



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 3 OF 2017

JOSEPHINE MBULA.....1ST PLAINTIFF/APPLICANT

STEPHEN KYALO2ND PLAINTIFF/APPLICANT

VERSUS

EMMAH MUENI MUSYOKA.....1ST DEFENDANT/RESPONDENT

JACKSON MUTHUSI MUSYOKA.....2ND DEFENDANT/RESPONDENT

ENOCK MUTUSE MUSYOKA3RD DEFENDANT/RESPONDENT

RULING

1. The Plaintiff/Applicants filed an Application dated 10/2/2017 seeking for prayers inter alia an order for exhumation of the body of the late Justus Musyoka Kimuyu who was buried at Kiia village, Kitaingo location with a view to taking of samples for purposes of DNA tests, that Applicants be allowed to extract a DNA sample out of remains of the deceased and be remitted to the Government Chemist for testing, that the Officer Commanding Kilome Police Station to supervise the exhumation and finally the Applicants and the 2nd and 3rd Respondents do present themselves for extraction of DNA samples at the government Chemist.

2. The Application is supported by the annexed affidavit of Josephine Mbula the 1st Applicant sworn on 8/2/2017 and further supported by the following grounds:-

- i. That the Applicants are the children of the late Justus Musyoka Kimuyu born of a first wife by the name Agnes Kavendi Kisenga.**
- ii. That the Respondents sidelined the Applicants in the burial of the deceased.**
- iii. That the Respondents have disputed the paternity of the Applicants to the deceased.**
- iv. That it is necessary for the exhumation of the remains of the deceased for the purposes of getting samples for DNA testing so as to settle the issue of paternity for purposes of inheritance of the estate of the deceased.**
- v. The Applicants rights and entitlement under the law of Succession Act and the Constitution of Kenya are likely to be comprised and denied.**

3. The Application was opposed by the Respondents. The 1st Respondent filed a replying affidavit in which she deposed inter alia that the Applicants are not children of the deceased and that the annexures presented by the Applicants are unknown to the Respondents and finally that the Applicants are out to harass the Respondents for no apparent reason.

4. Written submissions were filed in support of the rival contentions. It was submitted for the Applicants that the Applicants are truly children of the deceased Justus Musyoka Kimuyu as per the chief's letter as well as the deceased's letter addressed to the 2nd Respondent and a photograph showing the Applicants and the deceased which clearly left no doubt that the Applicants were the children of the deceased.

It was submitted for the Respondents that the Applicants are strangers and unknown to the family of the deceased. It was also submitted that the annexures presented by the Applicants do not pass the evidential test and do not establish any linkage with the deceased. It was submitted that the Applicant's case is weak in the sense that the alleged mother of the Applicants known as Agnes Kavendi Kisenga has not sworn an affidavit to confirm that she ever cohabited with the deceased and gave birth to the Applicants. Finally it was submitted that the prayers sought in the Application are not part of the prayers in the plaint. The case of **HELEN CHERONO KIMURGOR =VS= ESTHER**

JELAGAT KOSGEI [2018] eKLR was cited in support of that contention.

5. I have considered the Applicant's Application and the submissions of the learned Counsels as well as the cited authorities. It is clear that the Applicants have expressly indicated that they need the order for exhumation in order to obtain DNA samples so as to assist them pursue inheritance from the estate of the deceased. The Applicants also want this court to compel the Respondents to undergo a DNA test so as to establish the Applicants paternity to the deceased.

6. Exhumation of bodies or disinterring deceased persons is not something pleasant as it amounts to disturbing the spirits of the dead unless sufficient reasons are furnished. The Applicants have not convinced this court to warrant an order for exhumation.

7. The Applicants main concern currently is how to be made beneficiaries of the estate of the deceased. There is no evidence that the succession cause has been lodged as yet and the Applicants are at liberty to present their case in the succession cause once the same is filed and the succession court will issue the appropriate directions where necessary. It is rather curious why the Applicants have opted to rush for DNA when they could still raise the issue of their relationship with the deceased when the succession proceedings will be commenced.

8. It is noted that the copy of the certificate of birth presented by the 1st Applicant shows she was born on 3/8/1980 yet her mother is reported to have separated with the deceased in 1977 or thereabouts. There is also no copy of certificate of birth in regard to the 2nd Applicant or in the least an identity card has been shown so as to establish if there is any link or relationship with the deceased. No evidence has been presented to corroborate the alleged letter of deceased as well as the photographs or the chief's letter thus making the Applicants claim mere allegations.

9. The Applicants have not explained why their mother Agnes Kavendi Kisenga has not sworn an affidavit so as to shed light on the issue of her cohabitation with the deceased and the birth of the Applicants. This failure speaks volumes as to the bonafide of the Applicant in the present application. The conduct of the mother to the Applicants in deciding to remain behind the scenes casts doubt on the bonafides of the Applicants Application because the mother of the Applicants is deemed to know more about her relationship and the children sired with the deceased. Since such crucial information has been deliberately withheld by the Applicants, the present Application appears to have been brought in bad faith. I find the Application is only meant to harass the Respondents and disturb the spirits of the deceased for no good reason. Again the prayers sought in the Applicant's Application are not in tandem with the prayers in the Pleint. The lack of nexus leads to the conclusion that the Application is an abuse of the court process.

10. In view of the foregoing observations, I find the Applicants have failed to establish a sufficient link between them and the late Justus Musyoka Kimuyu during his lifetime to persuade this court to find it necessary to make a drastic order for the exhumation of the deceased's body for purposes of DNA as requested by the Applicants. The Applicant's Application dated 10/2/2017 is dismissed with costs to the Respondents.

Orders accordingly.

Dated and delivered at Machakos this 5th day of June, 2018.

D. K. KEMEI

JUDGE

In the presence of:-

No appearance for Were for the Plaintiffs/Applicants

No appearance for Mutinda - for the Defendants/Respondents

Stephen Kyalo – the 2nd Plaintiff

Josephine - Court Assistant