been called to make a statement and that the applicant should desist from implicating her personally with criminal activities.
28. She deposed that her late husband Jonathan Muia Nziuko never took in any other person as his child other than her children and the applicants are only imposing themselves to be out of greed while blowing hot and cold air by claiming on one hand that they are the children of the late Jonathan Muia Nziuko while on the other hand deposing that he allegedly accepted them as his children with no proof of dependency whatsoever. It is contended that the 1st Administrator left the applicants out as they are not entitled to the estate herein and the 1st applicant cannot purport to depose on her behalf.
29. She deposed that they are not dealing with a polygamous but rather a monogamous family.
30. The matter was canvassed by written submissions.

APPLICANTS’ SUBMISSIONS

31. The applicants in their submissions dated 7th October, 2023 and filed in court on 9th October, 2023, wherein counsel for the applicants raised two following issues.
32. First was whether the applicants should be enjoined as the beneficiaries of the estate of the deceased, counsel relied on Section 3 (2) of the *Law of Succession Act* and submitted that the Applicants in their supplementary Affidavit averred that they have always lived with the late Jonathan Muia Nziuko as their father and that he expressly recognized them as his children and at no point did their father or anyone else their paternity during their father’s lifetime.
33. The 1st Applicant submitted that he had annexed a copy of a chief’s letter dated 11th October, 2011 and marked as SMN2 which confirms that the 1st Administrator lived with the late Jonathan Muia



Nziuko as his wife and together they had three children namely Michael Maithya; Catherine Mwendu and Stephen Muthiani. Further that Applicant's graduation ceremony photographs show the 1st Applicant together with his mother, the 1st Administrator, his father, the late Jonathan Muia Nziuko and his sister, the 3rd Applicant. The 1st Applicant contends that this confirms his relationship with the deceased. To bolster his averment counsel relied on the case of Patricia Muthoni Njuki & 2 Others Vs Faustino Njeru Nthiga & Another [2020] eKLR.

34. It was submitted that Section 41 of the LSA provides for the principle of representation wherein a grandchild is substituted for his or her parent in all cases of intestacy where the parent dies before the intestate and relied on the cases of Re Estate of Joseph Gichuki Riunge (Deceased) [2016] eKLR, Re Estate of Samuel Simekha Chalingo (Deceased) [2017] eKLR and in Re Estate of Katingi Ndambuki Mutwota Alias Katingi Ndambuki Mutwota (Deceased) (succession Appeal E001 of 2022) [2022] KEHC 14292 (KLR), to buttress the point that the grandchildren of the deceased are beneficiaries and are entitled to participate in the succession proceedings.
35. As to who should bear the costs of this application, it was submitted that costs follow the event and costs are usually awarded to the successful party. It was submitted that the Applicants are entitled to the costs of the Application.

2ND ADMINISTRATOR'S SUBMISSIONS

36. In her submissions dated 6th November, 2023 submitted that the Applicants, who are children of Ida Margaret Ndumba, are not grandchildren to the deceased and that is why even their own mother never included them in the petition she filed herein after conducting a sham citation Machakos High Court Citation Cause number 968 of 2012 with the interested party herein and that they cannot now purport to depose inadvertently on her behalf without authority.
37. It was her contention that they simply want to scuttle the succession process and derail the course of justice. The applicants have deliberately failed to produce any identification document to show their relation to the deceased herein and the chief's letter clearly does not mention them. It was submitted that the applicants' failure to attach not only their identity cards herein but their birth certificates is fatal to their application as this is intentional and meant to conceal the truth as there are details in those birth certificates which they are trying to conceal or alter identity.
38. It was her contention that it is unbelievable that the 1st, 2nd and 3rd applicants being adults kept their national identity cards and birth certificates under one roof, there are no police abstract for any of them and they are also obliged by law to have identification documents, opining that not even a waiting card has been exhibited.
39. It was averred that the 1st Applicant does not substantiate which house was broken into at Muumandu and more so considering the Applicants and their mother have never lived in Muumandu. It was submitted that the 2nd administrator has never been called to make a statement with the police and the 1st applicant attempt to implicate her with alleged criminal activities without proof is uncouth.
40. It was averred that this is a matter which had been referred to mediation and the 2nd Administrator rightly opposed non-parties in this matter from participating in the mediation way back on 30/11/2021 only for the Applicants to bring this Application a period of 2 years down the line yet again stalling and scuttling the process. The 1st administrator attended all the called mediation sessions and it is therefore not true that she is unable to attend mediation sessions then it would also mean that she is actually unfit to be an administrator herein.



