REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 201 OF 2011

IN THE MATTER OF THE ESTATE OF DAVID ANDATI AMWAYI (DECEASED)

AGRIPINA KHASANDI ANDATI.....1ST ADMINISTRATOR/APPLICANT

LEXY ACHERWA LIVOYI ANDATI.....2ND ADMINISTRATOR/APPLICANT

VERSUS

ANNETE KHAYIKA MBWABI.....OBJECTOR/RESPONDENT

RULING

1. The objector who was formerly the petitioner in this succession cause filed this succession cause soon after the death of the deceased petitioning the court for grant of letters of administration intestate in her capacity, ostensibly, as the widow of the deceased. One Agripina Khasanda Andati filed an objection to the making of the grant to the objector on the ground that the objector was not a widow to the deceased. She simultaneously filed a cross-application and petitioned for grant of letters of administration. After hearing the parties, Mrima J. found in favour of Agripina Khasanda and ruled that the objector was not a widow to the deceased. He found that Agripina was the lawful widow of the deceased. The judge consequently appointed Agripina and her daughter Lexy Acherwa Andati as administrators of the estate and issued a grant of representation to them. They thereupon filed summons for confirmation of grant dated 3rd June 2015 seeking to distribute the estate of the deceased comprising of land parcel Shikoti/Butsotso/2883 as follows:-

Agripina Khasandi Andati

Lexy Acherwa Livoyi Andati To hold in trust of B

B L A (Minor)

The summons were supported by the affidavit of Agripina Khasandi, the 1st administrator.

2. The summons were opposed by the petitioner turned objector vide her objection dated 22nd March, 2017. The grounds in support of the objection were that the administrators have in their summons for confirmation of grant not disclosed that a minor by the name of AAA is a beneficiary to the estate of the deceased by virtue of being the deceased's son with the objector. Further that it is unfair for the whole estate to be given to BLA to the exclusion of AAA.

3. The objection proceeded by way of *viva voce* evidence. The objector testified and did not call any witnesses. The 1st administrator testified and adopted (with the consent of the advocates for the objector) the evidence of her mother-in-law and sister-in-law adduced during the objection proceedings.

4. The administrators were represented by the firm of **Muniafu & Co. Advocates** while the objector was represented by the firm of **Gulenywa Jonathan & Co. Advocates**.

5. It was the evidence of the objector that she was cohabiting with the deceased before he died in the year 2011. That she started living with him in the year 2009. That the deceased was living with two children of the 1st administrator, Lexy (the 2nd administrator) and Breen. The deceased told her that he had separated with the mother of the children. That in the year 2010 she sired a son AAA with him, born on the 24/8/2010. The deceased died on 6/1/2011. That the deceased was working with the United Nations in Nairobi. That after his death his family is being paid pension benefits. That her son Abram is one of the beneficiaries. So is she, the 1st administrator and her children.

6. That the deceased owned land parcel Butsotso/Shikoti/2883 that is registered in his name. That the administrators have left out her son in the proposed mode of distribution of the land. It was her prayer that her son be included as one of the beneficiaries of the estate.

7. It was the evidence of the 1st administator that she got married to the deceased in the year 1993 in accordance with Luhya customary law. They were blessed with three children of whom two are alive, the 2nd administrator and B. That in the year 2001 she and the deceased bought the subject land. Each of them contributed money towards the purchase of the property. It was however registered in the name of the deceased. After a period of 10 years they separated in 2003. The deceased passed on in the year 2011. She was admitted in hospital when he passed on and for that reason she did not attend his burial. That she did not include the objector's son in the proposed mode of distribution because there is no evidence that he was sired by the deceased. That the objector did not introduce the child to the family of the deceased that he was the deceased's son.

8. The evidence of the deceased's sister Mary Andeso Amwayi as adduced in the objection proceedings was that the 1st administrator was married to the deceased. That she was staying with them as a caretaker of their children until when the first born daughter joined form one. That later on there developed disagreements in the marriage and the 1st administrator left the matrimonial home. That in the year 2009 the deceased told her that he had a girlfriend whom he wanted to marry i.e. the objector. An occasion to introduce the two families of the objector and the deceased was organized. However that by the time the deceased died no dowry had been paid though the deceased and the objector were living together at Karen and they had gotten a child.

9. The mother of the deceased testified in the objection proceedings that the 1st administrator is the lawful wife of the deceased. That during the burial of the deceased the 1st administrator was admitted in hospital and did not attend the burial. That the objector attended the burial and posed as the wife to the deceased. That she was not aware that the objector was a wife to the deceased as she had not been introduced to her as the deceased's wife. That the objector was only a friend to the deceased. That she was not aware of any child arising out of that friendship as none had been taken to her.

10. The issue here is distribution of the deceased's land parcel Butsotso/Shikoti/2883. The land is registered in the name of the deceased. The 1st administrator alleges that the land belonged to her and the deceased as they jointly contributed to buy the property.

