



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

MISCELLANEOUS APPLICATION NO. 2 OF 2017

(FORMERLY PETITION NO. 376 OF 2016)

GEORGE KARIUKI NJOROGE (also known as

GEORGE KARIUKI NTIMAMA.....APPLICANT

VERSUS

DORCAS PEDELAI NTIMAMA (sued as next of kin of the late

HON. WILLIAM OLE NTIMAMA.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. The matter herein was commenced by way of a petition lodged at the Constitutional and Human Rights Division on 8th September 2016. It was transferred to the Family Division vide an order made on 20th December 2016.

2. In the petition the applicant prays for declarations -

- a. that he is entitled to extract tissue samples from the body of the late Hon. William ole Ntimama (hereinafter referred to as the late ole Ntimama) for deoxynucleic acid (DNA) analysis;
- b. that he is a biological son of late ole Ntimama and has a right to be recognized as a member of his family;
- c. that he is entitled by law to have the name of late ole Ntimama;
- d. that he is entitled to participate in the burial plans and proceedings of the late ole Ntimama; and
- e. that he is entitled to inherit and be joined as a beneficiary of the late ole Ntimama.

3. The factual basis of the petition is set out in the body of the petition and the affidavit sworn by the applicant in support of the petition, on 8th September 2016. He avers that he was born in 1956 out a relationship between his late mother, Rebecca Ngubia Wanjiku, and the late ole Ntimama. His mother was not married to the late ole Ntimama, and so the applicant was raised by a single parent. He noted from the media his striking resemblance to the late ole Ntimama and when he enquired about it from his mother in 1988, he was informed that indeed the said ole Ntimama was his biological father. She allegedly explained to him that she had not disclosed the fact to him previously as the late ole Ntimama was a public figure and she did not wish to provoke controversy. The applicant allegedly obtained the permission of the late ole Ntimama, and in 1998 he met the late ole Ntimama and they had a discussion during which he admitted paternity, but pleaded with him to keep the matter secret as he was a staunch family man and a respected public figure. A relationship developed between them leading to further meetings. The late ole Ntimama was said to have thereafter assisted the applicant acquire a motor vehicle and, in 2007, financially and materially supported the applicant's bid for the Limuru parliamentary seat. He avers that the late ole Ntimama intended to introduce him to his family, but he died before that could happen.

4. Contemporaneously filed with the petition was a Motion dated 8th September 2016., which principally sought an order allowing the

applicant to extract tissue samples from the body of the deceased for DNA analysis and to bar the interment of the remains of the deceased pending hearing and determination of the application. Preliminary objections were raised to the said application. The matter was placed before the Judge on 9th September 2016, who declined to grant the orders sought in the interim. The court, however, heard the preliminary objections on 20th December 2012 and dismissed them in a ruling delivered the same day.

5. The petition was amended on 21st October 2016, principally as some of the prayers in the petition had been overtaken by the event of the burial of the remains of the deceased, to remove some of the parties to the suit and to pray for a mandatory injunction to direct the respondents to cause the exhumation of the remains of the deceased.

6. There is only one response on record to the petition. This is by the 1st respondent. She filed grounds of opposition dated 12th July 2017. The said respondent states that the petition was defective to the extent that it did not meet the threshold set for constitutional petitions. She avers that the same does not disclose any violations by her or disclose any cause of action against her. She accuses the applicant of extreme indolence as the cause could have been brought at any time during the deceased's lifetime.

7. Directions on the disposal of the matter were given on 11th May 2017, that the petition would be disposed of by way of affidavit and oral evidence. The oral hearing happened on 2nd November 2017. The applicant gave sworn testimony, in which he breathed life to the averments made in his petition. He described how he got to meet the deceased, how the deceased assisted him materially and financially and how he got to meet some of the members of the deceased's immediate family. The 1st respondent did not testify nor call any witnesses.

8. At the close of the oral hearing, the parties were directed to file written submissions. There has been compliance. In his submissions, the applicant states that he has demonstrated that the deceased had admitted paternity and intended to introduce him to his family prior to his death. He submits that he would lose out on the fruits of succession should the court disallow him the opportunity to exhume the body of the deceased to obtain the samples needed for conduct of a paternity test.

9. On her part, the 1st respondent submits that the applicant had not disclosed any violation of his rights, neither had he demonstrated that he had any relief against the alleged violation. She further submits that if the order sought were to be granted, the execution of the said order would amount to a violation of the remains of the deceased. She argues that a human body should be treated with respect even after death, citing the Convention on Human Rights and Biomedicine and its additional protocol. She submitted that the orders sought would in an ideal situation be considered in cases where they are sought for the benefit of a minor, rather than an adult who is *compos mentis*, suggesting that the applicant should have sought the order prior to attaining majority age in 1974. She cited the decision in *Ruby Karimi vs. Hon. John Keen and another*: Constitutional Petition No. 143 of 2013.

