



REPUBLIC OF KENYA



**In re Estate of Shem Marcaad Nyamai alias Shem (Deceased) (Succession Cause 863 of 2016) [2024] KEHC 6079 (KLR) (Family) (27 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6079 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 863 OF 2016  
MA ODERO, J  
MAY 27, 2024**

**RULING**

1. Before this Court is the Summons dated 9<sup>th</sup> February, 2023 by which the Applicant Jennifer Jagire Nyamai seeks the following orders;-
  - “ 1. Spent
  2. That the Honourable Court be pleased to re-open the applicants case and the applicant be allowed to call Margaret Omolo (the Deceased’s biological sister) to testify on behalf of the applicant.
  3. That the costs of this application be provided for.
2. The application which was premised upon Section 47 of the *law of Succession Act*, the inherent jurisdiction of the court and all other enabling provisions of law was supported by the Affidavit of even date sworn by the Applicant.
3. The Respondent Zaina Rashid Mbonika opposed the application through the Grounds of opposition dated 22<sup>nd</sup> June, 2022.
4. The application was canvassed by way of written submissions. The Applicant filed the written submissions dated 13<sup>th</sup> March, 2023, whilst the Respondent relied upon her written submissions dated 6<sup>th</sup> March, 2023.

**Background**

5. This Succession Cause relates to the estate of the late Shem Marcaad Nyamai alias Shem M. Owiti alias Shem M.O Nyamai who died intestate on 5<sup>th</sup> March, 2016.



6. Following the demise of the Deceased the Respondent Zaina Rashid Mbonika filed in court a citation dated 19<sup>th</sup> May, 2016 seeking to have the Applicant and her children (the citee's) appear and accept or refuse to take out letters of Administration in respect of the estate of the Deceased.
7. The citee's did not respond to the citation and vide a ruling delivered on 30<sup>th</sup> May, 2018 Hon. Justice Onyiego directed the citor (Respondent) to petition the court for Grant of letters of Administration Intestate.
8. A Grant was duly issued to the Respondent on 6<sup>th</sup> August, 2021. The Applicant then filed a Summons for Revocation of Grant dated 27<sup>th</sup> May, 2021. The court directed that the matter would be heard by way of 'Vive Voce' evidence and parties were directed to comply with Order 11 of the Civil Procedure Rules 2010.
9. The hearing of the main suit commenced in Open Court on 23<sup>rd</sup> January, 2023. The Applicant gave evidence on that date and was cross-examined after which she closed her case. The hearing was slated to proceed on 16<sup>th</sup> February, 2023 on which date counsel for the Applicant informed the court that she had filed an application seeking to re-open the Applicants case.
10. Thereafter on 9<sup>th</sup> February, 2023, the applicant filed this application seeking leave to re-open her case and call one more witness to testify on her behalf. As stated earlier the application was strenuously opposed by the Respondent.

### **Analysis And Determination**

11. I have carefully considered the application before this court, the Ground of opposition filed by the Respondent as well as the written submissions filed by both parties.
12. The decision on whether or not to allow such an application to re-open a case is left purely to the discretion of the Judge. All that is required is that the decision be exercised judiciously and in the interest of justice. The court must consider whether allowing such an application will cause the opposite party to suffer prejudice.
13. The parties in this matter were directed to file and exchange any witness statements and / or Affidavits as well as any exhibits they would be relying on. This was to comply with the pre-trial directions in Order 11. However, the fact that the court certifies the matter ready for hearing is not necessarily a bar to a party applying to adduce additional evidence.
14. In Murphy on Evidence 12<sup>th</sup> Edition at paragraph 17.17 it is stated that
 

“ the general rule of practice, in both Criminal and Civil cases, is that every party must call all the evidence on which he proposes to rely during the presentation of his case, and before closing his case. (See *Kane* {1977} 65CR APPR 270). This involves the proposition that the parties should foresee, during their preparations for trial, what issues will be, and what evidence is available and necessary in order to deal with those issues. The definition of the issues in a Civil case, by exchange of statements of case and witnesses' statements, is designed to enable this to be done wherever possible.”
15. In the case of *Oakley v Royal Bank of Canada* {2013} ONSC 145 [2013] OJ NO. 109 SC the court stated as follows:-
 

“ the Court requires the parties to mitigation to bring forward their whole case, in both civil and criminal matters, the crown or plaintiff must produce and enter in its own case all



clearly relevant evidence it has. On the other hand, a trial judge has the discretion to permit a plaintiff to re-open its case. This discretion however must be exercised judicially. It must involve a scrupulous balancing of the accountability of counsel for decisions regarding the prosecution of its case and the interest of justice.” [Own emphasis]

16. In this matter although the Applicant has closed her case, the Respondent is yet to give evidence.
17. In the case of *Samuel Kiti Lewa v Housing Finance Company Limited & Another* [2015] eKLR, Hon. Lady Justice Mary Kasango (now retired) held thus

“the Court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion the Court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence. ....

the parties have a duty to ensure they comply with their respective time lines, and the Court must adhere to its own. There must be a fair and level playing field so that no party or the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party or the Court as a result of omissions or characteristics which were foreseeable or could have been avoided. The other issue the Court must consider when exercising its discretion to allow a further affidavit is the nature, context of the new material intended to be provided and relied upon. If it is small or limited so that the other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the Court must with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and or admissions of additional evidence.” [Own emphasis]

18. Similarly in *Odoyo Osodo v Rael Obara Ojuok & Others* [2017] eKLR the Court held that

“the Court’s discretion in deciding whether or not to re-open a case which the applicant had previously closed cannot be exercised arbitrary or whimsically but should be exercised judiciously and in favour of an applicant who had established sufficient cause to warrant the orders sought.”

19. The witness whom it is proposed to be called is a sister to the Deceased who presumably had intimate knowledge of the Deceased’s marital history. This is a matter in issue in this case. The evidence of this witness will therefore in my view enable the court to reach a just decision in the matter.
20. I do not see what great prejudice the Respondent stands to suffer if this application is allowed. The witness will give oral evidence and the Respondent will be at liberty to cross-examine her. Moreover since they have not opened their case the Respondent is at liberty to call a rebuttal witness if she so wishes.
21. Finally I do allow the summons dated 9<sup>th</sup> February, 2023 in terms of Prayer (2). The costs of this application will be met by the Applicant.

**DATED IN NYERI THIS 27<sup>TH</sup> DAY OF MAY, 2024.**

**MAUREEN A. ODERO**

**JUDGE**

