



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 28 OF 2019

(CORAM: WAMAE T. CHERERE-J)

IN THE MATTER OF ESTATE OF DEDAN KITHINJI MWAJA (DECEASED)

BETWEEN

ELOSY WANJA NJERU.....APPLICANT

AND

TERESA KAGENDO KITHINJI.....PETITIONER/ADMINISTRATOR

RULING

Background

1. Dedan Kithinji Mwaja (Deceased) died sometimes 26th November, 1999. He was survived by the following:

- 1) Teresa Kagendo Kithinji
- 2) Saraffin Muthuri Kithinji
- 3) Lawrence Gitonga Kithinji
- 4) Doris Kainda Kithinji
- 5) Consolata Ncurubi Mugambi
- 6) Godfrey Kirimi Kithinji

2. On 21st June, 2018, **Teresa Kagendo Kithinji** (Petitioner/Administrator) was issued with Letters of Administration Intestate. By a Certificate of Confirmation of Grant issued on 19th September, 2018, the deceased's estate was distributed as follows:

LR. NO. IGOJI/MWERUI I/1725 in equal shares to

- 1) Godfrey Kirimi Kithinji
- 2) Saraffin Muthuri Kithinji
- 3) Lawrence Gitonga
- 4) Doris Kainda Kithinji
- 5) Consolata Ncurubi Mugambi

LR. NO. IGOJI/MWERU 1436 in equal shares to

- 1) Godfrey Kirimi Kithinji
- 2) Saraffin Muthuri Kithinji
- 3) Lawrence Gitonga
- 4) Doris Kainda Kithinji

LR. NO. IGOJI/MWERU II/1117 in equal shares to

- 1) Godfrey Kirimi Kithinji
- 2) Saraffin Muthuri Kithinji
- 3) Lawrence Gitonga
- 4) Doris Kainda Kithinji

LR. NO. IGOJI/MWERU II/1725 in equal shares to

- 1) Godfrey Kirimi Kithinji
- 2) Saraffin Muthuri Kithinji
- 3) Lawrence Gitonga
- 4) Doris Kainda Kithinji

LR. NO. IGOJI/MWERU III/375 in equal shares to

- 1) Lawrence Gitonga
- 2) Saraffin Muthuri Kithinji
- 3) Consolata Ncurubi Mugambi

LR. NO. IGOJI/MWERU III/872 in equal shares to

- 1) Godfrey Kirimi Kithinji
- 2) Saraffin Muthuri Kithinji
- 3) Lawrence Gitonga
- 4) Doris Kainda Kithinji

SHARES AND MONEY to Teresa Kagendo Kithinji

- 1) National Bank of Kenya Ltd
- 2) Consolidated Bank Limited
- 3) Barclays Bank of Kenya Ltd
- 4) Kenya Commercial Bank Ltd

MOTOR VEHICLES to Teresa Kagendo Kithinji

- 1) **KAC 517C**
- 2) **KAE 888L**

3. By an application dated 21st January, 2019, **ELOSY WANJA NJERU**, the Applicant and administrator of the estate of Godfrey Kirimi Kithinji applied to substitute the name of Godfrey Kirimi Kithinji with his son Cliff Muguna Kirimi.

4. In her response dated 24th May, 2011, Petitioner/Administrator did not oppose the substitution of Cliff Muguna Kirimi with Godfrey Kirimi Kithinji but contended that Godfrey Kirimi Kithinji had another son **CM** born of Fridah Kathambi who is equally entitled to the estate of Godfrey Kirimi Kithinji. She proposed that the Applicant and Fridah Kathambi hold the assets in trust for their respective sons.

