



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 450 OF 2012

IN THE MATTER OF THE ESTATE OF ELIJAH DOLFUS NYASEME (DECEASED)

JUDGEMENT

1. On 30th August 2013, I delivered a ruling herein where I directed the Deputy Registrar to cause the petition herein, filed by Rose Caroline Abiero Nyaseme and Franklin Eric Odhiambo Nyaseme, to be gazetted, upon which the objector, Nicholas Stephen Otieno Nyaseme, has filed his objection, answer to petition and a cross-application. It was later on 24th September 2013 brought to the attention of the court that the cause had been gazetted on 14th December 2012 and an objection filed on 14th January 2013. That prompted the court to direct the objector to file his answer to the petition and cross-application within a stated period of time.

2. The said orders were not immediately complied with for orders were made thereafter for conduct of a patriarchal deoxyribonucleic acid (DNA) test on the objector and some other named survivors of the deceased. The said orders were not complied with and there were several applications made thereon. The test was eventually abandoned upon the failure of the petitioners to submit themselves thereto. It transpired that the objector had not yet filed his answer and cross-petition as directed on 30th August 2013 and 24th September 2013, and time was extended for him to do so.

3. There has been compliance with the said orders for the objector did, on 9th December 2016, file an answer to the petition, dated 9th December 2012. He subsequently filed a cross-application for a grant, dated 9th December 2016, on 13th December 2016, supported by an affidavit sworn on 9th December 2016. The objector filed another affidavit on 24th February 2017, sworn on 20th February 2017, curiously titled 'Replying Affidavit.'

4. Directions were given on 17th January 2017 on the disposal of the objection, to the effect that the same was to be heard in Nairobi, by way of oral and affidavit evidence, dates for hearing were given as 6th March 2017 and 7th March 2017, and the objector was ordered to serve.

5. According to the said pleadings, the objector claimed to be the first child of the deceased, and lamented that the petitioners had failed to disclose him as a son of the deceased. He has attached several documents to his papers to support his case. There is a certificate of birth; serial number *particulars withheld* dated 7th June 1990, which indicates that the objector is a child of the deceased with Margaret Owoga Ochola. There is a letter from the Chief of Kisumu East Location, dated 23rd August 2012, which lists him among the individuals said to have survived the deceased. There is also copy of a ruling of this court in Milimani HCCS No. 61 of 2012, where Khaminwa J identified the objector as the first son of the deceased. In the funeral programme, the objector is also identified as a son of the deceased.

6. Come 6th March 2017, the objector turned up ready for hearing. The petitioners were not in court, and

the court was informed that they had been served with hearing notice. There is an affidavit on record sworn on 3rd February 2017, returning service of a hearing notice dated 17th January 2017, indicating that the advocates for the petitioners had been served on 17th January 2017 and had embossed their official stamp on the face of the hearing notice returned to court.

7. The objector testified on oath on 6th March 2017. He described himself as a son of the deceased with Margaret Omoga Owuor. He complained that he had been denied his inheritance by the other side of the family which had barred him from accessing the estate. He referred to the birth certificate and the letter from the Chief as proof that he was indeed a child of the deceased. He pointed to the ruling in Milimani HCCS No. 61 of 2012 to assert that the court has already decreed him to be a child of the deceased. He also mentioned the funeral programme where he is mentioned among the sons of the deceased. He stated that although a DNA test had been ordered by the court, the other side of the family has remained unwilling to undergo the same.

8. In these objection proceedings I am called upon to determine only one issue: Whether the objector is a child of the deceased, whereupon resolving that question in the affirmative, I should proceed to order that grant of representation intestate be made jointly to him and others.

9. A DNA test is usually the most effective and scientific way of establishing the paternity of an individual. It was with that in mind that Kimaru J had ordered for such a test to determine the paternity of the objector herein. The DNA test was never done for the other side of the family frustrated the exercise. I dealt at length with that matter in the ruling that I delivered herein on 3rd June 2015. That test, if done, would have resolved that issue and obviated the need to conduct the objection proceedings.

10. In the objection proceedings conducted on 6th March 2017, the objector pointed me to several documents where he is referred to as a son of the deceased. There is a certificate of birth, serial number *particulars withheld*, dated 7th June 1990, which states that the objector was a biological son of the deceased with one Margaret Omoga Ochola. I note from the record that the other side of the family, principally Franklin Eric Odhiambo Nyaseme in his affidavit of 12th July 2016, argues that that is not true on the grounds that his father was a man called Joab Oliyoo Owuor. To denounce the birth certificate, the respondents should have attended court on 6th March 2017 to give evidence to counter that of the objector. They should have called for records from the office of the Registrar of Persons, the said Registrar to attend court and state that the certificate of birth that the objector was relying on was false.

11. More critical is the ruling of Khaminwa J in Milimani HCCS No. 61 of 2012, which was on a burial dispute pitting the objector and the other family over where the remains of the deceased were to be interred as between Kisumu and Karen, Nairobi. In the end it was ruled that the remains be interred at rural Kisumu. The court found for a fact that the objector was a son of the deceased. It has not been demonstrated that the said finding has been overturned on appeal. It would appear that following that court finding the objector was incorporated into the funeral programme and recognised as a son of the deceased.

12. In view of the above I do not hesitate in finding that the objector is a son of the deceased, in absence of evidence to the contrary, and he ought to have been disclosed as such in the petition filed by the respondents. I shall accordingly allow the objection and the cross-application on record, and make the following orders;-

(a) That the objector herein, Nicholas Stephen Otieno Nyaseme, shall be entered into the schedule of the survivors of the deceased in his capacity as son of the said deceased;

(b) That a grant of letters of administration intestate shall issue to Rose Caroline Abiero Nyaseme, Nicholas Stephen Otieno Nyaseme and Franklin Eric Odhiambo Nyaseme; and;

(c) That the objector shall have the costs of the objection proceedings.

DATED, SIGNED and DELIVERED at NAIROBI this 19TH DAY OF MAY, 2017.

W. MUSYOKA

JUDGE