



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

SUCCESSION CAUSE NO. 116 OF 2009

IN THE MATTER OF THE ESTATE OF JACOB MWALEKWA MWAMBEWA (Deceased)

M M M..... OBJECTOR/RESPONDENT

VERSUS

KASIANI MWAMBEWA KEKE

MATUNDA MWAKAWI KIWO.....PETITIONERS/APPLICANTS

RULING

1. The deceased whose estate the proceedings herein relate is Jacob Mwalekwa Mwambewa (“the Deceased”) who died on 15.10.08 at Kwa Hola. The record shows that on 30.3.09, a petition for grant of letters of administration for the estate of the Deceased was filed by Kasiani Mwambewa Keke and Matunda Mwakwawi Kiwo (“the **Petitioners/Applicants**”).

2. **By an application dated 14.12.09**, Moses Mwambewa Mwalekwa, the **Objector/Respondent herein sought *inter alia* the revocation of the grant of letters of administration issued to the Petitioners/Applicants on 29.5.09. His principal ground is that the Grant was obtained fraudulently as his consent as the only biological son of the Deceased was not obtained. He claimed that Petitioners/Applicants are not the son and mother of the Deceased nor are the other persons named as dependants the Deceased’s sons and daughter.**

3. In an affidavit sworn **on 1.3.10 on behalf of both Petitioners/Applicants**, the **1st Petitioner/Applicant denies that a grant was ever issued to them. He avers that the 2nd Petitioner/Applicant is a sister to the Deceased while he is a nephew of the Deceased. He denied that the Objector/Respondent is a son or dependant of the Deceased.**

4. The matter proceeded by way of *viva voce* evidence. The hearing of this matter commenced way back in December 2011. The Objector called 4 witnesses and closed his case. The **Petitioners/Applicants’ 1st witness was heard on 11.9.14 and on 28.10.14. The matter did not proceed again until 7.3.17. On that day the Petitioners/Applicants’ counsel sought to have a DNA test done on the Objector whereupon the Court directed that a formal application be filed. It is this application that is the subject of this ruling.**

5. The said application is dated 29.3.17 and the **Petitioners/Applicants seek the following orders:**

“1. THAT the late JACOB MWALEKWA MWAMBEWA’S grave situate in MRUGHUA

SUBLOCATION, BURA LOCATION be opened to exhume his body with the view of taking samples therefrom for purposes of Deoxyribonucleic Acid (DNA) tests.

2. **THAT** the officers of the Kenya Medical Research Institute do undertake disinterment and do obtain necessary samples for DNA Test.

3. **THAT** the objector **M M M** do present himself at the Kenya Medical Research Institute for extraction of DNA samples for testing.

4. **THAT** the results for the above DNA test in regard to the paternity of the Objector be forwarded to this Honourable Court by the Kenya Medical Research Institute

5. **THAT** costs of this application and process be in the cause.”

6. The principal ground for this application is that the Objector/Respondent claims to be the only biological son of the Deceased whereas the **Petitioners/Applicants knew the Deceased to be a bachelor and childless at the time of his death. The issue of the** Objector/Respondent’s paternity is highly contentious and the viva voce evidence has not shed sufficient light on the matter. Only a DNA test will settle the issue and hence the necessity to exhume the Deceased’s body for the purpose of extracting samples for DNA testing.

7. The Objector/Respondent opposes the Application and avers that the same is an afterthought given that the matter has been pending since 2009. The Objector/Respondent avers that both parties have presented their evidence and it is only fair and in the interest of justice that the Court be given an opportunity to make its decision. The Objector/Respondent contends that the Application is prejudicial not only to the Objector/Respondent but also to other family members of the Deceased. Exhumation of the remains of a deceased person remains frowned upon by the family members including the sister of the Deceased Matunda Mwakawi Kiwo. The issue before the Court is not paternity but succession and the **Petitioners/Applicants seek to divert the Court’s attention. According to the** Objector/Respondent, the Application is a clear indication that the **Petitioners/Applicants do not have faith in their evidence. Nothing warrants the exhumation of the remains of the Deceased. The Application is premature, lacks merit and should be dismissed with costs.**

