



REPUBLIC OF KENYA



**In re Estate of Njoka Wakiorah (Deceased) (Succession Cause 3270 of 2003)  
[2023] KEHC 22570 (KLR) (Family) (14 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 22570 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 3270 OF 2003  
MA ODERO, J  
APRIL 14, 2023**

**BETWEEN**

**TITUS KIRAGU NJOKA ..... 1<sup>ST</sup> APPLICANT  
SUSAN KIRAGU ..... 2<sup>ND</sup> APPLICANT  
CATHERINE GATHONI NJOKA ..... 3<sup>RD</sup> APPLICANT  
KENNEDY KIORAH NJOKA ..... 4<sup>TH</sup> APPLICANT**

**AND**

**KIORIAH NJOKA ..... PETITIONER**

**AND**

**KORIA NJOKA ..... 1<sup>ST</sup> RESPONDENT  
ESTHER WAKIGONDI NJOKA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before this court for determination is the summons dated 29<sup>th</sup> June 2021 by which the 3<sup>rd</sup> and 4<sup>th</sup> Objectors/Applicants namely Catherine Gathoni Njoka and Kennedy Kiorah Njoka seek the following orders:-
  1. Spent
  2. That the honorable court be pleased to declare that the actions of Kiorah Njoka, Jane Wangeshi Njoka and Ann Wangari Njoka of refusing to submit themselves for DNA testing as ordered on 9<sup>th</sup> October, 2014 amounts to contempt of court.



3. That the honourable court be pleased to raise a presumption of legitimacy in respect of Catherine Gathoni Njoka and Kennedy Kiorah Njoka and declare them children of the Deceased.
  4. That this honourable court be pleased to issue such other orders and directions as it may deem fit and expedient to implement the orders on 9<sup>th</sup> October, 2014.
  5. That costs of this application be provided for.
2. The Application was premised upon Rules 73 of the *Probate and Administration Rules* Cap 160 Laws of Kenya, Article 165 of *the Constitution* of Kenya and all other enabling provisions of the law and was supported by the Affidavit of even date sworn by the 3<sup>rd</sup> Applicant, Catherine Gathoni Njoka.
  3. The 2<sup>nd</sup> Respondent, Kiorah Njoka opposed the application through his replying affidavit dated 21<sup>st</sup> December 2022.
  4. The application was canvassed by way of written submissions. The Applicant filed the written submissions dated 4<sup>th</sup> November 2022. The Respondents did not file any written submissions but opted to rely entirely upon their Replying Affidavit dated 21<sup>st</sup> December 2022.

### **Background**

5. This Succession Cause relates to the estate of the late Njoka Wakiorah (hereinafter ‘the Deceased’) who died intestate on 11<sup>th</sup> October 2002 leaving behind several beneficiaries whose identities remain in dispute to-date. Following the death of the Deceased his son Kiorah Njoka (the 2<sup>nd</sup> Respondent) sought and obtained Grant of letters of Administration which were issued by the court on 14<sup>th</sup> November 2004.
6. The 3<sup>rd</sup> and 4<sup>th</sup> Applicants herein Catherine Gathoni Njoka and Kennedy Kiorah Njoka Claimed that they were children of the Deceased and therefore beneficiaries of his estate. Vide a judgement delivered on 9<sup>th</sup> October 2014 Hon. Justice Luka Kimaru (as he then was) directed that in order to resolve the question of paternity, the two(2) Applicants, the Respondent as well as his two sisters submit samples to the Government Chemist for DNA analysis within Fourteen (14) days of the delivery of the judgement. To date no DNA Report has been tabled in court.
7. The Applicants then filed the present summons seeking to have the Respondents found guilty of contempt for failing to comply with the court orders to avail samples for DNA testing.

### **Analysis and Determination**

8. I have carefully considered the application before this court, the Reply filed by the Respondents as well as the written submissions filed by the Applicants.
9. The fact that the High Court on 9<sup>th</sup> October 2014 made orders in respect of DNA testing in this matter is not in any doubt. For clarity the orders made by the Hon. Judge read as follows:-

“This court is mindful of the fact that the quality of evidence adduced by both parties has not shone much light regarding the paternity of the 3<sup>rd</sup> and 4<sup>th</sup> Applicants. However, with a view of resolving the case with certainty, this court hereby orders the 3<sup>rd</sup> and 4<sup>th</sup> Applicants, and the Respondent and his two sisters, Jane Wangeshi Njoka and Ann Wangari Njoka shall submit their respective biological samples to the Government Chemist for the purposes of ascertaining their paternity through DNA. The purpose of the DNA test is to determine



whether the father of 3<sup>rd</sup> and 4<sup>th</sup> Applicants is same as father of the Respondent, Kiorah Njoka, Jane Wangeshi Njoka and Ann Wangari Njoka. The said parties shall submit their biological samples to the Government Chemist within fourteen (14) days of the delivery of this judgement. The cost of the DNA examination shall be borne by each party. The parties shall be at liberty to mention this case before this court thirty (30) days from the date of delivery of this judgement for final orders. As regard costs, the court shall issue appropriate orders on that mention date. It is so ordered.”

