REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Probate & Administration 470 of 1990

IN THE MATTER OF THE ESTATE OF

GEORGE MUSAU MATHEKA – DECEASED

JUDGEMENT

The Petition for grant for letters of Administration was filed by the widow Isabella Gichugu Matheka and eldest daughter Rita Mueni Ndinda Matheka. On 18th April, 1990, the petitioner named her three sons out of them two were minors and the adult son gave his consent for the Petition. The parents of the deceased were also named as the dependants.

The objector Eric Muthui Matheka filed a cross-petition for letters of administration on 7th September, 1990 through his Advocate after having failed to file an Answer to the Petition in pursuance to Notice of the Registrar dated 27th July, 1990.

Then arose a protracted proceedings.

The objector based his cross-petition supported by the affidavit sworn by his mother Anne Syokau Kimwele on 23rd January, 1991 which annexed a Statutory Declaration of Identity made by the deceased on 13th November 1979 in the Deed Poll on change of name of the objector filed by her as a parent and a certificate of Birth issued on 22nd February 1972. The column to mention the name and surname of the father was blank in the Birth certificate.

In the said affidavit, Anne has averred that in the end of 1964 she came to Nairobi and the deceased came to Nairobi in 1965 and they started the relationships. The objector was conceived during Easter 1966 when they stayed together where the deceased was living.

However, I must note at this stage that Anne in her evidence before the court specifically stated that she never lived with the deceased and that she was only visiting the deceased at the residence near Dagoreti (where CID HQ is now situated) and that the deceased was living alone.

While I am at her evidence, I may also point out certain discrepancy as regards the ommission to put the name of the deceased as a father of the deceased in the certificate of Birth of the objector.

In her examination-in-chief, she said, she did not put the name of the deceased as a father because during that time they had disagreement, while in cross-examination she stated that it was because they were not married and in later part of her cross-examination, she

stated and I quote "***I did not fill in the column of father because I got the certificate after the deceased had already married.***"

The name of the objector in the Birth certificate was shown as Eric Muthui but the mother in her evidence readily conceded that even before the Deed Poll was filed, the objector was known and identified as Eric Muthui Matheka.

Coming back to the history of cross-petition, Isabella opposed the cross-petition, and filed an affidavit sworn on 2nd February 1993 averring mainly that the deceased was merely supporting the objector by paying for his education as he did for many more. As regards the Deed Poll, she stated that after the said Deed Poll was brought to her attention, a family meeting was called in April 1980 and the deceased declared before the family members that the objector was not his biological son and that he was only supporting him as he did for others. She also annexed Pupil's record of Nairobi School wherein the objector has stated that his mother was facing difficulties paying his fees together with his brother who was also studying at Nairobi Primary.

This record is dated 23rd January, 1980. It is an admission form. The column of father's name is blank and in column D thereof the aforesaid remarks are made in his own handwriting.

When Anne was confronted with the said record, she only stated that Eric knew his father was paying his fees. The objector also did not give any satisfactory answer to these remarks made by him.

The evidence of the objector and his mother to the effect that the deceased had paid school fees for the objector from the beginning is not substantiated and the aforesaid record makes a very big dent in the veracity of the said claim.

This proceedings came to an end when Hon. Githinji J. (as then he was) vide his ruling delivered on 27th October, 1999 allowed the Petitioner's claim and granted the letter of administration to her and her daughter. The objector's claim was to be heard by way of protest in the Application for Certificate of Confirmation to be filed by the Petitioners. This application was filed on 8th November 1999. The objector swore and filed an affidavit of protest and claimed to be included ***"as a son of the deceased and thus a beneficiary in the estate".*** Anne as well filed her affidavit in support of the claim of the objector.

I may only note that a ruling by Aluoch J. (as she then was) made on an application by the objector seeking accounts, which also revoked the grant so issued and substituted the objector as a co-administrator, was appealed against. The Court of Appeal allowed the appeal and set aside the order made by Hon. Aluoch J. and directed that the issue as to whether the objector is a son be heard and determined on merits.

Thus the matter came before this court for hearing and determination of the said issue. It was further directed that the parties in their respective evidence shall rely on the documents and affidavits.

The evidence

The objector and his mother testified.

