



**REPUBLIC OF KENYA**

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

**PETITION NO. 6 OF 2017**

**MOSES KIPKIRUI CHERUIYOT alias**

**MOSES KIPKIRUI CHELUGET.....PETITIONER**

**-VERSUS-**

**RAELI CHELUGET.....1<sup>ST</sup> RESPONDENT**

**JOHNSTONE LANGAT.....2<sup>ND</sup> RESPONDENT**

**WILSON CHERUIYOT NGERECHI.....INTERESTED PARTY**

**RULING**

The petition dated 30<sup>th</sup> June 2017 and which is expressed to be brought under articles 27, 28, 45, 35 and 53 of the Constitution seeks the following orders

1. That an order of mandamus do issue, directing the Government chemist in conjunction with the parties representatives do extract from the deceased remains appropriate specimens for the purposes of sampling and or producing an accurate DNA profile of the applicant vis-a-vis the deceased.
2. That a declaratory order do issue confirming that the petitioner is the biological son to the Deceased as well as an heir/Dependant of the Deceased.
3. That any fees or costs payable for the execution of the DNA testing order to be that by the Estate through the administrators.
4. Such order or further order to be made as the Honourable Court deems just and expedient,
5. Costs

The grounds are that the petitioner seeks an order for mandamus to the Respondents to allow the applicant to carry out a DNA test on the deceased so as to establish his paternity.

That the petitioner feels obligated to ascertain his heritage as rumours and hearsay cannot be enough as there ought to be a conclusive scientific exercise to tally his DNA with that of the Deceased which he pleads with the court to help him actualize.

The petition is grounded upon the right to human dignity which states that every person has inherent dignity and the right to have that dignity respected and protected.

It is also grounded on the right to access information as provided for under article 45 of the constitution.

Under Article 45 it is provided that the family is the natural and fundamental unit of society and the necessary basis of social order and shall enjoy the recognition and protection of the state.

Therefore, the petitioner has the right to know his biological father.

The petitioner contends that there is sufficient evidence to link the applicant and the Deceased to warrant the exercise of discretion in favour

of an order for DNA testing sought by the him.

### **Petitioner's case**

In his affidavit in support of his application/petition dated 30<sup>th</sup> July 2017 he depones that he was born in the year 1984 to one **Jane Cherono** and a **Mr. Kiplangat A. Misoi** alias **Isaiah Cheluget** and christened **Kipkirui A. Misoi**

That upon attaining the age of majority he was registered as **Moses Kipkirui Cheruiyot** which name he identifies himself with to date.

That in some of his academic documents he has used the name **Moses Kipkirui Cheluget** and that the names **Moses Kipkirui Cheruiyot**, **Kipkirui A. Misoi** and **Moses Kipkirui Cheluget** refer to one and the same person.

It is further contended that he was informed by his mother Jane Cherono that one **Isaiah Cheluget alias Kiplangat A. Misoi** was his biological father.

That she met the deceased in the year 1983 while a student at Kyogong High School whereas the Deceased was working with the Kenya Government.

That prior to his birth the deceased transferred his mother from Kyogong Secondary School to Narok Mixed Secondary School. He further contends that he was born at Tenwek Mission Hospital and was issued with a notification of birth bearing the names of **Kipkirui A. Misoi**, further that the deceased was also known as **Kiplangat Misoi** the name Misoi having been derived from his father.

In the year 2007 the petitioner contends to have established contact with the Deceased (Isaiah Cheluget) and thereafter they were in constant communication as evidenced by call records.

Further that they met with the Deceased and had cordial discussions as evidenced by photographs taken with him and that the Deceased had sent him money for general upkeep on a father-son relationship as evidenced by a safari com mobile money transfer statement.

The petitioner depones and contends that he has constantly been mocked for reasons that he was born out of wedlock and that he is a bastard and that its only fair that there should be a conclusive scientific exercise to tally his DNA with that of the Deceased.

### **Respondents case**

In her affidavit in reply dated 15<sup>th</sup>/11/2017 the 1<sup>st</sup> Respondent denies having been served with a court order dated 4/7/2017 as purported by the court process server.

She further depones that the petition seeks declaratory orders for the petitioner to be recognized as an heir and thus it is misconceived and is incurably defective since there exists a procedure for recognition of beneficiaries and dependants under the law of Succession Act.

It is contended that the orders for exhumation of the deceased remains are against her culture and also against rules of natural justice since the deceased beneficiaries have not been ascertained and are not parties herein.

The 1<sup>st</sup> Respondent denies ever meeting the petitioner who is a total stranger to her. She depones that a notification of birth is a statutory form under the Births and Death Registration Act and is used to apply for a birth certificate but it is not a birth certificate.

