REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

PROBATE AND ADMINISTRATION DIVISION

SUCCESSION CAUSE NO. 959 OF 2015

IN THE MATTER OF THE ESTATE OF JACKSON NICHOLAS KYENGO MULWA

(Also known as KASANGA JOEL MULWA) (DECEASED)

DIANA MUTHEU .....APPLICANT

VERSUS

MARTHA KASNAGA MULWA ..... 1ST RESPONDENT

JOSEPH KONZOLLO MUNYAO ..... 2ND RESPONDENT

SAMMY MWENDWA MUTAVI MUVELAH..... 3RD RESPONDENT

DR ANDREW KAVULYA MULEE ..... 4TH RESPONDENT

RULING

1. In her Application dated 15th April 2016 brought under section 26 of the Law of Succession Act, Cap 160 and Rule 45(1) of the Probate and Administration Rules, 1980, the Applicant Diana Mutheu seeks the following orders; First, that reasonable provision be made for the Applicant as a dependent of the deceased out of his net estate and secondly, that costs be provided for.

2. The application was supported by the affidavit of the Applicant dated 15th April 2016 and supplementary affidavit dated 24th October 2018. The Applicant averred that she is a child of the deceased herein. She stated that the will left by the deceased did not acknowledge her, nor bequeath or gift her any property. The Applicant further stated that the deceased was aware of her existence and cared for her from infancy until his death. She also contended that the deceased educated her from primary school up to her master's level.

3. It was the Applicant's case that the deceased not only owned various properties as per his last will but others that were not included and that she stands to lose immensely if she is not recognized as the deceased child and accordingly provided for. She averred that she is known to the deceased's other family and that she was introduced to one of the deceased's sons Mr. Kioko Mulwa and the deceased's brother Phillip Mutuku who also played an active part in her life. She also averred that the deceased introduced her to his friends and they knew her as his daughter.

4. In her supplementary affidavit dated 24th October 2018, the Applicant deposed that she was willing to undergo a DNA test to ascertain that she is a biological child of the deceased so that reasonable provisions can be made to her as a dependent of the deceased.

5. Mary Agatha Mulwa, a beneficiary and surviving spouse of the deceased, filed a replying affidavit dated 6th June 2016 in which she averred that she had no objection to the application if indeed the Applicant could prove through DNA testing that she is the biological daughter of the deceased.

6. In opposition thereto the 1st Respondent Martha Kasanga Mulwa filed a replying affidavit dated 29th august 2018 in which she described herself as a wife of the deceased and a beneficiary of his estate. She averred that the Applicant is neither a biological nor adopted child of the deceased and at no time did the deceased assume responsibility of maintaining her. She also stated that the Applicant had not produced any evidence in support of her claim. She asserted that the Applicant's birth certificate indicated one Maurice Kennedy Mativo Mwau as the applicant's biological father and not the deceased.

7. She refuted claims that the Applicant was known to the deceased family and stated that the deceased made his will knowingly and had

recollection of all his children, all of whom he included in his will. On the graduation photographs produced as evidence, she asserted that they were produced in contravention of Section 106A and B of the evidence act and thus could not be authenticated. She also denounced the attached receipts stating that they did not indicate the deceased as the payer of the monies.

8. At the hearing date of 30th July 2018, the Counsel on record elected to make written submissions in respect of the application. Counsel for the Applicant filed written submissions dated 24th October 2018 in which she asked the court to rule in their favor and allow the application with costs.

9. Counsel submitted that the Applicant's interest in the estate emanates from the fact that she is a child and therefore a dependent of the deceased. She stated that **section 26 of the Law of Succession Act** empowers this court to make provisions for dependents. She asserted that the Applicant qualifies as a dependent in accordance with **section 3(2), (3), (4), (5) and 29 of the Act**.

10. Counsel also submitted that any payments in support of the Applicant by any other person did not negate the link between the Applicant and the deceased. Further that the deceased not being included as the Applicants father in her Birth certificate was not fatal to the claim of paternity. Counsel attributed the exclusion to lack of consent from the deceased and there being no existing marital relationship as required under **section 12 of the Registration of Births and Deaths Act, Cap 146**. Therefore, that a DNA test would be welcome to ascertain the paternity and prove dependency.

11. To buttress her arguments, Counsel cited decisions in **E.W.G –Vs- J.M.N and Another (2017) eKLR**; **Benjamin Kibiwot Chesulut –Vs- Mary Chelagat & another (2015) eKLR**; **M.W & 3 others –Vs- D.N (2018) eKLR**; **Elizabeth K Ndolo –Vs- George M. Ndolo Civil Appeal 128 of 1995**

12. In the written submissions dated 21st February 2019 through Iseme Kamau and Maema Advocates, for the 1st Respondent, it was submitted that the Applicant had not established that the deceased was her biological father. On proving dependency, the case of **Re Estate of George Musau Matheka (Deceased) (2010) eKLR** was cited where court observed that the onus lies on the claimant to prove paternity of the deceased.

