



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PROBATE AND ADMINISTRATION DIVISION

SUCCESSION CAUSE NO. 1239 OF 2008

IN THE MATTER OF THE ESTATE OF JAMES KANYOTU (DECEASED)

JANE GATHONI MURAYA KANYOTU.....PETITIONER/RESPONDENT

VERSUS

MARY WANJIKU KANYOTU1ST RESPONDENT

CHRISTOPHER NGATA KANYOTU2ND RESPONDENT

ANDREW PETER NGIRICI3RD RESPONDENT

JOHN KARIUKI KANYOTU4TH RESPONDENT

SANDRA NJAU KANYOTU5TH RESPONDENT

A N D

KAWAKANJA LIMITED1ST INTERESTED PARTY

KANGAITA COFFEE ESTATE LIMITED2ND INTERESTED PARTY

FRANCIS IGANJO MUTAHI3RD INTERESTED

PARTY WILLY KIHARA4TH INTERESTED PARTY

DICK MAINA5TH INTERESTED PARTY

RULING

1. The deceased in this estate is JAMES KANYOTU who died Several applications have been filed in this cause and it seems that parties cannot agree on how to proceed. Learned counsels Mr. Nyangena, Mr. Odawa and M/s Maitai have urged that their various applications be heard and determined before the matter moves to confirmation of grant. This they say will enable the court to determine the beneficiaries and the property of the Estate. On the other hand learned counsels M/s Thongori, M/s Nyiha and Mr. Munge are of the view that the summons for confirmation of grant should be filed, whereupon parties can file protests thereto if they are in disagreement.

2. The Record show that there are pending in this cause several applications as follows:

Summons dated 5th March 2015 by the Applicant, Willy Kihara Njoki through Maina Nyangena his Advocate and brought under **Sections 47 and 71 of the Law of Succession Act, Rules 40,41,63 & 73 of the Probate and Administration Rules and Order XXXVI of the Civil Procedure Rules** dated 5th March 2015 for orders:

1. That the remains of the deceased hereinabove James Kanyotu be exhumed on a date to be fixed by the court.
2. That the Chief Government Chemist in conjunction with the parties representatives do extract from the deceased's remains appropriate specimens for the purpose of samplings, profiling and/or producing an accurate DNA profile of the applicant vise-a-vis that of the deceased.

The grounds advanced are:

- a. Some beneficiaries of the estate have doubted and/or disputed the applicant's relationship to the deceased hereinabove.
- b. The Chief Government Chemist cannot accurately extract, sample and or accurately discriminate the paternity of the dependants of the deceased without the DNA profile of both the biological parents.
- c. It is only fair and just that the lineage of the applicant be put to rest by making and issuing the orders sought above.

There is also the Summons dated 15th April 2015 by Sandra Gathoni Kanyotu through her Advocate M/s. Nyiha, Mukoma Advocates and brought under **Sections 47 Law of Succession Act** for orders:

1. That Willy Kihara Njoki be ordered to deposit with this court the sum of Kshs.20 million received by him from the Estate of the deceased.

Supported by the affidavit of Sandra Gathoni on grounds that:

- a. Upon the institution of this succession cause, one Willy Kihara Njoki presented himself as a son of the deceased and made claims to be a beneficiary to the Estate of the deceased.
- b. On diverse dates in 2013 and 2014 the administrators of the Estate of the deceased paid Willy Kihara Njoki the sum of Kshs.20 million on condition that the same was to be refunded if it was found out that he was not a son of the deceased.
- c. By a DNA report dated 27th June 2014, the Government Chemist made a conclusive finding that the said Willy Kihara Njoki was not a son of the deceased and consequently he is not a beneficiary of the said Estate.
- d. Despite the DNA having been made on 27th June 2014 none of the administrators of the Estate have made any effort to recover the sum of Kshs.20 million illegally paid to Willy Kihara Njoki.
- e. Willy Kihara Njoki has now come to this court seeking to have another DNA report prepared and to have the remains of the deceased exhumed – an application that is vigorously opposed by the administrators and beneficiaries of the Estate.
- f. There is real and present danger that if the said sum of Kshs.20 million is not deposited in this court during the pendency of the hearing of the challenge lodged by Willy Kihara Njoki, the Estate will not be able to recover the sum from him.

There is another Summons dated 28th July 2015 by Clint Mathenge, the 6th Interested Party through Odawa Advocate and brought under **Sections 26, 27, 28, 32(2)(3)(4), 47, 66 and 68** of the **Law of Succession Act, Rules 15, 16, 17 and 73** of the **Probate and Administration Rules** for orders:

1. That pending the hearing and determination of this application there be stay of further proceedings in the matter.
2. The court to expunge off the court record the report by the Government Chemist dated 27th June 2014 and the information given by the Government Chemist on 13th May 2014.
3. The court sets aside all orders made in reliance of the report by the Government Chemist dated 27th June 2014 and the information given by the Government Chemist on 13th May 2014.
4. The Applicant be declared to be a dependant, heir, son and beneficiary of the Estate of the deceased.
5. The court makes orders and directs for reasonable provision for the Applicant from the estate of the deceased in the percentage and ratio of the rest of the dependants/beneficiaries.

It is premised on the following grounds:

- a. The Applicant CM was born in 1995 and was only 13 years old when his father the deceased passed on in 2008.
- b. The Applicant has now reached age of majority and has been recognised in the detailed consent file don 10th February 2014 and the interim estate distribution.
- c. The report of Government chemist dated 27th June 2014 and his court attendance comments on 13th May 2014 ought to be expunged and struck off the court records as they seek to disinherit the Applicant whom it is not in dispute that he is son of the deceased and child of MMM.
- d. The Applicant's mother has been recognised in the consent filed on 10th February 2014 and the interim estate distribution and the Administrators and other children of the Deceased have recognised her.
- e. The Report and the attendance comments sought to invariably move the court to ultimately and eventually make orders which will be contrary to CM's interest who is an undisputed heir and child of the deceased not only biologically but also under the legal provisions establishing dependency to estate of deceased and entitlement to inheritance.
- f. The DNA tests carried out on the Applicant were merely speculative fatally flawed and of no evidentiary value as the Deceased never disputed the progeny of the Applicant nor were the deceased's DNA samples/specimens obtained in viable condition in absence samples.
- g. The Government Chemist has also disputed, rebutted and recanted the DNA tests.

Lastly there is an application filed through Ms Maitai dated 6th September 2013, which seeks to remove one property from the list of assets, because it is said to have been bought by the Applicant and he holds a title deed thereto.

3. To my mind and for good order all these applications can be dealt with during the confirmation of grant and each party shall have a chance to file either, a consent or affidavit of protest to the confirmation of the grant to ventilate their claim or grievance. The filing of the summons for confirmation of grant will unlock the cause and propel it forward.
4. In the premise I direct as follows:

- a. M/s Thongori Advocate to file summons for confirmation of grant on behalf of the Administrator she represents and serve it upon all the parties on record within 30 days.
- b. No other applications shall be filed until the summons for confirmation of grant is filed.

SIGNED DATED and **DELIVERED** in open court this **17th day of November 2015.**

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L. A. ACHODE

JUDGE