



REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE NO. 283 OF 2013

IN THE MATTER OF THE ESTATE OF SALIM KIMUTAI CHEBII-DECEASED

EUNICE JEPKORIR KANDA.....1ST PETITIONER

MUSA KOMEN CHEBII2ND PETITIONER

FRANCIS KIMAIYO MUTWOL.....3RD PETITIONER

VERSUS

MARY JACINTA MUMBUA.....OBJECTOR/APPLICANT

RULING:

Pursuant to this Honourable Court's Ruling of 29th October, 2019 on the application dated 25th October 2019 by the objector/applicant herein. This Court ordered that;

- a) The applicant's son Michael Chebii Kimutai on the one hand and Weldon Kimwetich Kimutai, Griffins Kiplagat Kimutai, Ray Sogomo Kimutai and Tassia Barsumbat Kimutai do submit to a (DNA test) to determine paternity.
- b) The DNA test be conducted at the Government Chemist Laboratories at a date to be agreed upon by them and in any event within 14 days of this order.
- c) Costs of the DNA test to be met by the applicant.

The undisputed facts before this Court is that, pursuant to the said Court's ruling dated 25/10/2019 parties were to avail the following persons; Michael Chebii Kimutai (applicant's son), Weldon Kimwetich Kimutai, Griffins Kiplagat Kimutai, Ray Sogomo Kimutai and Tassia Barsumbat Kimutai for a DNA test so as to establish whether the objector/applicant's son shares common paternity to the four acknowledged sons of the deceased for purposes of succession in respect of the Estate of Salim Kimutai Chebii.

Counsel for the petitioners/ respondents submitted that on 27th November, 2020 with the view of undertaking the DNA test as directed by this court, his client reported to the Government Chemist by 10:28 am together with the four dependants. That at 11:16 a.m they noted that there was no payment or booking that had been made and the order for it had not been served by the objector. He also opposed the notion by Counsel for the objector suggesting that the DNA test should be deemed to be positive due to petitioners failure to subject themselves to DNA test. The DNA test not having been done, Counsel for the petitioners submitted that the only recourse available to the parties herein is to rescheduled for another test.

The objector/applicant's counsel opposed the said averments and submitted that his client was at the Government Chemist with the minor on the said date. That the DNA test payment was to be paid by 11:30 a.m after ascertaining all the parties present. He further submitted that the objector has a letter dated 27/11/2020 from the Government Chemist confirming that she was in attendance unlike the petitioners who have not supplied Court with their attendance register. The objector further submitted that they could not have paid for the DNA test if the parties were not available. It was the objector's case that payment is done upon collection of samples and no samples were taken as parties did not appear. In view of the foregoing, the objector prayed that DNA test should be regarded as being positive.

Due to the contention as to who was in attendance for the DNA test on that scheduled date. This court was to be furnished with the CCTV footage from the Government Chemist but the same was not availed. The objector's Counsel also produced a copy of letter dated 4/2/2021 from the Government Chemist indicating that the CCTV footage was not available.

I have considered submissions by learned counsels and it is vivid from the onset that no DNA test was undertaken by the parties. I also

acknowledge the fact that on 27th October, 2020 the date when parties herein allegedly claim to have reported to the Government Chemist, none of their samples were taken for testing.

At the center of this dispute is the issue of paternity of the objector's child of which I am convinced that justice will prevail if the said DNA test is undertaken to conclusively determine paternity of the said child for purposes of Succession in respect of the Estate of Salim Kimutai Chebii.

The DNA test will establish whether the objector's child share common paternity with the known and the undisputed children of the deceased. The establishment of the truth on the issue of paternity of the objector's child is central in articulating his claim to the estate. Am further persuaded that the only way parties in this matter will fairly move forward is if the DNA test is conducted as earlier on directed by this Court.

Aroni J in **M.W & 3 Others –Vs- D.N [2018] eKLR** held that;

“The beneficiaries named in the application may suffer some inconvenience and intrusion to their privacy. This has to be weighed against the need to resolve the outstanding issue. Secondly quite obvious the issue of inheritance is at stake. If the results favour the applicant she stands to benefit, if not the deceased will stand vindicated and the estate's status quo maintained. I therefore find that the most efficacious and justifiable way to resolve the issue is to order that the applicant D.N and the beneficiaries named in the application P.S.K, V.N.K and A.S.K do submit to sibling DNA test to determine paternity at the Government Chemist at a time to be agreed upon but not later than 14 days of the date hereof”.

The favoured position by the Court as per the ruling of 29/10/2019 is not yet met. Parties blame each other for the failure. There is need to establish the correct position in relation to paternity of the objector's son of which will resolve the central issue in this matter. I therefore direct that the objector/Applicant do book an appointment with the Government Chemist, indicating the date and time the samples will be taken, and invite the Petitioners/Respondents to appear on the said date and time to undergo the process, and if they do fail to comply having been duly invited, the Court will deem the applicant's son, one Michael Chebii Kimutai, to be a son of the deceased, one Salim Kimutai Chebii, entitled to inherit part of his Estate.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 3RD day of May, 2021.

In the presence of:-

Mr. Mogare for the Petitioner.

Ms. Tirop holding brief for Mr. Juma for the Objectors.

Gladys - Court Assistant

Mr. Mogare: I pray it be in Kisumu.

Court: Parties to attend the Government Chemist in Kisumu.

Mention on 14/6/2021.

S. M GITHINJI -JUDGE

3/5/2021