REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1577 OF 2006

IN THE MATTER OF THE ESTATE OF MARTIN LUTHER AWUOR (DECEASED)

RULING

1. On 2nd May 2018 it was pointed out to me by the parties that they were awaiting a ruling on the application dated 5th October 2012. I gave them a date for ruling on that application. In the course of preparing a draft ruling on the application. I perused the record before me. I noted that when the matter was initially placed before me on 28th October 2013, I had directed that the deponent of the affidavit sworn in support of the application be availed for cross-examination on the contents of her affidavit. There was a further direction that the maker of the birth certificate that she was to rely on be availed too.

2. When the matter came up next on 27th May 2014, it transpired that a preliminary objection had been raised to the said application. That thwarted the hearing as I had to rule on the said objection. I delivered the ruling on 2nd October 2015, dismissing the objection. Before a date could be taken for hearing of the said application, citations were issued by another party, and an objection was raised on the said citations. I was to rule on the said objection but I never got to, as a copy of the citation filed in court was not in the court file, and when I called upon the parties to avail one they did not cooperate. Eventually, I dismissed the objection by my ruling of 19th October 2017.

3. As it is, I had given clear directions on how the application dated 5th October 2012 was to be disposed of. The oral hearing did not happen, and no justification has been given to me for departure from the said directions. The application is for dependency. It is purported to be brought under sections 47 and 70 of the Law of Succession Act, Cap 160, Laws of Kenya. Dependency is provided for in Part III of the Act, sections 26 to 30 thereof. The said application should have been premised on those provisions.

4. The application is by a person who claims to be a child of the deceased born outside of wedlock. She seeks to be treated as a dependant of the deceased. Under Part III she ought to prove that she is indeed a child of the deceased. She need not, however, prove dependency once it is established that she is a child of the deceased. To prove paternity requires much more than mere reliance on documents. To do justice to the applicant, it would be imprudent to dispose of the application by merely considering the documents filed in court or the written submissions of the parties. The applicant must establish paternity through demonstrating that her mother and the deceased had a close relationship which provided opportunity for sexual contact that would have led to her conception, or, alternatively, apply for a deoxyribonucleic acid (DNA) test to be carried out. The test can be done with samples from the deceased's remains, and that may require exhumation, or from samples from the deceased's biological children.

5. Clearly, I cannot decide the matter on the basis of the material before me. The application has been challenged by the other parties. They do not concede to it. They have asked to cross-examine the applicant. The applicant has to establish her case. To do so, she must take the witness stand for cross-examination, and a DNA test may have to be conducted before it can be said that the time is ripe for determination of the said application.

6. As I have been transferred from the Family Division, I will not be available to hear the matter. I shall in the circumstances refrain from giving comprehensive directions on the conduct of the actual hearing. I shall leave that to my predecessor. The matter shall hereafter be placed before the Presiding Judge of the Division for re-allocation or further directions.

DATED, SIGNED and DELIVERED at NAIROBI this 14TH DAY OF JUNE, 2018.

W. MUSYOKA

JUDGE