



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 138 OF 2012

IN THE MATTER OF THE ESTATE OF THE LATE KOIMA CHERUIYOT (DECEASED)

VICTOR KIPRUTO KOIMA.....PETITIONER

VERSUS

WILSON KIPKAZI KOIMA.....1ST OBJECTOR

JAMES KIPKEMOI KIPKAZI.....2ND OBJECTOR

R U L I N G

1. The deceased Koima Cheruiyot died on 7th January 2007.
2. The grant of letters of Administration intestate was issued to the deceased's son one VICTOR KIPRUTO KOIMA, the petitioner herein on 12th June 2018 following a recorded consent.
3. According to the Chief's letter from Perkerra Location dated 20th February 2012, the deceased was married to two wives Kabon and Elizabeth Koima and had the following children:
 1. Ruth Jebet Cheruiyot - Daughter
 2. Benjamin Kipkemoi Koima - Son
 3. Micheal Kipchumba Koima - Son
 4. Victor Kipruto Koima - Son
 5. Jane Jerotich Koima - Daughter
4. The estate of the deceased comprises of Title No. Baringo/Perkera/101/136.
5. The 1st objector WILSON KIPKAZI KOIMA vide his Application dated 25th April 2012 claimed that he was the only biological son of the deceased and his 1st wife Kabon; that the petitioner had deliberately excluded his name from the list of beneficiaries as shown by the chief's letter dated 20th February 2012.
6. He contended that the family of the deceased met and discussed the deceased's affairs. That he was recognised as the son of the deceased the petitioner had chased him from the land he had been utilizing. That it was decided by the elders that the sons of the deceased himself included would each get seven (7) acres of land while the deceased youngest child a daughter who was school going would get two (2) acres. He complained that the petitioner had left him out of the list of beneficiaries when they went to give the names to the chief for purposes of the petition. He sought orders that the estate of the deceased to remain intact and the *status quo* as at the time of the death of the deceased be maintained pending the determination of the cause.
7. His application was opposed by VICTOR KIPRUTO KOIMA on the grounds that Kabon never had any children and lived with the objector who was the son of the deceased's brother one Chepng'eno Cheruiyot. That Kabon went back to her parents where she subsequently died. The deceased however gave the objector land in Kapkein out of the goodness of his heart.

8. Vide a Ruling dated 5th October 2012 the application was allowed. The issue as to whether the objector was a beneficiary or not was flagged out for directions.

9. Subsequently parties took directions to proceed with the matter by way of *viva voce* evidence. Hearing commenced and four objection witnesses testified.

10. On 9th April, 2019 when the matter came up for further hearing the parties proposed that DNA be conducted in order to ascertain whether or not the 1st objector is the son of the deceased. The court vide an order dated 9th April 2019 ordered that the 1st objector and the petitioner to avail blood samples within 30 days to the government chemist for DNA analysis and gave a mention date of 10th June 2019.

11. On 10th June 2019 parties recorded a consent to the effect that the 1st objector, the petitioner, Joseph Chepyegon Kipngeno and Joseph Kibet to be included in the DNA specimen taking and matching. The parties complied with the court's directions and DNA test was conducted by Dr. J Kimani.

12. Dr. Joseph Kagunda Kimani testified that he was a government analyst based at the government chemist Department in Nairobi, and the head of the Forensic Biology section, where he had worked for twenty (20) years, dealing with issues of human identification through DNA, technology, forensic analogy of homicide and sexual cases and determination of genetic relationships.

13. He told the court that he held a doctorate in human genetics, from Zhejiang University in China, Masters and Bachelor's degree in Biochemistry from Kenyatta University. On 8th July, 2019, at the government chemist laboratory Nairobi, he obtained buccal samples from Victor Kiprono Koima, Wilson Kipkazi Koima, Joseph Kipyegon Kibet and Joseph Chepyegon Chepngeno. He was required to determine genetic relationship using DNA technology which he did. Before giving the court his findings he explained the following;- That there are two (2) types of possible outcomes with that kind of test.

i. Automal DNA relationship which will require a wider genetic pool, i.e more people.

ii. Y -chromosome determination, which is the more favoured because the participants are all male. Why? Because the Y chromosome is inherited patrilineally and is passed on unchanged from generation to generation among paternal males.

Using this test it is possible to determine the patrilineal lineage of a male.

14. He proceeded to generate the individual Y chromosome profiles of the four(4) individuals, did comparative analysis of the profiles and came to the following conclusions;-

That;

ü Wilson Ipkazi Koima

ü Joseph Kipyegon Kibet

ü Joseph Chepyegon Chepngeno Share a common patrilineal lineage, while Victor Kipruto Koima was of a different Patrilineal lineage. He produced his report as exhibit.

15. On cross examination he told the court that paternity testing was one component of determination of genetic relationship as to whether one was the biological father of the other. He said that for paternity testing one would require the DNA profile of the alleged father hence genetic determination could not be conclusive. He confirmed that if the brief was to determine whether the four subjects shared the father this report would be inconclusive.

16. On re-examination, he said that the Y chromosome test established that males who shared the same Y chromosome were from the same male lineage, that it could be concluded that the fathers of the three(3) were brothers or paternal cousins.

17. Parties closed this issue. Mr Akango for the petitioner requested for another hearing date. Mr. Ogeto for the objector opposed this stating that there was no need and the case ought to be closed and parties filed their final submissions.

