



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION NO. 1158 OF 2013

IN THE MATTER OF THE ESTATE OF RICHARD YEOVA KAVIVYA (DECEASED)

ROBERT KAVIVYA YEOVAPETITIONER

VERSUS

JOYCE MWENDE YEOVARESPONDENT

RULING

Counsel for the petitioner raised an issue in the midst of the oral hearing of Succession Cause 2204/2013 and 1158/2013.

He stated that during cross examination of the 2 witnesses from the Objector's side he was unable to and had to restrain himself from cross examining the 2nd witness on their paternity as regards the deceased being their biological father and the intricate details as to why and how the deceased and their mother parted ways and eventually divorced. Therefore, to determine the issue of who are the beneficiaries of the deceased's estate once and for all that it is only fair that the court is presented with all relevant facts so as to arrive to an informed and fair decision. The only way is to have DNA testing conducted on the 1st family members mainly DW II and DW III respectively.

The Objector's Counsel objected to the DNA testing and stated that they filed affidavits by the Objector and outlined circumstances to show that they are children of the deceased and attached relevant documents. The Petitioner did not reply or contest the information.

The matter commenced hearing and the same has been adjourned severally and today when the witnesses from the Objector's side testified the issue of DNA testing was introduced. They objected to DNA testing and stated if allowed all the children of the deceased shall be subjected to the said process of determining paternity.

The court finds as follows:

1. The matter commenced hearing in September 2015 after pleadings were closed from then till now no one has raised the issue of DNA testing. The same is raised at the tail end of the proceedings which will delay the conclusion and determination of the matter.
2. The fact of paternity of the children of the 1st family DW II and DW III is not critical as long as each party proves their claim that DW II and DW III were children of the deceased from the definition of

'child' under **Section 3(2) of the Law of Succession Act, Cap 160.**

3. Section 109 – 110 of the Evidence Act prescribes that, 'he who alleges must prove.' Therefore, the burden of proof is on the party alleging a fact to prove the fact by evidence.

4. If or when the Court finds that to arrive at a just and fair decision of the matter DNA testing is crucial and necessary, it shall order the same then.

5. DNA testing on especially adults to determine paternity must be critical to the determination of the matter. It is an intrusive process interfering with one's privacy, unless absolutely necessary it is not granted.

6. The real issue is whether by definition of child in **Section 3(2) of the Law of Succession Act** the objectors were/are to be treated as children of the deceased.

7. The DNA testing should have been brought at the earliest opportunity not at this stage. It is time consuming and costly and it is at the convenience of one party against the other and shall only serve to delay conclusion of these proceedings.

From the above reasons I find it on a balance of convenience that DNA testing is not necessary at this stage for determination of the matter at hand. It will only cause delay and cost. If the Party/Petitioner insists on the DNA testing then it shall proceed on condition it is all children of the deceased at the Petitioner's cost and costs and indemnity of the suit from the commencement to date.

The hearing to proceed on a date taken by the Parties.

READ AND SIGNED IN THIS COURT IN THE PRESENCE/ABSENCE OF PARTIES ON THIS 8TH DAY OF FEBRUARY, 2017.

M. W. MUIGAI

JUDGE