11. Section 25 of the Land Registration Act No. 3 of 2012 grants a registered proprietor of land absolute ownership of the land subject to such rights and interests that do not require to be noted in the register. Since the property is registered in the name of the deceased it is his free property. It has to go through the process of succession. If the 1st administrator has a claim over the land she can do so during confirmation of grant. It is for this court to distribute the property in accordance with intestate succession as provided in the Law of Succession Act, Cap 160 Laws of Kenya.

12. The question here is whether AAA is a son to the deceased so as to be entitled to share the estate of the deceased. His mother, the objector, contends that the minor was sired by the deceased. The 1st administrator on the other hand contends that there is no evidence to proof that the minor was sired by the deceased as no DNA test has been done to confirm it. She further contends that the minor was not introduced to the deceased's family as is the practice in Luhya custom. Therefore that the minor is not son to the deceased.

13. The objector filed a birth certificate for the minor that connotes his father as the deceased and his mother as the objector.

14. The objector stated that the minor was born when she was cohabiting with the deceased. The issue of marriage between the objector and the deceased was closed by Justice Mrima who found that the objector was not married to the deceased. The minor's claim is therefore not based on marriage between his mother and the deceased but rather on that the minor was sired by the deceased.

15. The advocates for the objector submitted that the minor is a dependent of the estate of the deceased under Section 29 of the Law of Succession Act. That he has already shared in the distribution of the deceased's pension which forms part of the deceased's estate. That the minor should therefore be included in the distribution of the remaining estate.

16. The advocates for the administrators on the other hand submitted that the objector has failed to take out a DNA paternity test on the minor. That the fact that the objector was cohabiting with the deceased is not proof of paternity. That the minor was not introduced to the family of the deceased as son to the deceased.

17. The standard of proof in civil cases is on a balance of probability. In **Kanyangu Njogu –Vs- Daniel Kimani Maingi (2001) eKLR** it was held that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other. In **Siraj Din –Vs- Ali Mohamed Khan (1957) EA 25**, it was held that:-

> **"The quantum of proof required in civil litigations is not such as resolves all doubt whatsoever but such as establishes a preponderance of probability in favour of one party or the other ….." (as cited in BWK –VS- EK & Ano. (2017) eKLR).**

18. It was the evidence of the objector that the minor has been enjoying the pension benefits of the deceased. However there were no documents laid before the court to show that the deceased had declared the minor to his employer to be his son. The fact that the minor is enjoying such benefits is not without more proof of paternity. It has not been established on what basis the minor is enjoying the benefits.

19. The minor was born when the objector was cohabiting with the deceased. That could as well be the case but there is still a possibility that he was not son to the deceased. Since the protestor was not married to the deceased the presumption that the minor was an issue of their cohabitation does not arise.

20. Though the matter herein is a succession one, it also involves the right of a minor child. Section 4 (2) of the Children Act behoves the

court to consider the best interests of a child whenever determining an issue concerning a child. Article 53 (1) of the Constitution of Kenya 2010 states that:-

> **"Every child has the right –**
>
> **……**
>
> **(e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not."**

It is my considered view that if the minor herein was sired by the deceased his rights were not extinguished by the fact that his mother was not married to the deceased.

21. The issue of paternity in this case was central in the dispute at hand. The 1st administrator questions why the protestor has not called for a DNA test to be conducted on the minor. The objector has not given an explanation why she has been non-responsive of a DNA test being done. It is the view of this court that in this modern age a DNA test is crucial in determining paternity. It is in the best interests of the minor that a DNA test be done so that it can conclusively be determined whether he is a son to the deceased or not. Whether the minor was introduced to the deceased's family is not material. Such customs have no place in face clear provisions of the Law of Succession Act as to who is supposed to inherit a deceased's property.

22. Rule 73 of the Probate and Administration Rules bestows a succession court with inherent powers to make such orders as may be necessary for the ends of justice. The ends of justice in this case are, in my humble view, that a DNA test be conducted on the minor before the issue as to who is to inherit the deceased's property is determined.

23. I am alive to the fact that Article 31 of the Constitution of Kenya 2010 grants every person the right to privacy while Article 28 grants every person inherent right to dignity. The court should therefore not be seen to invade on such rights without an application being placed before it. The said rights were emphasized in the case of **DNM –Vs- JK (2016) eKLR** where the late Onguto J. stated that:-

> **"The bid to establish the truth through scientific proof must however not be generalized and should never so lightly prevail over the right to bodily integrity and right to privacy until it is clear that such rights ought to be limited. The clarity is only established where an undoubted nexus is shown as well as a specified quest to protect or enforce specific rights…."**

24. In face of the rights to privacy and dignity enshrined in the Constitution I am hesitant to make straight orders for any particular relation of the deceased to provide the necessary samples for a DNA sampling. It is my view that this should follow from an application by the parties.

25. In the foregoing the judgment herein is put on hold until after a DNA test is conducted in respect of AAA to ascertain whether he has any relationship with the deceased. Any of the parties is at liberty to make an application to that end.

Delivered, dated and signed at Kakamega this 29th day of May, 2020.

J. N. NJAGI

JUDGE

In the presence of:

No appearance for the Administrators/Applicants

No appearance for the Objector/Respondent

Administrators/Applicants - absent

Objector/Respondent - absent

Court Assistant - Polycap

30 days right of appeal.