



REPUBLIC OF KENYA



In re Estate of Benson Mwangi Kimanga (Deceased) (Succession Cause 1445 of 2020) [2024] KEHC 7655 (KLR) (Family) (27 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7655 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1445 OF 2020
HK CHEMITEI, J
JUNE 27, 2024
IN THE MATTER OF THE ESTATE OF BENSON MWANGI KIMANGA (DECEASED)**

BETWEEN

**ALICE WANJIRU MWANGI 1ST APPLICANT
MARY WAITHIRA MWANGI 2ND APPLICANT
JANE WAMAITHA MWANGI 3RD APPLICANT**

AND

**STEPHEN MAINA KIMANGA 1ST RESPONDENT
FREDRICK NJORA MWANGI 2ND RESPONDENT
PAUL KIMARI MWANGI 3RD RESPONDENT
JOTHAM GITHINJI 4TH RESPONDENT**

RULING

1. This ruling relates to the application dated 31st January, 2024 filed by Wangalwa Oundo, the Applicants' advocate on record, seeking for orders that:
 - (a) This Honourable Court be pleased to admit the supporting affidavit of Jotham Githinji (deceased) dated 21st June, 2021 as evidence in this court.
 - (b) The costs of this application be provided for.
2. The application is supported by affidavit sworn by Wangalwa Oundo on 31st January, 2024 stating inter alia that the Applicants filed summons dated 21st June, 2021 and thereafter their counsel made an application dated 5th August, 2021 for the summons dated 21st June, 2021 to be heard urgently during



court vacation due to the Alice Wanjiru Mwangi's and Jotham Githinji's ill health. Jotham Githinji died before the summons dated 21st June, 2021 was heard. The Applicants thereafter filed an objection to the making of the grant of probate dated 7th December, 2020.

3. The said Jotham Githinji was the deceased's last born brother who had a recollection of the events surrounding the marriage between the deceased and Alice Wanjiru Mwangi and was a witness to it. Parties gave oral evidence during the hearing of the objection and the petition for probate of written will. Alice Wanjiru Mwangi wants to be recognized as the deceased's first wife.
4. The application is opposed vide replying affidavit sworn by Jonathan Omangi, advocate on 8th February, 2024. He states, inter alia that Alice Wanjiku Mwangi's statement and oral testimony do not mention the presence of a minor, Jotham Githinji during the Kikuyu traditional marriage in 1951 or any other time. Minors are not allowed to participate in Kikuyu traditional marriage ceremonies save for eating purposes.
5. Further that the affidavit sworn in 2021 over events that took place over 70 years ago is doubtful. Jotham Githinji is an executor and beneficiary of the deceased's will and it does not make sense why he waited for 15 years to challenge the will. There will therefore be no chance to cross examine him on the content of his affidavit since he is now deceased.
6. The Applicants have filed submissions dated 26th January, 2024 placing reliance on the following:-

a. Section 34 (1) of the *Evidence Act* which states as follows:

“Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceedings, for the purposes of providing the facts which it states, in the following circumstances- (a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable.”

b. Section 35 of the *Evidence Act* which states as follows:

“(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say- (a) if the maker of the statement either – (i) had personal knowledge of the matters dealt with by the statement.... (b) if the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.”



- c. [*Republic v Evans Masbeti Shimwati*](#) [2017] eKLR where the court cited the case of [*Abdi Adan Mohamed v Republic*](#) eKLR where the court stated as follows:

“.....It, of course, will be impractical where it is demonstrated that the witness sought to be summoned is deceased, to insist on calling such a witness. Similarly, if the witness cannot be traced and it is demonstrated to the satisfaction of the court that efforts to trace him have failed, the magistrate or judge may adopt and rely on the evidence on record previously recorded by the (outgoing) magistrate or judge.”

7. The respondents have filed submissions dated 28th February, 2024 relying on the following:

- a. Section 34 (1) of the [*Evidence Act*](#) which states as follows:

“Evidence given by a witness in a judicial proceeding is admissible in a subsequent proceeding or at a later stage in the same proceeding, for the purpose of providing the facts it states, in the following circumstances – (a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable; and where, in the case of a subsequent proceedings...”

