



In re Estate of Kitur Chesungulgei (Deceased) (Succession Cause 53 of 2020) [2023] KEHC 17293 (KLR) (15 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17293 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 53 OF 2020
RN NYAKUNDI, J
MAY 15, 2023**

IN THE MATTER OF THE ESTATE OF KITUR CHESUNGULGEI (DECEASED)

BETWEEN

ESTHER JEPKEMEI KETER ALIAS SORGOR OBJECTOR

AND

GIDION KIBITOK & 3 OTHERS PETITIONER

RULING

1. Before me are Summons for Revocation of grant dated January 25, 2023 filed by the Applicant herein. The Applicant seeks orders that
 1. The grant of letters of administration intestate in respect of the estate of Kitur Chepsungulgei who died on May 30, 1980 made to the Petitioners herein on November 30, 2020 and confirmed on November 1, 2022 be revoked and/or annulled.
 2. The Court do distribute the estate of the deceased afresh and each beneficiary's share including the Applicant's be determined by the Court.
2. The application is premised on the grounds therein and it is further supported by the affidavit sworn by Esther Jepkemei Keter alias Sorgor on January 25, 2023.

Applicant's Case

3. The Applicant deposed that she is the daughter of the deceased herein and hence one of the beneficiaries to his estate. The Applicant further deposed that deceased herein had was married to her mother one Tina Jepkirong as his first wife. She further deposed that the deceased herein had also married three other wives being mothers to the Petitioners/Respondents herein.
4. According the Applicant, the Petitioners/Respondents herein are her step-brothers.



5. The Applicant further deposed that the Petitioners/Respondents petitioned for the grant letters of administration intestate over the estate of their late father and were subsequently issued with the grant which was later confirmed on November 1, 2022. The Applicant alleges that the Petitioners did not obtain her consent at the when they were petitioning for the grant of letters of administration with respect to their father's estate. The Applicant contends that she was not mentioned at all in the Chief's letter as being one of the children of the deceased herein and thus misleading this Court on true facts in this cause.
6. The Applicant contends that at the time of distribution this Court was misled to believe that the deceased had three wives when in fact he was married to four wives hence three houses were listed instead of four.
7. The Applicant contends that the Petitioner herein obtained the grant of letters of administration fraudulent and or by making false statement and concealment material facts to this Court. The Applicant further deposed that the grant was obtained by untrue allegations of facts.
8. According to the Applicant the Petitioners deliberately omitted her name from the list of persons that ought to have benefitted from the estate of the deceased whilst knowing that she is one of the bona fide beneficiaries to the estate. The Applicant contends that the Petitioners secretly filed this instant cause without her knowledge and to a detriment as an equally competent beneficiary.
9. The Applicant maintains that the Petitioners' failure to disclose material facts to this cause is incurable and defective hence warranting revocation/annulment of the grant of letters of administration issued by this Court.
10. The Applicant added that no prejudice would befall the Petitioners if the orders sought were to be granted. On the other hand, the Applicant contends that she stands to suffer irreparable loss and damage if the orders sought are not issued.

Respondents' Case

11. In opposing the application, the Respondents relied on the Replying affidavit sworn by Gidion Bitok on March 7, 2020.
12. The Respondents contend that the Objector is a total stranger to the estate. The Respondent further contend that the Objector/Applicant has never depended on the deceased during his lifetime.
13. The Respondents want a DNA test in order to establish the Objector's relationship to the deceased.
14. The Respondent contend that the alleged marriage between the Objector's mother and the deceased has been unsubstantiated. The Respondent further contend that the Objector has not established whether the relationship between her alleged mother and the deceased subsists and or was ever legalized as insinuated.
15. On the issue of consent, the Respondents maintain that they were under no legal obligation to seek consent from the Objector herein as she is a stranger to the estate of the deceased.
16. The Respondents reiterated that the Objector is a complete stranger to the estate herein and they were under no legal obligation to include her as a beneficiary.
17. The Respondents want the estate to be distributed amongst the three household herein.
18. With regards of allegations that this instant cause was filed secretly, the Respondents maintain that the grant herein was gazetted and hence the question of secrecy does not arise.



19. The Respondents contend that if the orders herein were to be issued then they stand to suffer irreparable loss as their respective shares to the estate will be reduced in favour of a complete stranger.
20. The Respondent further contend that the onus of proving dependency lies with the Objector herein and not with them.
21. According Respondents, the application herein is only meant to derail justice at the expense of the rightful beneficiaries of the deceased's estate.