10. The only issue for me to determine is whether the petitioner has made out a case to warrant the grant of an order to exhume the remains of the deceased for DNA extraction.

11. Exhumation of human remains since interred has been addressed by the courts in various decisions. I will look at just two of them, one local and the other foreign. The oldest of the two is *Re Matheson (deceased)* (1958) 1 All ER 202, where the court said on exhumation -

‘As I have said, the primary function of the court is to keep faith with the dead. When a man nears his end, and contemplates a Christian burial, he may reasonably hope that his remains will be undisturbed, and the court should ensure that, if reasonably possible, this assumed wish will be respected. In all these cases the court must and will have regard to the supposed wishes of the deceased. I say supposed wishes, because it can rarely, if ever, happen that the circumstances I have said, the primary function of the court is to keep faith with the dead. When a man nears his end, and contemplates a Christian burial, he may reasonably hope that his remains will be undisturbed, and the court should ensure that, if reasonably possible, this assumed wish will be respected. In all these cases the court must and will have regard to the supposed wishes of the deceased. I say supposed wishes, because it can rarely, if ever, happen that the circumstances giving rise to the application can have been contemplated, still less, discussed, in the lifetime of the deceased.’

12. Locally, it was said, in *Hellen Chrono Kimurgor vs. Esther Jelagat Kosgei* (2008) eKLR, that –

‘From time immemorial, it has been the natural desire of most men that after their death, their bodies should not only be decently and reverently interred, but should also remain in the grave undisturbed. This view should and is indeed respected by societal institutions including the courts of law. Occasions, however, arise when unforeseeable circumstances make it desirable or imperative that a body should be disinterred for good reasons. While the court would usually be slow to make orders for disinterment, it nevertheless will not hesitate to do so in suitable cases. The court will, on the other hand, avoid placing any fetters on its discretionary power to do so. That is to say, the court will, without fear, make orders for disinterment whenever the circumstances of the case make it desirable or imperative to do so.’

13. An order for exhumation of the remains of a deceased person is a drastic and unpleasant order, grant of which should only be made in special, unique and compelling circumstances. This is so as exhumation is offensive to cultural and religious beliefs and practices, and it may cause public outrage. There is therefore a burden on the person seeking the order to convince the court that the right circumstances exist for grant of the order. In the instant case, the petitioner has to demonstrate, on balance of probability, that he has established a sufficient link between himself and the deceased so as to persuade the court to grant the order. He has stated that by proving paternity he hopes to share in the deceased's estate. In determining whether to grant the order or not, the court must weigh the interests of the petitioner as against those of the deceased and his family. It is only where the rights of the petitioner outweigh or override those of the deceased's that exhumation orders can be granted.

14. The petitioner has presented evidence which indicates that he was born in 1956. He allegedly met the deceased for the first time in 1998 but he had learnt of his paternity from his mother twenty years prior. At the meeting, the deceased was said to have had stated that he would

have liked the matter of the paternity to be kept secret given that he was a public figure. Allan Ntimama was said to have been present when the deceased promised to introduce the petitioner to the family, but I not that the said Allan was not called as a witness at the trial. The petitioner asserts that he had no ill will or reason to commence action during the deceased's lifetime, and that he had no reason to obtain samples during the deceased's lifetime for the deceased had acknowledged paternity and had expressed intention to formalize his position as his legitimate son. However, the court notes that the petitioner had a long time, more than thirty years, within which he could have sought to be recognized as a son of the deceased and to have his name, and he did not have to wait until after the deceased's death to make his move. I strongly feel that he slept on his rights, and what he now seeks to do would be to expose the family of the deceased to emotional anguish and torture.

15. I am conscious of the fact that a DNA test would settle the truth of the matter at hand, but I am also aware of the position that so far as possible the wishes of a dead person ought to be respected. While there is likelihood of the petitioner being a biological child of the deceased, grant of an exhumation order would be an intrusive way of establishing paternity, especially in the present circumstances where the petitioner knew the deceased and interacted with him during his lifetime. The deceased had children who survived him. DNA testing can be carried out using samples provided by them without having to have the remains of the deceased disinterred. I note that the petitioner seeks DNA testing for the purpose of succession to the estate of the deceased. The question of paternity can be handled within a succession cause without the necessity of commencing separate proceedings.

16. In view of what I have stated here above, I am of the persuasion that the petition is misguided to the extent of the order it seeks for the exhumation of the remains of the deceased. It has not been shown that special, unique and compelling circumstances exist to warrant grant of the orders sought. I hereby decline the invitation to make orders for the disinterment of the remains of the deceased. The exhumation orders are the precursor to the other prayers in the petition, the said prayers shall accordingly fail. In total the petition fails, and it is hereby dismissed in its entirety.

PREPARED, DATED AND SIGNGED AT KAKAMEGA THIS 31st DAY OF January, 2019

W. MUSYOKA

JUDGE

DATED, SIGNED and DELIVERED at NAIROBI this 15th DAY OF February, 2019

ASENATH ONGERI

JUDGE