8. The Petitioners/Applicants’ reason for seeking exhumation of the Deceased is that they disputed the Objector/Respondent’s claim that he is the biological son of the Deceased. They claim that the Deceased did not in his lifetime have a child though he married several wives. These wives including the Objector/Respondent’s mother deserted the Deceased and subsequently remarried and went on to have children. The exhumation and DNA test is the only way to establish the truth regarding their assertion that the Objector/Respondent is not a son of the Deceased and therefore not entitled to his estate.

9. The Objector/Respondent’s case is that he is the only son of the Deceased while the **Petitioners/Applicants assert that the Deceased never had any children during his lifetime.** For the Objector/Respondent it was submitted that the Application is an afterthought. I do agree that this application for DNA testing has come rather late in the day in this 2009 matter. Whereas the Objector/Respondent and his witnesses insist that he is a son of the Deceased, the **Petitioners/Applicants are emphatic that the Deceased never had any children in his lifetime.** It is therefore difficult to decipher the truth about the paternity of the Objector/Respondent from the evidence on record. The paternity of the Objector/Respondent is central to this succession dispute herein. In the circumstances, there is necessity to employ a scientific method to determine the paternity question for conclusive results.

10. The Court notes the Objector/Respondent’s submissions that the drastic measure of exhumation will be prejudicial not only to the Objector/Respondent but to the Deceased’s relatives and community at large. This Court appreciates that exhumation may be deemed to be a cultural outrage and the Court should be slow to grant such orders. However as observed by Onyancha, J in Hellen Cherono Kimurgor v Esther Jelagat Kosgei [2008] eKLR, the Court will not hesitate to make orders for disinterment in suitable cases:

“From time immemorial it has been the natural desire of most men that after their death, their bodies should not only be decently and reverently interred, but should also remain in the grave undisturbed. This view should and is indeed respected by societal institutions including the courts of law. Occasions, however arise when unforeseeable circumstances make it desirable or imperative that a body should be disinterred for good reasons. While the court would usually be slow to make orders for disinterment, it nevertheless will not hesitate to do so in suitable cases. The court will, on the other hand, avoid placing any fetters on its discretionary power to do so. That is to say, the court will without fear make orders for disinterment whenever the circumstances of the case make it desirable or imperative to do so. This, in my view, is the tenor of the case of Re Matheson (deceased) [1958] 1 All ER 202.”

11. At page 204, the Court in Re Matheson (supra) expressed itself thus:

“As I have said, the primary function of the court is to keep faith with the dead. When a man nears his end and contemplates Christian burial, he may reasonably hope that his remains will be undisturbed, and the court should ensure that, if reasonably possible, this assumed wish will be respected. In all these cases the court must and will have regard to the supposed wishes of the deceased. I say supposed wishes, because it can rarely, if ever, happen that the circumstances giving rise to the application can have been contemplated, still less, discussed, in the lifetime of the deceased.”

12. This Court would wish to keep faith with the deceased herein and not disturb his remains, nevertheless, the pursuit of the truth overrides the supposed wishes of the Deceased. Further family as well as cultural discomfort and outrage must give way to establishing the truth regarding the paternity of the Objector/Respondent which as stated earlier is central to the succession dispute herein. The DNA testing will not prejudice the Objector/Respondent if anything it will reaffirm his claim as the only son of the Deceased and settle the dispute herein with finality.

13. In the result I am satisfied that the Application dated 29.3.17 has merit and the same is allowed as prayed. The cost of exhumation and the DNA test shall however be borne by the Petitioners/Applicants while the costs of this Application will abide the final determination of the matter.

DATED, SIGNED and DELIVERED in MOMBASA this 24th day of November 2017

M. THANDE

JUDGE

In the presence of: -

..... **for the Petitioners/Applicants**

.....**for the Objector/Respondent**

.....**Court Assistant**