



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**SUCCESSION CAUSE NO. 536 OF 2004**

**IN THE MATTER OF THE ESTATE OF M'KUNGANIA M' MBUI (DECEASED)**

**JULIUS M' KUNGANIA.....PETITIONER/APPLICANT**

**VERSUS**

**SUSAN KINANU KUNGANIA ..... 1<sup>ST</sup> OBJECTOR/ RESPONDENT**

**HELLEN NKUENE ..... 2<sup>ND</sup> OBJECTOR/RESPONDENT**

**GATWIRI DANIEL ..... 3<sup>RD</sup> OBJECTOR/RESPONDENT**

**KIRIMI KUNGANIA ..... 4<sup>TH</sup> OBJECTOR/RESPONDENT**

**RULING**

1. **Julius M'Kungania**, the applicant, took out a Summons dated 18<sup>th</sup> June, 2019 seeking the review of the orders of this Court made on 6/6/2019 and that the Court rehears the Cause by taking viva voce evidence.
2. The applicant further prayed that upon the grant of the prayer for review, this Court do order the D.N.A testing of the applicant with a view to ascertain whether he is a child of the deceased in this Cause.
3. The summons for review was supported by the affidavit of the applicant and the statements of **Agnes Igoki (daughter to Virginia Thuguchi)**, **Jennifer Kajuju (daughter to Virginia Thuguchi)** and **Edward Nkonge Kirika (Chairman Kiriambui Clan, descendant of M'Kibugei, great-grandfather of Virginia Thuguchi and Grace Kanyamu)**.
4. It was their contention that the deceased had initially married **Grace Kanyamu** with whom he sired four children i.e. **Kirimi Kungania, Susan Kinanu Kungania, Zipporah Gatwiri M'Kungania, Nkuene M'Kungania**. That later on, he married Grace Kanyamu's elder sister **Virginia Thuguchi**. That at the time the deceased was marrying **Virginia Thuguchi** she already had seven children whom she came with to the home of the deceased. These were named as **Agnes Igoki, Charity Kinanu, Elizabeth Gatwiri, Felicity Karambu, Julius Mwiti, Penina Kathambi (deceased)** and **Jennifer Kajuju**.
5. They further contended that at the time **Virginia Thuguchi** came to the home of the deceased, **Jennifer Kajuju** already had three children i.e. **Mercy Gacheri, Dorothy Kagendo and Denis Kimathi**. That the deceased in an abominable act had relations with **Jennifer Kajuju** and sired three children i.e. **Julius M'Kungania, Morris Gitonga and Nanis Kinya**.
6. The summons for review was opposed by the Objectors through the sworn affidavit of **Susan Kinanu Kungania** who averred that the objectors are not willing to undergo a D.N.A test. That the applicant is a perennial liar and has been silent about the matter of paternity.
7. The sworn affidavit of **Susan Kinanu Kungania** was supported by her own statement and that of **Kirimi Kungania, Hellen Nkuene and Rose Muthoni Kirimi, sons and daughters of the deceased**. Perhaps truthful and/or a statement of revolt, **Susan Kinanu** stated that she had sexual relation with his father, the deceased herein and as a result sired a daughter, **Stella Makena**. **Kirimi M'Kungania** stated that her wife **Rose Muthoni Kirimi** bore three kids with the deceased i.e. **Denis Murithi, Duncan Gichunge and Benson Mawira**. **Hellen Nkuene** a daughter of the deceased, stated that she had sexual relations with the deceased in the year 1984-1985 and bore a daughter **Doreen Kawira**.
8. On 28/10/2019 the court directed parties to file their respective submissions. As at the time of writing this ruling, only the objectors had put in their written submissions which I have dully considered.
9. **Order 45**, relating to review, is one of the Civil Procedure Rules imported into succession practice by **rule 63 of the Probate and**

**Administration Rules.** An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review as set out in Order 45 of the Civil Procedure Rules.

10. In the ruling the applicant seeks to review, the Court relied on the letter of introduction dated 6<sup>th</sup> December, 2004 and the affidavit of **Jennifer Kajuju** of 27/06/2007 wherein she had stated that she is a daughter of the deceased. On that basis, the Court made a finding that the applicant in this matter had misled the court in stating that **Jennifer Kajuju** was a wife of the deceased. In this regard, the Court made a finding that **Jennifer Kajuju** was a daughter of the deceased and that **Julius Muthomi, Mercy Gacheri, Dorothy Kagendo, Dennis Kimathi, Nanais Kinyua and Morris Gitonga** were grandchildren of the deceased.

11. It was the objector's submission that the applicant had failed to demonstrate that there is a mistake or error apparent on the face of the record and/or any sufficient reason to enable this court set aside its decision. That the applicant had all the time to seek an order for D.N.A during the trial but he failed to do so. That if a D.N.A test could be conducted, the rightful person from whom samples would be obtained in order to obtain certainty is the deceased.

12. The submission of the objector are not without basis. The information, the applicant seeks to bring to this court must have been well within his knowledge and he never sought to bring the same during the hearing of the matter that resulted in the ruling being challenged. The same can therefore not be considered as a new discovery.

13. The court relied on the evidence as presented by both parties to eventually hold that Jennifer Kajuju was a daughter to the deceased. This fact has not been disputed by the applicant. This court cannot therefore be faulted that there is a mistake and/or error apparent on the face of the record.

14. In considering whether there is a sufficient reason, I note that the parties have now become forthright in disclosing the that the deceased may have behaved in an inappropriate manner towards those who would be considered to be his daughters which resulted in him siring children with him. If that is proved, then the position taken by the Court in the impugned ruling may not stand.

15. The Court is alive to the fact the matters which are being peddled now were in the knowledge of the parties but were not disclosed to the Court. However, this Court is alive to the fact that the same may have been deemed to be so embarrassing to be paraded in public until some have now found that without the disclosures, they may be disinherited.

16. To this Courts mind, that is sufficient reason to make this Court revisit its decision and allow the parties parade everything before Court for justice to be met. In view thereof, I will allow the prayer for review.

17. As regard the conduct of a D.N.A test, I will not rule on it. I will leave the same to be determined by the Court that will finally try the matter.

18. Accordingly, I allow the application. The ruling dated 6/6/2019 is hereby set aside. I direct that the matter be determined through *viva voce* evidence by a different Court. The costs of the application shall be in the cause.

**DATED** and **DELIVERED** at Meru this 11<sup>th</sup> day of December, 2019.

**A. MABEYA**

**JUDGE**