41. It was submitted that the 1st Administrator herself ought not participate in these proceedings as she was not a lawfully wedded wife to the 2nd Administrator's deceased husband as she claims further, the reason why she is in the proceedings is because she commenced this succession cause behind the 2nd Administrator's back and the 2nd Administrator came in when she learnt of the same and had the grant herein revoked and as a result thereof she was made an administrator.
42. It was her case that her late Husband Jonathan Muia Nziuko was very outgoing and if anybody invited him for a function he would willingly attend and this happens with most people and more so Jonathan referred to Ida Margaret Ndumba as "a business partner" and that the alleged photographs do not make someone a child to a deceased. Reliance was placed on Section 106B (4) of the *Evidence Act* and opined that the alleged annexed photos relied on by the Applicants are inadmissible herein as no certificate thereto has been filed.
43. Averring that the late Jonathan Muia Nziuko never took in any other person as his child and that his only biological children are those he got with the 2nd Administrator. She prayed that the Applicants' application be dismissed with costs.
44. The 1st Administrator and the Interested party did not respond .to the Chamber Summons Application nor file submissions

DETERMINATION

45. I have considered the Chamber Summons application and the corresponding affidavits as well as the submissions on record and find that the issue for determination is whether the Applicants should be enjoined as beneficiaries of the estate.
46. The issue before this court is whether the 1st, 2nd and 3rd Applicants should be enjoined as interested parties in this suit and consequently participate in the medication proceedings.
47. The Supreme Court elucidated on the issue of joinder of an interested party in the case of Communications Commission of Kenya & 4 Others v Royal Media Services Limited & 5 others [2014] eKLR, where it held:-

“The applicant now seeks to be enjoined in this matter, even though it was neither a party at the High Court nor at the Court of Appeal. The applicant has not demonstrated how the ends of justice would better be served by enjoining it in the appeal...

We cannot exercise our discretion to enjoin a party that disguises itself as an Interested Party, while in actual fact merely seeking to institute fresh cause.”
48. The same court in Francis Karioko Muruatetu & Another v R & 5 Others [2016] e KLR regarding considerations on the admission of interested parties will be of guidance in determining this issue. the Apex court stated that;

“

- “(33) These legal provisions have been considered by the Court in Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 Others, Supreme Court Petition No. 12 of 2013, [2014] eKLR (an application by the Law Society of Kenya). In this case, the Law Society of Kenya (LSK) sought to be enjoined in the proceedings as an interested party, but leave was denied. The Court observed that :



“[13] While the Rules have a definition of who an amicus is, there is no definition attributed to ‘Intervener’ or ‘Interested Party’. However, from Rule 25 above, one is allowed to apply to be enjoined any time in the course of the proceedings.

“[14] Black’s Law Dictionary, 9th Edition, defines “intervener” (at page 897) thus:

“One who voluntarily enters a pending lawsuit because of a personal stake in it” and defines ‘Interested Party’ (at p.1232) thus:

“A party who has a recognizable stake (and therefore standing) in a matter”.

(34) With that definition of “interested party,” the Court proceeded to hold further [paragraphs 17-18]:

“[17] Suffice it to say that while an interested party has a ‘stake/interest’ directly in the case, an amicus’s interest is its ‘fidelity’ to the law: that an informed decision is reached by the Court having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom.

“[18] Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...”

(35) This Supreme Court decision was cited by the High Court in *Judicial Service Commission v. Speaker of The National Assembly & 8 Others*, [2014]eKLR. The High Court also cited the definition of ‘interested party’ in: *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereafter the “Mutunga Rules”) thus:

“Rule 2 of the Mutunga Rules defines an interested party as a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the Court, but is not a party to the proceedings or may not be directly involved in the litigation.”

(36) Once again in the said High Court matter, the LSK was denied admission as an interested party because, in the perception of the Court, it could not show an identifiable stake in the matter or in its outcome, or what prejudice it would suffer if not enjoined as a party.

(37) From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:

One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

- i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.



- iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.” (emphasis added)
49. As espoused above, enjoinder is not a right of a party but at the discretion of the court. In summary, the applicant has to have a stake in the subject matter before the Court, he has to show that he will be affected by the decision of the Court, and that his interests will not be articulated well in his absence from the proceedings.
 50. In this case, the Applicants allege to be the grandchildren of the deceased by virtue of being the children of the 1st Administrator but have not attached identity cards nor birth certificates to show their relationship with the late Jonathan Muia Nziuki.
 51. According to the chief’s letter dated 01.02.2012, the estate herein was survived by the following;
 - a. Jonathan M. Nziuki (deceased)
 - b. Magdalena Kamene Nzyuko daughter in law
 - c. Thomas Cleophas Munyasya grandson
 - d. Alphonce Makitia Muia grandson
 - e. Victoria Kensly Muoti Muia granddaughter
 - f. Veronicah Makala Muia granddaughter
 52. The contention that the above named are grandchildren of the deceased is not in contention and was emphasized by this court in its ruling of 28.06.2021.
 53. According to the chief’s letter dated 11.10.2011, IDAH NDUMBA NZUIKO lived with the late JONATHAN MUIA NZIUKO for over twenty five years as husband and wife and had three children namely;
 - a. Michael Maithya
 - b. Catherine Mwendu
 - c. Stephen Muthiani.
 54. Section 51(2) of the [Law of Succession Act](#) provides as follows;
 - (2) Every application shall include information as to—
 - (a) the full names of the deceased;
 - (b) the date and place of his death;
 - (c) I his last known place of residence;
 - (d) the relationship (if any) of the applicant to the deceased;
 - (e) whether or not the deceased left a valid will;
 - (f) the present addresses of any executors appointed by any such valid will;



- (g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;
- (h) a full inventory of all the assets and liabilities of the deceased; and
- (i) such other matters as may be prescribed.

