



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 3270 OF 2003**

**IN THE ESTATE OF NJOKA WAKIORIAH**

**RULING**

1. In a judgment delivered by Kimaru J on the 9<sup>th</sup> of October 2014 where the issue before court was determination of whether the 3<sup>rd</sup> and 4<sup>th</sup> Applicants i.e. **Catherine Gathoni Njoka** and **Kennedy Kioriah Njoka** were children of the deceased, the judge being of the view that the evidence of both sides did not prove much as regards paternity of the two, ordered that the 3<sup>rd</sup> and 4<sup>th</sup> Applicants, the Respondent **Kioriah Njoka** and his two sisters; **Jane Wangeshi Njoka** and **Anne Wangari Njoka** shall submit their respective biological samples to the government chemist for purposes of ascertaining their paternity through DNA within 14 days of delivery of the judgment .

2. The above judgement has not been complied with to-date inviting the application dated 6<sup>th</sup> April 2017 subject of this ruling.

3. Prayer 1, 2 and 3 of the said application are spent. For determination and prayers 4, 5 and 6 as follows:

**“4. That this honourable court be pleased to declare that the 3<sup>rd</sup> and 4<sup>th</sup> applicants are children of the deceased and proceed with distribution of the estate of the deceased.**

**5. That this honourable court be pleased to issue such other directions as it may deem fit and expedient to implement the judgment of the court delivered on 9<sup>th</sup> October, 2014.**

**6. Costs.”**

4. The application was based on grounds that the 2<sup>nd</sup> Respondent and his siblings have refused to submit to DNA testing as ordered in the judgment, and are disposing off part of the estate and have leased a huge chunk, to the detriment of the applicants who now wish to be presumed heirs.

5. In support of the application was filed an affidavit of the 3<sup>rd</sup> Respondent **Catherine Gathoni Njoka** who reiterated the grounds set above.

6. The application was objected to by way of a replying affidavits dated 18<sup>th</sup> May, 2017 by **Said Kioriah Njoka, Anne Wangare Njoka & Jane Wangechi Njoka**. In essence their replying affidavits attacks the judgment, and there is further an indication that they had filed an application for stay of execution on the 8<sup>th</sup> of February, 2017 pending appeal.

7. Notable is that an application for stay was filed sometime back but the same has not been set down for hearing, secondly nothing was said of the pending appeal.

8. Without doubt the Respondents are not in a hurry to prosecute the application for stay nor obey the court order.

9. However, that notwithstanding this court has not been moved to adjudge the Respondents guilty of contempt. The application before court asking this court to consider consequences of the offence of contempt of court.

10. In **Communications Commission of Kenya and Tetra Radio Limited; Civil Appeal (application) No. 121 of 12** the judges of Appeal stated:

**“We do not think it necessary for us to address the many side issues provoked by this application, if the applicant is serious about upholding its right under the order of the High Court or the dignity of the court, it must, in the absence of the respondent admitting to being in contempt of court, first initiate proper contempt proceedings. As and when a competent court has adjudged the**

**respondent to be in contempt of court, and only then, can we be moved to consider the orders being sought for.”**

11. As earlier stated, this court is being asked to assume contempt and proceed to give remedial orders. In my considered view for now the application before court is premature. The court ought first to be moved in order to pronounce the respondents to be in contempt., which has not been done.

12. For the reasons above the application is declined.

The Applicants be at liberty to re-apply for the orders at the appropriate time.

**DATED, SIGNED and DELIVERED at NAIROBI this 28<sup>th</sup> DAY OF February, 2019.**

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**ALI-ARONI**

**JUDGE**