13. Counsel asserted that the birth certificate produced in evidence bore the name of one Maurice Kennedy Mativo Mwau as the father of the Applicant and not the deceased. Therefore that, it was sufficient proof that the Applicant was not a biological child of the deceased. To buttress this assertion, they relied on the cases of **EMM -Vs- IGM & another (2014) eKLR** and **Re Estate of G.K (Deceased) (2017) eKLR**, where the court observed that failure to include the fathers name and or substituting the fathers name with another in a birth certificate undermines allegations of paternity. The 1st Respondent urged that the Applicant should produce concrete evidence in support of her claim.

14. Counsel argued that the Applicant did not produce any cogent and tangible evidence that the deceased recognized her as his child and that both Mary Mulwa and Phillip Mulwa did not corroborate allegations that they knew the Applicant. They also submitted that the Applicant had failed to prove that the deceased paid her fees, as the receipts produced did not indicate where the monies came from. It was also their contention that if at all the deceased paid the monies; it was not an indication of permanent responsibility. On the threshold of evidence in support of claim, the cases of **Lucy Wanjiru Mwangi –Vs- Daniel Njuguna Njihia & Florence Njeri Mwaura (2016) eKLR** and **Re Estate of James Muiruri Waweru (Deceased) (2006) eKLR** were cited where the courts observed that Photographs are not conclusive proof of any relationship.

15. As far as DNA goes, the 1st Respondent submitted that the Applicant did not make any application with prayers to be subjected to a DNA test thus court has no basis to grant such orders. Further that the court can only order DNA if the Applicant had established sufficient link with the deceased which was not the case. To buttress this assertion Counsel relied on **re Estate of John Maganga Okwaro (Deceased) 2017 eKLR**, where court observed that an applicant should provide sufficient basis for DNA to be ordered.

16. On whether the Applicant had proved dependency on the deceased, Counsel pointed out that the Applicant had failed to establish any relationship with the deceased and in any case had not satisfied the requirements of **Rule 45(2) (g)** and **(h)** of the **Probate and Administration Rules** and upheld in **John Gitata Mwangi and 3 others –Vs- Jonathan Njuguna Mwangi and 4 others (1999) eKLR.** Further that the Applicant had failed to establish that she was a dependent or that the deceased had assumed permanent responsibility over her. He relied on the case of **EMM –Vs- IGM and Another (2014) eKLR, Kimani Mathenge Muriuki & 2 Others –Vs- Patricia M Muriuki & Another SC No. 976 of 1994 and Re estate of George Musau Matheka (Deceased) (2010) eKLR**.

17. The executors opted not to participate in this application.

18. I have considered the pleadings and the submissions filed by the learned counsel. The issue that arises for determination in the instant application is whether the Applicant has laid sufficient evidence to prove that she is a dependent of the deceased. The determination of the rest of the issues will depend on the outcome of the resolution of the question of dependency.

19. Section **29 of the Law of Succession Act** provides that:

> ***For the purpose of this part dependent means-***
>
> ***a. The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;***
>
> ***b. Such of the deceased's parents, step parents, grandparents, grandchildren, step children, children whom the deceased had taken into his family as his own, brothers and sisters and half-brothers and half-sisters, as were being maintained by the***

deceased immediately prior to his death; and

c. Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

20. Section **3(2) of the Law of succession Act** describes a child to**;**

include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or of whom he has voluntarily assumed permanent responsibility.

21. The Applicant is therefore required to demonstrate that she is a dependent of the deceased and thus entitled to a share of his estate. That is the question I set out to answer.

22. The standard and burden of proof provided by the Evidence Act ought to be discharged; he who alleges must prove. **Section 107 of the Evidence Act, Cap 80** of the Laws of Kenya places the burden of proof on the party that alleges. In **Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 3 Others (2014) eKLR**, the supreme Court held inter alia:

> "*The person who makes such allegations must lead evidence to prove the fact. She or he bears the initial legal burden of proof, which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence of a fact in issue."*

23. It is therefore incumbent upon the Applicant to prove on a balance of probabilities that she is the biological child/dependent of the deceased.

24. The Applicant claims to be a biological child of the deceased. It was her testimony that the deceased was in a relationship with her mother, one Agnes Nduku Munyoli and out of that relationship the Applicant was conceived. In support of this claim, she produced a birth certificate in exhibit marked DM1 being serial No. 184474 obtained on 23rd March 2006. This court notes that the birth certificate indicates one Maurice Kennedy Mativo Mwau as the father of the Applicant while the deceased is Jackson Nicholas Kyengo Mulwa alias Kasanga Joel Mulwa. It appears that the two are completely different people, a fact that the Applicant herself has alluded to. She attributed this omission to the failure of her mother to obtain consent to have the fathers name in the birth certificate and the restriction imposed by the **section 12 of the Births and Deaths Registration Act** which has since been declared unconstitutional. She testified that the person indicated therein is her stepfather who had by then married her mother.