- b. Section 33 (f) of the [*Evidence Act*](#) which states as follows:

“When the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.”

Analysis and Determination

8. Having gone through the application before this court, the responses and submissions filed by the parties, the issues for determination as crafted by the Applicants is whether or not the affidavit of Jotham Githinji (Deceased) is admissible in this Honourable Court.

9. In [*Murgor & Murgor Advocates v Kenya Airports Authority*](#) [2022] eKLR the court stated as follows:

- “27. Before venturing to answer the aforesaid question, it is important to take note of the provisions of Order 19 rules 1 & 2 of the [*Civil Procedure Rules 2010*](#), which provides as hereunder:-

Power to order any point to be proved by affidavit [Order 19, rule 1.]

Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable:

Provided that, where it appears to the court that either party bona fide desires the production of a witness for cross-examination and that such witness can be



produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

2. Power to order attendance of deponent for cross-examination [Order 19, rule 2.]
 - (1) Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent.
 - (2) Such attendance shall be in court, unless the deponent is exempted from personal appearance in court, or the Court otherwise directs.

28. It is apparent or evident that evidence may be given vide an affidavit, in appropriate cases and/or with leave of the court. However, where a Party desires to cross examine on the contents of an affidavit, such a party is at liberty to apply to court to order and/or direct the attendance for cross examination of the Deponent.

29. What comes out clearly is that the order and/or direction for attendance for cross examination must relate and/or be directed to the Deponent of the impugned affidavit. Contrarily, such an order cannot be made and/or directed to a person other than the Deponent of the impugned affidavit.

30. In view of the foregoing, I am afraid that the Application by the advocate/applicant, which seeks to cross examine one, Ms. Margaret Munene, on the contents of the Replying Affidavit sworn by Ms. Kathrine Kisila, now deceased, on the 15th July 2020, is misguided and/or misdirected.

31. In support of the foregoing position, I invoke and rely in the Decision in the case of *G G-R v H-P S* [2012] eKLR, where the Honorable court stated as hereunder;

“The law has allowed evidence to be proved by way of Affidavits under Order 19. But under Rule 2 of the said Order, the court may order a deponent of an Affidavit to attend court to be cross examined. It would appear that where allegations of matters touching on fraud, mala fide, authenticity of the facts deponed, bad motive among others are raised, cross-examination of a deponent of an Affidavit may be ordered. This also extends to where there is conflict of Affidavits on record or where the evidence deponed to is conflicting in itself.”

Further, the order for cross examination is a discretionary order but as is in all discretions, the same must be exercised judiciously and not whimsically. There should be special circumstances before ordering



a cross examination of a deponent of an Affidavit. The court must feel that adequate material has been placed before it that show that in the interest of justice and to arrive at the truth, it is just and fair to order cross examination.

32. In any event, the position as pertains to any deposition, affidavit and/or declaration made by a person who is deceased, prior to and/or before the hearing and disposal of the proceedings, where such disposition were made is well provided for and underscored by the provisions of Section 33 of the *Evidence Act*, Chapter 80 Laws of Kenya.”

10. Section 33 (f) of the *Evidence Act* provides,

“Statements, written or oral, of admissible facts made by a person who is dead, or cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible when the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.”

11. In light of the foregoing, I think the affidavit of Mr. Wangalwa clearly explains how the Applicant attempted to have the late Joram Githinji testify before he passed on. The application to have the matter heard during vacation states as much.

12. Secondly and based on the above cited authorities this court has the discretion to permit evidence to be tendered by way of affidavits. It becomes even more apparent when the deponent has passed on.

13. I respectfully do not find any prejudice the Respondents are likely to suffer. In any case that evidence alone is not sufficient for this court to determine the matter at hand. At the appropriate time it shall be required to take cumulatively the entire evidence adduced by the parties in order to arrive at its final decision.

14. In the premises I do not find any reason not to allow the application and the same is granted as prayed.

15. Costs shall await the outcome of the main suit.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAIROBI THIS 27TH DAY OF JUNE 2024.

H K CHEMITEI

JUDGE

