



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO.535 OF 2006

IN THE MATTER OF THE ESTATE OF ZWN (DECEASED)

CDM.....APPLICANT

-VERSUS-

J B C.....1ST RESPONDENT

SCN.....2ND RESPONDENT

LMW.....3RD RESPONDENT

RULING

1. The Applicant claims that she is the grand-daughter of the Deceased herein and is therefore entitled to benefit from his estate. The Applicant's claim is that she is the biological daughter of RKWN – also deceased, who, it is undisputed, was the biological son of the Deceased.

2. According to the Applicant, her alleged father and all those claiming under him had been left out the Affidavit dated 17/08/2007 in support of the Summons for Confirmation of Grant. Her aunt - the 3rd Respondent herein then filed an Affidavit of Protest dated 21/04/2009 where the said RKW and his two other children were included as beneficiaries. The two children are KK and LK. The Applicant says that these two are her step-siblings – borne of RKW and two different women – just like in her case. She says, therefore, that she does not understand why the administrators of the estate of the Deceased elected to exclude her while including KK and LK.

3. The Applicant filed an Affidavit of Protest dated 28/02/2017. The parties agreed that she be subjected to a DNA test to determine if she was, indeed, the biological daughter of RKW.

4. In a report dated 04/09/2020 the Government Analyst was of the opinion that the DNA test conducted was inconclusive. It was also his opinion that there was a need to get a wider gene pool or have the DNA generated from the remains of RKW to arrive at a comprehensive resolution. Following that recommendation, the Applicant has now approached the Court asking the that the Court grant orders for the exhumation of her alleged deceased father interred on Nyandarua/Gilgil West/xxx for purposes of taking samples for another DNA Test. The Applicant also feels that there is a need to subject her two siblings to DNA test for better results.

5. In her Notice of Motion dated 08/01/2021, the Applicant seeks the following pray

1. ***THAT*** the late RKWN'S grave situate in all that parcel of land known as L. R NYANDARUA/GILGIL WEST/xxx in Olkalau within Nyandarua County, be opened to exhume his body with the view of taking samples therefrom for purposes of Deoxyribonucleic Acid (DNA) tests.

2. ***THAT*** the officers of the Kenya Medical Research Institute do undertake disinterment and do obtain the necessary samples for DNA Test.

3. ***THAT*** the applicant herein, her two siblings; KK and LK and a brother or sister of the deceased RKWN do present themselves at the Kenya Medical Research Institute for extraction of DNA samples for testing

4. ***THAT*** the results for the above DNA test in regard to the paternity of the applicant be forwarded to this Honourable Court by the Kenya Medical Research Institute.

5. ***THAT*** the Officer Commanding Olkalau Police Station do provide security during the exhumation exercise.

6. **THAT** costs of this application and process be in the cause.

6. The 1st Respondent supports the Applicant's position. In his affidavit dated 02/06/2021, the 1st Respondent says that from the recommendations of the previous DNA report, a DNA test would be the only credible way for the Applicant to determine her paternity.

7. The Application is opposed by the 3rd Respondent through her Affidavit dated 31/05/2021. The 3rd Respondent concedes that the Applicant is a child of her deceased brother and is entitled to benefit from the estate of the Deceased herein. She is therefore opposed to exhumation of her late brother's body, which she deems unnecessary.

8. This, she says, is exacerbated by the uncertainty of whether there are any remains, her brother having died 30 years ago, and the undesirability of subjecting them to the emotional torture and trauma of having to see the remains of their brother and relieve the sad circumstances of his demise.

9. The 3rd Respondent believes that the exhumation for purposes of a DNA test is a drastic measure, that should only be made in exceptional circumstances. She cites the case of ***Hellen Cherono Kimurgor v Esther Jelagat Kosgei [2008] eKLR***. She suggests the use of any other methods of ascertaining the Applicant's paternity if the same is extremely necessary.

10. In the Applicant's submissions dated 15/03/2021, the Applicant reiterates the grounds of her application and affidavit. She cites the cases of ***Re PWM (Deceased) [2016] eKLR*** and ***Re Estate of Jacob Mwalekwa Mwambewa (Deceased)[2018] eKLR*** in support of her argument that the issue of paternity ought to be first determined before the succession can proceed.

11. From the record, the Applicant was triggered to file this application for what she deems to be first, exclusion of her father from the Deceased's estate and subsequently, her exclusion from claiming under her father's estate. The Applicant is invoking the right to claim from her grandfather's estate, by virtue of her father being deceased. From previous affidavits of the 3rd Respondent, (see the affidavits of 21/04/2009 and 06/10/2021), the 3rd Respondent has advocated for the inclusion of two of RK's children to the exclusion of the Applicant.

12. Save for the apparent exclusion, the Applicant's paternity has not been expressly denied by either of the parties. The 1st Respondent only says that the Applicant should be allowed to ascertain her paternity. This is one of the issues that would need to come at the time of hearing of the Protests filed by the 3rd Respondent and the Applicant, respectively. In which case, it will call for the parties to give a history of the circumstances of how the Applicant came to be associated with or why her paternity is denied.

13. All parties agree that exhumation is a drastic measure, but the Applicant argues that it is necessary. For the Court to order such a drastic measure, there needs to be established a nexus between the Applicant's claim of being a child and her alleged disinheritance. I am persuaded by the reasoning of Wendoh J. in the similar case of ***In re Estate of John Itegi Githinji (Deceased) [2020] eKLR***, where it was stated :

The process of exhumation being so drastic can only be undertaken where there is dire necessity. As observed earlier, this application is premature. There are other available ways which the applicants can establish their rights in the objection proceedings other than calling for exhumation at this stage. Further to that, there must be evidence lasted at the hearing to determine whether exhumation is necessary.....

14. Likewise, in ***R N C & 2 others v S M G [2017] eKLR*** the Court held that an order of exhumation of a deceased person to have a DNA testing to carry out a paternity or maternity test of a child is a drastic order which must only be made in exceptional and compelling circumstances.

15. The circumstances in this case are neither exceptional nor compelling. The 3rd Respondent in her Replying Affidavit acknowledges that the Applicant is a child of RKW. The other parties did not address the issue. Again, the Applicant's and the 3rd Respondent's protests are yet to be heard, which in my view, will determine whether there is a need for the drastic measure of exhumation. It is at the hearing of those Protests that the Applicant is liberty to adduce any other evidence to prove her connection with RKW and the Respondents to adduce evidence to the contrary if need be. Thereafter, the Court can determine is there is a need for either exhumation or a DNA test with RKW's other children.

16. On the alternative prayer seeking that RK's other children be subjected to a DNA test, it would be imprudent to order a DNA test on persons who are not party to this Application, and who have not had a chance to respond to the same.

17. The upshot is that the application dated 08/01/2021 is denied at this time for the reason that it is premature as there may be other testimonial means for the Applicant to prove that she was, indeed, a child of RKW. That proof will include, for example, the admission by the 3rd Respondent – LMW – that the Applicant is, indeed, a child of RKW. In the face of these other available means of proof, the drastic action of ordering an exhumation is unwarranted.

18. The costs of this Application shall be in the cause.

DATED AND DELIVERED AT NAKURU THIS 17TH DAY OF FEBRUARY, 2022

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.