Protestor's /Applicant's case

5. Applicant stated she married Godfrey Kirimi Kithinji and they were blessed with a son Cliff Muguna Kirimi. She disputed that **CM** born was son of Godfrey Kirimi Kithinji. She tendered certificate of death for Godfrey Kirimi Kithinji who died on 24.11.2018, marriage certificate dated 03.02.2010 between her and Godfrey Kirimi Kithinji, certificate of birth for **CM** dated 03.04.2019, letters of administration ad litem issued to her on 16.01.2019 and eulogy of Godfrey Kirimi Kithinji among other documents as exhibits. PW2 Fr. Michael Mbaabu tender baptism register for Nkubu Catholic Church which shows the parents of **CM** as Fridah Kathambi and Sospeter Muriithi. PW3 Raphael Kinuthia Ngugi confirmed that the certificate of birth for **CM** PEXH. 10 was a genuine document issued by the Registrar of Births and Deaths. PW4 Dorothy Gatwiri Senior Chief Ukuu Location confirmed that the late application for birth certificate for **CM** was signed by her deputy James Mwenda on 02.04.2019 when he was lawfully in office. PW5 Joseph Murungi Ntiba did not know Fridah Kathambi and her son **CM** and did not know if **CM** is Godfrey Kirimi Kithinji's son. PW6 Nicholas Muthuri tendered school register PEXH. 14 for Burie Kingori primary school where **CM** is registered as son of Sospeter Mutugi. PW7 Lawrence Gitonga Kithinji and PW8 Evans Kaaria Mwaja and PW9 Raphael Mwebia Mwaja who are brother and uncles to Godfrey Kirimi Kithinji stated that they did not know that Godfrey Kirimi Kithinji had a son with Fridah Kathambi. PW10 Purity Karimi Mugambi, chief Mweru location did not know if Godfrey Kirimi Kithinji had a son with Fridah Kathambi.

Petitioner's/Administrator's case

6. Petitioner/Administrator, who is step-mother to Godfrey Kirimi Kithinji and her daughter Doris Kainda Kithinji stated that before the death of Godfrey Kirimi Kithinji, they only knew his son **CM** born of Fridah Kathambi and that the Applicant and her son were unknown to them. They proposed that the estate of Godfrey Kirimi Kithinji stated be distributed to his sons **CM** and Cliff Muguna Kirimi. DW3 Fridah Kathambi stated that she married Godfrey Kirimi Kithinji in 2000 and they begot a son **CM** in 2004. That they separated when she learnt he was married and she herself got married to Sospeter Muriithi in whose name her son's baptism card and school register was registered.

Analysis and Determination

7. I have considered the evidence on record and the issue for determination is whether **CM** is entitled to the estate of Godfrey Kirimi Kithinji.

8. The following issues are not disputed.

1) **CM** was born on 05.12.2004

2) Godfrey Kirimi Kithinji died on 24.11.2018

3) **CM's** Certificate of birth S/No. Axxxx dated was issued on 03.04.2019 5 months after the death of **Godfrey Kirimi Kithinji**

9. The Applicant contested paternity of **CM** due to production of a birth certificate issued after the death of his alleged father Godfrey Kirimi Kithinji. The court is often faced with a dilemma in instances where a certificate of birth is issued after the death of an alleged father from whom DNA could have been taken as in this case.

10. In this cause, the Petitioner bears the burden to prove on a balance of probabilities that **CM** is the son of **Godfrey Kirimi Kithinji**. *The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not.*

11. Other than the certificate of birth issued after the death of Godfrey Kirimi Kithinji that identifies **CM** with the said Godfrey Kirimi Kithinji, all other documentary evidence identifies him with Sospeter Muriithi.

12. A certificate of birth such as the one issued in respect of **CM** is problematic and raises a doubt as to the correctness of the entries thereto. Its validity is questionable based on the fact that the alleged father had already died when it was issued. Evidence that Godfrey Kirimi Kithinji and Fridah Kathambi lived together as husband and wife for 5 years and that he supported **CM** was not supported by cogent evidence and this court concludes that the allegations were not established on the balance of probability

13. Consequently, I find that the Petitioner has not proved on a balance of probabilities that **CM** is a son of Godfrey Kirimi Kithinji.

14. It is therefore hereby ordered:

1) The inheritance of Godfrey Kirimi Kithinji from his deceased father shall be transmitted to Elosy Wanja Njeru and her son Cliff Muguna Kirimi in equal shares

2) The Certificate of Confirmation of Grant issued on 19th September, 2018 shall be rectified accordingly.

3) Each party shall bear its own costs of these proceedings

DATED AT MERU THIS 25TH DAY OF NOVEMBER, 2021

WAMAE. T. CHERERE

JUDGE

Court Assistant - Morris Kinoti

For Applicant/Protestor - Mr. Gitonga for Basilio Gitonga, Muriithi & Associates

For Petitioner/Respondent - Mr. Otieno for Otieno C. & Co. Advocates