



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
SUCCESSION CAUSE NO. 2367 OF 2007

IN THE MATTER OF THE ESTATE OF REGINALD MWATHI WAIYAKI (DECEASED)

ELIZABETH WAIRIMU WAIYAKI.....APPLICANT/ADMINISTRATOR

VERSUS

ELIZABETH WANGARI MWATHI.....1ST RESPONDENT

CAROLINE WANJIKU WAIYAKI.....2ND RESPONDENT

RULING

1. In its ruling dated 2nd October 2014 on an application for revocation filed by the 2nd respondent, Kimaru (J) ordered that both the applicant and the respondents be subjected to DNA testing to determine their paternity with certainty as the respondents had alleged that they were daughters of the deceased and hence entitled to inherit his estate. The court directed that the parties herein appear before the Government Chemist to conduct the said DNA test.

2. The applicant subsequently filed Notice of Motion dated 5th February 2015 seeking a review of the above mentioned orders so as to provide for an alternative independent DNA services provider to conduct the paternity test instead of the Government Chemist. She asked that Pathcare Kenya Limited be the ones to conduct the DNA test instead of the Government Chemist. The application was premised on grounds that subsequent to the parties herein giving their DNA samples to the Government Chemist on 14th October 2014, they were summoned there and informed them that the samples they had given earlier had been inexplicably contaminated and thus required new samples to conduct another DNA test. The respondent is thus apprehensive that the government chemist's DNA testing mechanism was unreliable and would compromise the DNA results. It is for this reason, and given the gravity of the matter, as the result of the DNA test could have devastating effects on her right to own property that she sought the review of the ruling by Kimaru (J). Lastly, she stated that there is good and sufficient cause for review, no party would be prejudiced with the prayers sought and that the application has been made diligently and without unreasonable delay.

3. The application was opposed by the respondents who each filed their respective replying affidavits. The 1st respondent stated that the Government Chemist explained to all the parties that the genesis of the

mistake had been occasioned by a mix-up of the swabs arising from the similarities in the first names of the parties to the suit. That the applicant's prayer for the tests to be done by a doctor of her choice is self-serving and the same should be declined. The applicant urged the court to decline the prayers sought and prayed that the court orders for the exhumation of the body of the deceased so that relevant tissues be retrieved to enable a fool proof report to be presented to this court.

4. The 2nd respondent on her part stated that she was agreeable to a repeat of the test to be carried out by the Government Chemist and was not agreeable to the proposed provider Pathcare Kenya Limited who she stated had no experience in conducting DNA tests, were expensive and their impartiality in the matter was questionable. She further stated that exhumation of the body of the deceased would enable samples be extracted from it which would yield instant and accurate results on the issue of paternity.

5. The parties filed their written submissions which have duly been considered.

6. **Order 45** of the **Civil Procedure Rules** allows for review of decree or order where there has been discovery of new and important matter that was not within the applicant's or court's knowledge, or where there has been demonstrated mistake or error apparent on the face of the court, or for any other sufficient reason.

7. The applicant fears that the Government Chemist will not give a reliable DNA result owing to the mix up that occurred with the samples that they had provided. She has opted for a private provider. The respondents oppose the request and still believe that the Government Chemist is a reliable agency. They state that the Government Chemist owned up to the mix-up and explained that this occurred because of the similarities in the first names of the parties in the suit. Indeed the applicant and the 1st respondent share the first name. The respondents say that the private provider has no experience in DNA tests.

8. In my view, the fact that the mix-up at the Government Chemist was detected is a point of strength, and not the basis for vilification. There should be no reason to doubt this agency that has a long history of conducting successful DNA tests. I find that the application by the applicant has no reasonable basis.

9. The issue being raised now that the body of the deceased be exhumed to provide material (tissue) to be used in the DNA tests is an afterthought. It was not an issue at the time the application was heard by Justice Kimaru. The result is that the application for review fails. The DNA tests will still be conducted by the Government Chemist. I ask that each party bears own costs.

DATED and DELIVERED at NAIROBI this 24th day of November 2015

A.O. MUCHELULE

JUDGE