Determination

22. I have carefully the application and the rival affidavit on record. In my view the only issue for determination is whether the orders sought can be issued.
23. The Objector/Applicant in line with the provisions of 76 of the *Law of Succession Act*, seeks to have the grant of letters of administration issued on 30/11/2020 and confirmed on November 1, 2022, be revoked and or annulled for failing to disclose that she too is a beneficiary and or dependant of the estate herein.
24. The Objector has alleged that is the daughter of the deceased and therefore entitled to inherit from the estate herein. The Respondents on the other hand have in the strongest terms opposed the said allegation and termed the Objector as a stranger to the estate herein. The Respondents herein maintain that the only way the issue of the Objector's identity can be settled is if a DNA test was to be conducted.
25. With the foregoing assertions in my I am of the view that the issues that have been raised by the respective parties herein cannot be conclusively dealt without first establishing the relationship between the Objector and the Petitioners herein.
26. For purposes of progress in this matter, I concur that only way to put the issue of the Objector's identity at rest is if a DNA test if conducted between her and the Petitioners herein. I find that it is not necessary to exhume the body of the late Kitur Chepsungulgei for purposes of conducting a DNA test. It is possible for sibling DNA to be conducted to establish whether the Objector was sired by the deceased herein. As established by science DNA is the fundamental building block for an individual's entire genetic makeup. Being a component of virtually every cell in the human body and a person's DNA is the same in every cell. It is indeed a powerful tool because each person's DNA is unique with an exception of identical twins. Addressing this Succession Cause on kinship the DNA evidence from the siblings within the same bloodline has become necessary. From the evidence this is a cold inheritance case which is protracted with no sign of convergence of minds between the disputants to the estate of the deceased. It has therefore become necessary that their DNA test being the most legitimate and scientifically perfect means that the court could use to establish the assertion on paternity. The legal scheme under Section 118 & 119 in this cause would have come to the aid of the Objector but on scrutiny of the evidence, I am not able to draw an inference contemplated in the provisions. Section 118 of the Act, embodies the rule of law that the birth of a child during the continuance of a valid marriage or within 280 days after its dissolution shall be conclusive proof that the child is legitimate unless is established by evidence that the husband and wife did not or could not have any access to each other when the child could have been conceived. The object of this provision to attach any legitimacy in favour of the objector remained in the realm of the unknown. The presumption of legitimacy under Section 119 seems to have been attacked by the petitioner's case, it is necessary in this context to note that conclusive proof may be found or not found by carrying out a DNA analysis. The law as it is in Section 118 and 119 of the *Evidence Act*, applies Mutatis Mutandis to the circumstances of the objector's case as to heirship. It is not possible for the court to reach the truth without such a test.



My reasoning around this question is that I am alive to the constitutional imperatives on the right to privacy for every person in Article 31 and the right to inherent dignity and the right to have that dignity respected and protected as enshrined in Article 28 of the Constitution. The consequences of this is that extraction of DNA samples is a sensitive matter and that it is not something permissible as a matter of course until and unless the claimant of a right lays down prima facie case to warrant a DNA test report. In other words, DNA test is an order of last resort to resolve the controversy for the interest of justice. It is a protective jurisdiction and never should be invoked for a collateral purpose to assist a litigant who has not discharged the burden of proof of a prima facie case. Never should a DNA test be used as a fishing expedition or for improper motive. However, weighing one factor after another I am satisfied that this is not one such a case as pleaded by the objector Esther Jepkemei Keter Alias Sorgor.

27. I therefore, direct that both the Petitioners and the Objectors herein be subjected to DNA test to ascertain the issue of the paternity of the Objectors before this Court can make a finding whether or not the said Objector is entitled to a share of the deceased's Estate.

1. Accordingly, I hereby order as follows;

- i. That a DNA examination shall be done on both the Petitioners (namely Gidion Kibitok, Benard Kipkorir, Stephen Kiplagat and Dennis Kiplagat) and the Objector (namely Esther Jepkemei Keter alias Sorgor) in order to determine the issue of the identity of the Objector herein.
- ii. That the DNA to be done by Kenya Medical Research Institute (KEMRI).
- iii. That matching samples shall be taken from the bodies of the Petitioners and Objector named in (i) above within (45) days from the date of this ruling.
- iv. That the costs of conducting the DNA test be shared equally between the Objector and the Petitioners.
- v. That the Kenya Medical Research Institute to submit their report within (30) days from the date of submission of samples.
- vi. That this case will be mentioned on June 26, 2023 for status conference.
- vii. Interim Orders on preservation of the estate extended
- viii. Thereafter, the totality on distribution of the estate be fast-tracked to bring it to a closure.
- ix. Costs of the application to abide the outcome of the DNA result.

It is ordered so.

DATED AND DELIVERED AT ELDORET THIS 15TH DAY OF MAY , 2023.

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R NYAKUNDI

JUDGE

In the presence of:

Mr Chebiego Advocates

M/s Isiaho Advocates

Mr Momanyi Advocate

