REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 435 OF 2013

IN THE MATTER OF THE ESTATE OF JOHN KUNGU GITUKU (DECEASED)

RULING

1. There are two applications by two different persons pending ruling and whose subject is related.

I will consider both of them separately though and distinctly in this ruling.

2. The first application is dated the 11th of December 2019 and filed by one **Paul Nderitu Wanjiru** pursuant to Section 76 (a) (b) & (c) of the Law of Succession Act (The Act) and Probate and Administration Rules (Rules) and Rule 3 of the High Court (Practice and Procedure) Rules.

3. The said applicant claims to be a child of the deceased and therefore seeks to be recognized as such. He also seeks for the proceedings to be stayed pending that hearing of the application and for the grant herein revoked and annulled

4. The applicant in his supporting affidavit claims that he is the first child of the deceased having been born on the 12th of December 1989 between the deceased and one Esther Wanjiru Nderitu who had a relationship then with the deceased. He also claims that the deceased took care of him and even set him up in business.

5. This application was supported by the affidavit of Esther Wanjiru Nderitu (mother) and Joseph Irungu Gituku who confirm the allegations. The two affidavits were filed late and without leave of the court.

6. The application was objected to by the 1st Objector **Purity Wanjiru Kimani** who argued that the application is an afterthought having been brought 7 years after filing of the Petition. She further argues that no evidence of the allegation has been placed before court.

7. The application is said to have been objected to by the Petitioners though the affidavit of Lydia Muthoni Wahome dated 7th April 2020 (the same is not on record).

SUBMISSIPONS

8. In his submissions Paul Nderitu Wanjiru (2nd Objector) submitted that the grant was obtained fraudulently by concealment of the fact that he is a child of the deceased, who during his lifetime recognized him and catered for him a fact well known at the deceased home area. Further that his claim is supported by his biological mother and the deceased brother.

9. In their submissions which are similar the respondents to the application dated 11th December 2019 argued that the two affidavits in support of the application were filed out of time, without leave and ought to be struck out. Further, the application is an afterthought and no evidence supporting the claim has been placed before court. And that the 2nd and 3rd prayers are premature.

10. As for the 2nd application dated 20th February 2020 one of the Petitioners **Lydia Muthoni** seeks to have **Catherine Wairimu Kirago** undergo a DNA test to establish whether she is a child of the deceased. It is her claim that as a widow she is not certain whether the said Catherine Wairimu Kirago is indeed a child of the deceased on grounds that her identity card and birth certificate do not have similar details. Further the said Catherine has two different birth certificates.

11. It was equally submitted on behalf of the Petitioner that the DNA will establish the paternity of the said Catherine and this will not prejudice the parties but assist the court determine the real issue at stake.

12. The 2nd Objector did not respond to the application. The 1st Objector, Purity Wanjiru Kimani objected to the same through her affidavit

of 9th March 2020 stating that the application has been made late in the day; the issue of DNA testing had been visited by the court earlier and the court had determined who of those claiming dependency should be subjected to the same; Catherine is domiciled in Finland and requiring her to come to Kenya will be unaffordable as she is currently a student; and as the mother she has given reasonable explanation of the different information of place of birth on the identity card and the birth certificate.

13. The first application raises two issues;

i. **Whether the 2nd Objector is a child and therefore beneficiary to the estate of the deceased.**

ii. **Whether or not to revoke the grant.**

14. As regards the 1st application, this being a family matter and without placing too much technicality at the expense of dispensing substantive justice, the court declines to strike out the two affidavits filed late and admit the same in order for the court to arrive at a just and fair decision.

15. The issue of whether one is a beneficiary per se cannot be adequate to revoke a grant as necessary provision of such a beneficiary can be provided for at the point of distribution of the estate and confirmation of the grant. Therefore, the court finds it unnecessary to revoke the grant based on the said reason.

16. Njangu v Wambugu & Another Nairobi HCCC No. 2340 of 1991 (unreported) the court said:

> **"In conclusion, I hold the view that where paternity is in dispute then within reasonable limits and in appropriate cases DNA testing of non-consenting adults may be ordered even at an interlocutory stage… The bid to establish the truth through scientific proof must however not be generalized and should never so lightly prevail over the right to integrity and right to privacy until it is clear that such right ought to be clear…"**

The above authority captures the two scenarios, one where there may be need and the other where it may be unnecessary, based on the circumstances of each individual's situation.

17. Despite the evidence by the 1st applicant's mother and that of the deceased brother, the court has formed the opinion that evidence before it on the 2nd Objector's paternity is not sufficient to determine the issue. At this age and time, the surest way to get a scientific answer is by subjecting the applicant to a DNA test. The court therefore directs that a paternity test be carried out between Japheth Gakuo Gituku, Richard Gituku Kiragunand Paul Nderitu Wanjiru within the next 30 days of this ruling at a time and date to be agreed upon. The Petitioner and the 2nd objector to meet the costs of the DNA test.

18. The second application's sole issue is **whether or not to order for a DNA test for Catherine a daughter of the 1st Objector so as to ascertain her paternity.**

19. Should a DNA test be conducted?

As regards Catherine there is evidence on both sides that the deceased and her mother cohabited at the time of her birth and continued to do so up to about age 3. Indeed, the Petitioner had heard of her and saw her pictures with her son. Two of the deceased brothers knew of the cohabitation and the existence of a child.

Before court were, produced a transaction slip dated for 8/8/2019 & 7th January 2020 for school fees at Catholic University for Catherine by the deceased. Further, there were family pictures with Catherine and her mother. Indeed, the petitioner admits there was a relationship between the two and she knew there was a child.

20. Upon receiving evidence, the court was not convinced to have Catherine subjected to a DNA test. But directed her sister to be subjected to the same. The court's position remains

21. The court is convinced that enough evidence has been placed before court to prove that the deceased was the father of Catherine and he indeed did take care of her welfare including her education, subjecting Catherine to a DNA test against ample evidence would be unjustified, unfair and an injustice. The applicant has not laid any basis for the need for the DNA test.

22. Matter to be mentioned further on a date to be agreed upon for further directions.

DELIVERED AND SIGNED AT NAIROBI THIS 30th DAY OF SEPTEMBER, 2021.

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ALI ARONI

JUDGE