10. The Applicants aver that the Respondents have totally failed and/or refused to submit samples for DNA testing as directed by the court. That meanwhile the Respondents are continuing to dispose of parts of the estate of the Deceased to the detriment and prejudice of the Applicants. That one of the Applicants Kennedy Kiorah Njoka is very sickly and is in need of urgent medical attention.
11. The Respondents however assert that they are not to blame for the failure of Government Chemist to file the DNA report. The Respondents aver that in full compliance of the court orders they all on 15<sup>th</sup> July 2021 presented themselves to the Government Chemist where their samples were taken for purposes of testing. That the non-compliance by the Government Chemist cannot be blamed on the Respondents. The Respondents therefore deny being in contempt of court orders.
12. The only issue for determination is whether the Respondents have disobeyed the orders made by the court on 9<sup>th</sup> October 2014.
13. Black’s Law Dictionary 7<sup>th</sup> Edition defines contempt as follows:-

“The failure to obey a court order that was issued for another party’s benefit. A civil contempt proceeding is coercive or remedial in nature. The usual sanction is to confine the contemnor until he or she complies with the court order.”
14. *Halsbury’s Laws of England* (4<sup>th</sup> Edition (9<sup>th</sup> Re-Issue), Pg. 33, para 52.) defines civil contempt as follows:-

“...disobedience to process is a civil contempt of court to refuse or neglect to do an act required by a judge or order of the court within the time specified in the judgment order requiring a person to abstain from doing a specified act, or to act in breach of an undertaking given to the court by a person, on the faith of which the court sanctions a particular course of action or inaction...”
15. Section 5 of the *Judicature Act* which confers jurisdiction on the superior courts to punish for contempt provides as follows:-
  - “(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.
  - (2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.”
16. In the case of *Ringera & 2 Others – vs- Muite & 10 Others* Nairobi Civil Suit No. 1330 Of 1991. The court set out the conditions upon which a finding of contempt may be made as follows:-



- (a) There must be an existing court order capable of being disobeyed;
  - (b) The alleged contemnor must have been made aware of the existence of the court order; and
  - (c) There must be shown to be a breach (disobedience) of the said court order.
17. The reason why courts punish for disobedience of its orders is in order to uphold the dignity of the court and to ensure that courts are not reduced to issuing orders in vain.
18. In *Sheila Cassatt Issenberg & Another v Antony Machatha Kinyanjui* [2021] eKLR, the court stated that:-

“The reason why courts punish for contempt is to uphold the dignity and authority of the court, ensure compliance with directions of the court observance and respect of due process of law, preserve an effective and impartial system of justice, and maintain public confidence in the administration of justice by courts. Without sanctions for contempt, there would be a serious threat to the rule of law and administration of justice. For a party to be cited for contempt, he must have violated and or disobeyed an order that was directed at him”
19. In order to establish contempt which may give rise to circumstance sanctions the standard of proof is above a balance of probability but below the standard required in criminal cases being beyond reasonable doubt. In *Muthika -vs- Babarini Farm Ltd* [1985] KLR 229, 234, the Court of Appeal stated as follows:-

“...In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt... The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence which can be said to be quasi - criminal in nature.”
20. The Applicants allege that the Respondent in defiance of the orders made by the court have adamantly refused to submit themselves for extraction of samples for the purposes of DNA testing. The Respondents on the other hand have ably demonstrated not only that they have in compliance with the courts orders presented themselves to the Government Chemist for removal of samples but that they are ready and willing to submit to a fresh DNA test if necessary.
21. Annexed to the replying Affidavit dated is a receipt Serial Number 2374519 dated 15<sup>th</sup> July 2021 being payment for extraction of samples (Annexure KN-1).
22. Annexures KN-2 and KNA-3 are two letters both dated 21<sup>st</sup> July 2022 written by the Respondents Advocate to the Government Chemist indicating the readiness of the Respondents to submit themselves for fresh DNA sampling in the event that the first samples taken were misplaced and/or spoilt.
23. In the circumstances the question of contempt does not arise at all. The Respondents have proved that they have fully complied with the orders made on 9<sup>th</sup> October 2014.
24. The failure of the Government Chemist to release the results of the DNA analysis cannot be blamed on the Respondents. If the Applicants wished the tests to be repeated they ought to have filed the relevant application. Indeed the prosecution of this application has been nothing but a waste of the court's time.



25. This is a very old matter and the court urges the parties to co-operate in order to bring finality to this cause. It is in the interests of all parties to have the estate fully distributed to the genuine heirs.
26. In conclusion I find that there is no evidence of contempt by the Respondents. I find no merit in this summons. The same is dismissed in its entirety. Costs are awarded to the Respondents.

**DATED IN NAIROBI THIS 14<sup>TH</sup> DAY OF APRIL, 2023.**

.....

**MAUREEN A. ODERO**

**JUDGE**