55. This Court has perused the application for grant of letters of administration on record and agree with the 2nd Administrator that there has been no mention of the applicants as the people who survived the deceased yet it is not disputed that the 1st Administrator is the 1st, 2nd and 3rd Applicant's mother. How could she have made such an omission?

56. The Applicants in this case only benefit from this estate through their father who was an only child.

57. In the case of *Cleopa Amutala Namayi v Judith Were Succession Cause 457 of 2005* [2015] eKLR Mrima, J. observed thus:

“Be that as it may, under Part V of the Act grandchildren have no automatic right to inherit their grandparents The argument behind this position is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents indirectly through their own parents.... The children to the grandparents inherit first and thereafter the grandchildren inherit from their parents. The only time where the grandchildren can inherit directly from their grandparents is when the grandchildren's own parents are dead...

58. In re Estate of Imoli Luhitse Paul (Deceased) [2021] eKLR the court stated as follows;

“Grandchildren are not in the same footing with the daughters-in-law or children-in-law of the deceased. Grandchildren would be blood relatives of the deceased. They would be entitled automatically, as blood kin of their grandparent, to take the share due to their own parents, the biological children of the deceased, where such biological children are dead. A surviving spouse of a dead child of the deceased is not a biological kin of the deceased parent-in-law. Such a child-in-law would have no automatic right or entitlement to a share in the estate of her parent-in-law. Whereas statute is clear that grandchildren have a right under sections 39 and 41 of the *Law of Succession Act*, there is not a single provision in the *Law of Succession Act*, or any other statute for that matter, which makes provision for any in-law. Consequently, since in-laws have no rights of inheritance from the estates of their in-laws, they can only approach the court upon obtaining representation to the estates of the persons on whose account they claim. Their claim to a stake in the estate of the parent-in-law would not be in their own right, but rather on behalf of the estate of another, their dead spouse. They can only stake a direct claim to the estate of their late spouse, whose assets include what the dead spouse inherits from the estate of their parents. I must emphasize that grandchildren are not in that boat with such in-laws, and they claim from their grandparent's estate, not on behalf of their dead parents, but directly as grandchildren, children of such dead children, the share that ought to have gone to their parents.”

59. The evidence relied upon by the Applicants to show their relationship with the deceased is a letter from the chief and a photo graph indicating that the deceased attended their graduation, nothing else. The photograph is contested by the 2nd Administrator who contends that Section 106B (4) of the *Evidence*



Act has not been complied with and therefore the alleged annexed photos relied on by the Applicants are inadmissible herein as no certificate thereto has been filed.

60. The admissibility of electronic records is indeed provided for under Section 106 B of the Evidence Act (Cap 80) Laws of Kenya in the following terms:

“106B (1) Notwithstanding, anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as a computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

- (a) identifying the electronic record containing the statement and describing the manner in which it was produced;
- (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
- (c) dealing with any matters to which conditions mentioned in sub-section (2) relate; and
- (d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate),

shall be evidence of any matter stated in the certificate and for the purpose of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge of the person stating it.”

61. In the case of Republic vs Barisa Wayu Matuguda [2011] eKLR the court observed that:

“ . . . any information stored in a computer. . . which is then printed or copied. . . shall be treated just like documentary evidence and will be admissible as evidence without the production of the original. However section 106B also provides that such electronic evidence will only be admissible if the conditions laid out in that provision are satisfied.

.....

This provision makes it abundantly clear that for electronic evidence to be deemed admissible it must be accompanied by a certificate in terms of section 106B (4). Such certificate must in terms of S.106B (4) (d) be signed by a person holding a responsible position with respect to the management of the device.... Without the required certificate this CD is inadmissible as evidence”

62. This Court finds the photographs inadmissible for failure to comply with section 106 B of the Evidence Act.



63. Accordingly, I find that the Applicants have proved that they have a stake in the succession proceedings herein. However, their mother is alive and well for there has been no evidence of her incapacity and the contention that she has been attending mediation sessions has not been contested. In any event, the Applicants have not shown how they will be affected by the decision of the Court and that their interests will not be articulated well in their absence from the proceedings. If the Applicants are joined to the Mediation Proceedings then similarly the Respondents children be joined.
64. In the end, the chamber summons are found without merit and is dismissed. The Court Order of 28/06/2021 shall suffice.
65. Each party will bear its own costs.

It is so ordered.

RULING DELIVERED, SIGNED & DATED IN OPEN COURT IN MACHAKOS HIGH COURT ON 26TH APRIL, 2024. (VIRTUAL/PHYSICAL CONFERENCE).

M. W. MUIGAI

JUDGE

SUCC CAUSE NO. 1182 OF 2012 - MHC	0
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