18. I directed that counsel address the court on the issue.

19. Mr Ogeto made brief written submissions which he relied on. He highlighted the same. First he objected to the petitioners request to call more witnesses. He argued that when they took directions before *Ndung'u J* on the issue of DNA it was determined that the issue at hand would properly be determined by DNA report. That the court was categorical that the issue of the objector would be determined by the DNA test; that it was on this premise that they had entered into the consent dated 10th June, 2019. He submitted that following the DNA report, the question raised by the objector was to be brought to rest and there would be no need for further evidence. That for purposes of the DNA specimens the objector chose Joseph Kipyegon Kibet, and the petitioner chose Joseph Chepyegon Chepngeno. He urged the court to find that the issue had been settled and to direct that the case was closed and for parties to file their final submissions. He cited the case of in the **Estate of John Rennie Carrie Gordon (deceased) [2021] eKLR.**

20. Mr. Akango for the petitioner submitted that it was true that the DNA test was resorted to by way of consent. However the DNA report did not settle the issue as to whether the 1st , 2nd objectors were beneficiaries of the estate of the deceased. That the DNA report had not

settled the issue of paternity, leaving the issue as to whether the 1st objector was the biological son of the deceased unsettled. Secondly the DNA report did not resolve the issue of beneficial interest, that the 2nd objector was not claiming from the estate as a biological son of the deceased, but on the basis of some form of creditor, that he paid fees for the deceased's children, and the deceased promised to give him a portion of the estate, which the petitioner disputes. On the basis of these two (2) arguments, there was need for further evidence. Mr. Akango further submitted that the DNA sampling could only confirm patrilineal lineage of the persons whose samples were taken and since no samples were taken from the deceased, there was nothing to compare the samples to determine the paternity of the 1st objector. He relied on, **Halsburys Laws of England Vol. 5 4th Edition (1993) Butterworths**, and **WKG Vs JWM & Another [2010] eKLR** on the question of DNA sampling on siblings and paternity. It was his position that the court needed further evidence to be able to deal with the issues raised by the objectors.

21. In his rejoinder Mr Ogeto submitted that the DNA samples were taken and the evidence was clear that the 1st objector was not linked to the deceased, and the 2nd objectors claim was different.

22. The issue for determination is whether the DNA report or evidence concluded the issues raised by the objectors to warrant not calling any other witness.

23. It is Mr. Ogeto's submissions that the consent on the DNA tests was intended to bring the matter to a close, and let the court determine the issues on submissions.

24. The record shows that up to the time of the consent three(3) witnesses had testified, the 1st and 2nd objectors and one other witness had testified before *R. P. V. Wendo J.* On 12th June, 2015 the matter had been taken over by *A. K. Ndung'u J.*, and the 4th objector's witness was to testify. It is at that time that a consent that was entered into in the following terms:-

i. for grant of letters of administration to be issued to the petitioner (Victor Kipruto Koima)

ii. for the petitioner to take out summons for confirmation of grant

iii. for the objectors to take the position of protesters.

iv. that the evidence of the three witnesses already on record be deemed as evidence for determining distribution.

v. the outstanding witnesses by the objectors/protesters to testify in further support of the protesters case and in any addition to any other witnesses.

25. With this evidence from the record it is evidently clear that Mr. Ogeto's objections to a further hearing date are not supported by the record. The record clearly demonstrates that the consent entered into resolved the issue of who would be administrator of the estate, and not whether the 1st objector was the biological son of the deceased. The record further shows that the matter was to proceed for further hearing. Why? Because the objectors had not closed their case and the petitioner had not testified.

26. It is also evident that the consent of 12th June, 2018 changed the nature of the proceedings. The petitioner would file Summons for Confirmation of Grant, which he did on 2nd July, 2018 dated 3rd July 2018. According to the consent to objectors were to lodge their protests within 30 days of service of the Summons for Confirmation of Grant. I have checked the record and I have not seen any protest by the objectors as directed by the court. Hence the terms of the consent have not been fully complied with as it is apparent that the parties concentrated on getting the DNA report, which they expected to settle the issue as to whether the 1st objector is the biological son of the deceased. This particular issue has not been conclusively determined as the evidence by the expert only confirms patrilineal lineage as only a paternity test would have settled the issue.

27. The objectors/protesters had not called all their witnesses and they had not closed their case. The petitioner has also not testified.

28. From the foregoing it is clear that;

a) The consent of 12th June, 2018 did not state that the DNA report would bring this matter to conclusion.

b) The same consent envisaged that the parties would call further evidence to determine the issue of distribution.

c) The DNA test did not settle the issue of distribution of the estate of the deceased which includes issues raised by the 2nd objector which have nothing to do with parentage.

d) Clearly Mr. Ogeto's objection to a further hearing date are not supported by the evidence on record.

29. The objection is therefore overruled for want of merit. I direct that;-

i. The objectors file and serve their protests to the Summons of Confirmation of Grant within 30 days hereof together with their written witness statements and documentary evidence if any.

ii. The matter be mentioned for compliance and fixing of new hearing date on 14th of October 2021.

iii. **Orders accordingly.**

Dated signed and delivered by email this 17th September 2021.

Mumbua T Matheka

Judge

Akang'o & Co. Advocates for the Petitioner

Ogeto & Ogeto Co. Advocates for the Objectors