The objector apart from what is observed hereinbefore, also relied upon following further documents, namely:

(1) Affidavit of Support sworn by the deceased on 17th June, 1987 to Ministry of Education, Science and Technology wherein he stated that the objector is his son.

(2)A Christmas card (1989) addressed to Mum, Eric and Richard from “dad”

(3)A typed letter of 12th July, 1989 addressed to Director of Ministry of Education wherein he has stated that he had still to receive fees advice for his two sons from Canada and India.

It also states ***“I have managed for 2 years (India) and one year (Canada and United States). Can you guide me?”***

(4)Several applications to purchase foreign exchange to be remitted to him in media.

(5)A photo published in News Media with the remarks “Hundreds at ex-Ps’s, mourners saying ‘God gives and God takes away”. Along with some of the family members, the objector is shown in the said picture.

He further testified that he has always lived with his mother but he was close to the deceased and he also joined him to a trip to Malawi and that the deceased applied for his passport. Curiously any documents like application made to that effect and/or any correspondence or even the passport itself has not been produced.

He further stated that he was unable to continue and finish his education in India as he was not sent any money after the death of the deceased. However, his testimony was challenged by Isabella by production of remittances to the tune of shs.44,000/= to the objector on her applications made after the death. Thereupon he agreed that the money was sent by Isabella even after the death and that one remittance also was for the payment towards a computer course as per the advice from his college.

Isabella has produced sufficient evidence to show the continuance of the support to finish his last year’s study as per the decision of the family members after the funeral was taken so as to complete the obligations undertaken by the deceased. I need not give the details of the remittances which are on the record of the cause, and not disputed.

The evidence of his mother Anne was also full of contradictions as regards his study and the payments of school fees. I may not reiterate this aspect as it is amply covered in earlier part hereof. She however, stressed that the objector is a son of the deceased conceived in Easter 1966.

As against that, Isabella testified that she met the deceased in early 1964 in Meru where the deceased was working as D.O. where she had gone for her Community Development work on official duty.

The deceased was transferred to Embu and their relationship started. The following year he was transferred to Kiisi and then, not before long, to Nairobi where he stayed with his elder brother Njyoka Mathenge. The place was behind Integrity Centre opposite Pan Afrique Hotel. She visited him there from 1965 to 1967. The said brother has sworn an affidavit on 3rd February 1994 which was a part of protracted hearing of proceedings arising from the cross-petition filed by the objector and determined by Hon. Githinji J. (as then he was).

The brother has averred that he was living with the deceased and during a single occasion when he saw objector’s mother at his flat it would have been impossible for the two to have stayed together.

I also note that Anne in the testimony before me has now changed her version that they did not stay together but she was only visiting him.

I would accept this affidavit in corroboration of Isabella’s testimony as it was filed during earlier proceedings which have been

heard and determined in favour of the Petitioners.

It is also agreed by the objector and his mother that her second son Richard is also known as Matheka and that name is shown in his official name.

During the proceedings, I did form a considered view, that the objector and his mother changed their evidence as and when some evidence to the contrary were produced.

As against that, the case of the petitioners has been consistent to the effect that the objector was not a biological son of the deceased and that he was amongst many who were assisted by the deceased.

She also agreed that the objector flew from India to attend the burial of the deceased and that she gave him money to buy the suit as he was being educated by the deceased and she did the same with another person called *Josphat Johanees Matheka* who came to attend the funeral from London and that he was also educated by the deceased. Amongst whom the deceased supported is Thungi who also came for funeral but she stated that he was in Kenya.

As regards averrements of his trip to Malawi with the deceased, she stated that she was not aware and asserted that no photograph of the trip is produced.

As regards the deceased referring him as his son in the affidavit sworn under the form supplied by Ministry of Education, she stated that she was not surprised to read that remark as the deceased wanted to support him as per African customs.

I may also note that apart from the signature, which according to her looked like that of the deceased, no evidence as to who filled in that form is available before the court. I say so because the other letter produced by the objector shows his signature as "George". Be that as it may, it is not in dispute that the deceased and by extension also Isabella paid for the objector's education.