As for the Mpesa monetary transactions, it is contended that three Mpesa transactions do not establish a link sufficient enough to call for an exhumation order.

Further that the procedure for inheritance to estates of Deceased persons is clearly provided for under the Laws of Succession and the petitioner does not stand to suffer prejudice since there exists remedies under the Succession Act and it would be scandalous if all the beneficiaries opted to take the route of the petitioner as there would be numerous orders for dis-interment.

In the present petition, the petitioner was allowed to tender evidence orally and was cross-examined by the Respondents as well as counsel for the interested party.

The 2<sup>nd</sup> Respondent and the interested party were also subjected to cross-examination.

### **The Law Analysis and Conclusion**

The orders sought in this constitutional petition are in the nature of mandamus to direct the Government Chemist to extract from the Deceased remains for sampling for DNA purposes.

2. A declaratory order confirming that the petitioner is the biological son to the Deceased as well as a heir/Dependant of the Deceased.

### **Issues**

1. Is there a competent petition before the court.
2. Does the petitioner have recourse to other statutory laws for the reliefs sought.
3. Is there a course of action to warrant an exhumation order.

### **1. Competence of Petition**

On the first issue, the constitutional threshold of a competent petition was set out in the case of **ANARITA KARIMI NJERU –VS- R [1976] KLR 1272** it was held **“If a person is seeking redress from the High Court on a matter which involves a reference to the constitution, it is important, if only to ensure Justice is done to his case, that he should set out with a reasonable degree of precision, that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed”**.

In the instant case, apart from the citing of various articles touching on the petition, this being articles 2, 3, 10, 19, 21, 22, 27, 28, 35, 45 and 53 of the Constitution, the petitioner has not in this petition gone further to show in what manner or form these articles have been infringed or threatened to be infringed and by who in particular.

The petitioner contends that he as a right to know his biological father in the same breath he maintains that in the year 2007 he established contact with Isaiah Cheluget and they were in constant communication, they took photographs together and he occasionally send him money via mpesa. At the time he was over the age of maturity he had therefore, ample time during that period to confirm his parenthood if he so wished.

The Deceased passed on in the year 2017. The petitioner had not demonstrated what measures he undertook to establish his paternity and or lineage and whether these measures were thwarted and or infringed by the deceased who he now wants his remains to be dis-interred or by the Respondents.

In short he has not shown how his right to know his biological father was infringed.

The petitioner at the time of the death of the Deceased was over 30 years old. He has not demonstrated how for a duration of a decade after establishing contacts with the Deceased his rights were violated.

At the time of filing this petition the beneficiaries of the estate of the late Isaiah Cheluget had not been ascertained. It had not been ascertained who were the petitioners in the Succession cause if any.

It is those petitioners and not necessarily the Respondents, in this petition that were to be litigated against.

### **2. Does the petitioner has recourse to other statutory laws for the reliefs sought?**

Matters of Succession and Inheritance are governed by the law of Succession Act Cap 160 Laws of Kenya.

Under the Law of Succession Act and in particular the provisions of S.23 (3) of the act one does not have to prove that he is a biological child of the Deceased for purposes of inheritance. The law allows for children born out of wedlock. What is required is to prove dependency.

There is no good reason, therefore for purposes of succession to subject an already interred body to be dis-interred for purposes of DNA testing to prove paternity.

### **3. Is there a cause of action to warrant the issuance of an exhumation order?**

As argued supra, there is no such cause of action. The courts have on numerous occasions frowned upon the issuance of exhumation orders.

Onyancha J as he then was following the dicta in Re Matheson (deceased) 1958 1 ALL ER 202 had in the case of Hellen Cherono Kimurgor –vs- Esther Jelegat Kosgei 2003 eKLR thus to observe:- “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 dis-interment, 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 powers to do so. That is to say the court will without fear make orders for dis-interment whenever the circumstances of the case make it desirable or imperative to do so. This in my view is the tenor of the case of Re Matheson (1958) ALL ER 202”.

In the instant case it is my considered view that an order for exhumation of a deceased person for purposes of carrying out DNA testing in order to ascertain paternity in matters of succession is clearly not warranted. I accordingly decline to grant the orders sought. This being a family dispute it is ordered that each party to bear its own costs.

Ruling delivered dated and signed this 2<sup>nd</sup> day of November in open court and in the presence of learned counsel for the applicant Miss Chirchir holding brief Mugumya for the petitioner, Learned counsel for the Respondents Miss Chemutai, Learned Counsel for the interested

party Mr. Koske.

Court Assistant Mr. Rotich.

**M. MUYA**

**JUDGE**

**2/11/2018**

**Court** – The Deputy Registrar to furnish the parties with certified copies of the judgment.

**M. MUYA**

**JUDGE**

**2/11/18**