25. It is trite law that a birth certificate is crucial in determination of paternity. However, in view of when the document was obtained this it may be that the deceased's name was substituted with that of the Applicants step father due to the requirement in law at the time. This assertion has however not been corroborated by any witness including the Applicant's own mother. In as much as a claim like this should be proven on a balance of probabilities, the Applicant's own document chosen in support of her case goes against her claim. In the circumstance, there is need for more compelling evidence other than the birth certificate produced to prove the deceased's paternity.

26. The Applicant also asserted that the deceased introduced her to his son Mr Kioko Mulwa and his brother Philip Mutuku who both knew her as his daughter. This claim was however not corroborated, as the Applicant did not call any of the two to testify in support of this claim. I cannot therefore conclusively find that the applicant has proved that the deceased is her biological father.

27. Independent of being a biological child of the deceased, and therefore an automatic dependent, the Applicant would also qualify as a dependent of the deceased if she can prove that she is a child whom the deceased had taken into his family as his own and who was being maintained by the deceased immediately prior to his death. Unlike the dependent under section 29(a), the dependent under section 29(b) has to establish that the deceased had taken her into his family as his own child and that she was being maintained by the deceased immediately prior to his death.

28. On maintenance, the Applicant asserted that the deceased was actively involved in her life and paid her fees since she was in Primary school all the way to her master's level. To this end she attached school fees receipts of the alleged payments made by the deceased. I have carefully gone through each of the receipts and have noted as follows:

i. The receipts dated 24/2/04; 26/8/04 and 24/2/04 indicate the payee as one Kasanga Mulwa.

ii. Receipts dated 4/7/05;4/10/05 and 14/10/03 do not indicate/ have been erased, and it is not apparent who made those payments.

iii. The receipts obtained from Catholic University of Eastern Africa all bare the name of the Applicant as the payee of the monies

29. From the above breakdown, it is clear that the deceased at some point made payments for the benefit of the Applicant. However only a minority of the receipts support the Applicant's claim on maintenance. The Applicant explained to the court that the deceased would at times give her cash, which she would then remit to the school. This is however not supported by any evidence. As noted above, it is the Applicants duty to prove her claim of maintenance and dependency on the deceased. This duty in my opinion has not been discharged as far as the receipts go.

30. The Applicant also produced photographs which she said she took with the deceased on her graduation day. It was also her case that the

deceased attended and financed her graduation party. This she attributed to him performing his fatherly duties. The 1st respondent on the other hand refuted this claim and asserted that the photographs had been produced in contravention of **sections 106 A and B of the Evidence Act**. the respondent also claimed that the photographs were not sufficient proof of dependency because there was context to them and the Applicant did not provide any proof that the deceased paid for the ceremony. Evidence on record clearly shows that the Applicant was known to the deceased. The nature of the relationship is what this court aims to establish however. In my view merely producing photographs of a graduation in which the deceased is standing beside the Applicant is not sufficient to prove father-daughter/ dependent relationship. It is not strange for anyone to attend a function and take pictures in those functions, their participation without any corroboration of existence of relationship, is not convincing.

31. In the case of **Sarah Kanini Thigunku Vs Elizabeth Njuki Thigunku (2016) eKLR**, the court had this to say regarding dependency

> *For one to be a dependent however, under section 29 aforesaid, it is clear that one must prove dependency. The use of the words..as being maintained by the deceased immediately prior to his death… in that section connotes that one must prove that he was dependent on the deceased before his demise. From the record, there was no evidence to show that either the Appellant or any of her children were dependent on the late Mbungu Thigunku. A mere relationship does not automatically qualify one to be a dependent under section 29 of the Act. Proof of dependency is paramount.*

In the circumstances therefore, the receipts and photographs by themselves without further evidence cannot be deemed to be proof of dependency.

32. In the interest of justice, it is paramount that all beneficiaries of the deceased are properly catered for. The Law of Succession Act in its very nature aims at ensuring all beneficiaries of a deceased person and their interests are protected. It is my opinion that the most efficient way to prove dependency in this matter would be through DNA evidence because the Applicant asserts that she is the biological child of the deceased. This court takes note that the Applicant has not prayed for DNA to be conducted. She alluded to her willingness to take the test to prove paternity in her affidavit and submissions. The 1st respondent opposed this assertion on the ground that the court has no basis to order for DNA because it was not prayed for in the pleadings.

33. It is a principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings or which is at variance with the averments of the pleadings goes to no issue and must be disregarded (see **Dakianga Distributors K Ltd Vs Kenya Seed Company ltd (2015) eKLR**). This court can therefore not on its own volition order for a DNA test to be conducted.

34. Accordingly, for the reasons set out above, I find that the evidence tendered by the Applicant Diana Mutheu Mwau is not sufficient for this court to make a finding that she is a dependent of the deceased Jackson Nicholas Kyengo Mulwa and that she is entitled to any share of his estate. I find that this application lacks merit.

35. There shall be no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF NOVEMBER 2021

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L.A. ACHODE

JUDGE