Lastly, as regards the photo published in newspaper, she said that the photographer asked Eric to join in. She denied that the objector was recognized as a family member or as a son to the deceased. She emphasized that the objector never visited them in any one of the several places of residence used by the family.

This proceedings took time to finish because it was interrupted thrice to get reports on DNA Test. Several appearances were made to report the follow-ups thereof.

The objector's counsel asked for DNA Test of siblings relations in presence of his doctor and client, after a report which was prepared by Dr. John Kimani Mungai dated 21st November, 2008 was filed. In any event, the said Doctor gave evidence and the report was made after testing DNA profiles from the blood samples of the objector, his mother, children of the deceased and of Isabella.

After explaining in full how he arrived at the issue of genetic inheritance, Dr. Mungai in simple terms stated that every person carried half from mother and half from father his/her genetic inheritance. By examining DNA in a person and his/her biological parents – it is possible to determine the elements of DNA gained from their biological mother and those from biological father.

After several efforts, it was concluded that from the specimen of bone extracted from the body of the deceased, it was not possible to gather DNA profiles of the deceased, and thus the sibling relations test was carried out.

He opined that based on his findings made in the said report (Ex. 7), ***"Eric Matheka, Ann Kilwle's son is excluded as a biological child to George Matheka".***

During his cross examination, the request by the Defence counsel was granted to allow the objector's Dr. Mpoke to visit Government Chemist to look at Data preserved on the computer. The request was made after it was stated by Dr. Mungai that due to malfunction in their printing mode, the printing of the results was poor.

Thereafter on 15th October, 2009, a consent order was recorded, namely; ***"the report by Dr. Mpoke of KEMRI dated 15th June, 2009 and that prepared by Dr. Mungai on 21st November, 2008 be produced as expert evidence".*** Dr. Mungai was questioned on the said report prepared by him while Dr. Mpoke was not called as a witness.

I have already stated the finding of Dr. Mungai hereinbefore. Dr. Mpoke though agreed to the conclusion made by Dr. Mungai on the siblings DNA report to the effect that the biological father of the children of Isabella is the same, paused a question namely ***"My professional opinion is that these results DO NOT answer the fundamental question; 'who between these two individuals is late George Mathega?'".***

Based on this question, Mr. Singh, the learned counsel for the objector, submitted that in absence of the proof that the biological father of the children of Isabella is the deceased, this scientific evidence should be disregarded.

In other words the implication of this submission is that Isabella's children could not be the biological children of the deceased.

To this submission, I may observe that first of all, the objector himself has admitted that the children of Isabella are his step brothers and step sister. Secondly, it is not for the petitioners to prove that the children mentioned in the petition are the children of the deceased. It is not questioned that they are not born during the subsistence of the marriage and cohabitation and also that they all were born before the death of the deceased. Even as per law, they are presumed to be the children born of wedlock, and not out of it. Moreover, paternity of all the children is from same person.

More pertinently, it is for the objector to prove that he is the biological son of the deceased and onus to do so lies squarely on him.

Only because the deceased paid school fees and to facilitate the purchase of foreign exchange described the objector as his son, the objector does not become his son. The Deed Poll does not help him as it was solely filed by his mother, the mere photo at the funeral where hundred of mourners attended and viewed the body also does not support his contentions. The Christmas card also included Richard, who is admittedly not a son of the deceased.

His case, to crown the issue, has been also disapproved by the DNA findings presented by consent.

I must stress that to suggest that all the children of Isabella could be sired by a person other than the deceased during the subsistence of marriage is nothing but preposterous contention.

Reliance on the case of ***Margaret Dorren Atieno Adango vs. Benjamin Adango Adeya & Others*** (2006) e KLR is also misguided as the facts of the case are totally different and distinguishable.

To sum up, I must state that I have carefully considered the pleadings, documents and exhibits produced as well as submissions made.

From the aforesaid, I find that the objector has failed to prove as per law that he is the son of the deceased as averred. He has been amply supported in his education and has to be satisfied with it.

I thus dismiss the protest filed by the objector and direct that the Petitioners to proceed with their application for certificate of confirmation.

I also order that the objector pays the costs considering the history of this cause.

Dated, Signed and **delivered** at Nairobi this **29th** day of **January, 2010.**

K. H. RAWAL

JUDGE

29.01.2010