



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 691 OF 2015**

**FORMERLY CHUKA SPM'S SUCCESSION CAUSE NO. 44 OF 2008**

**IN THE MATTER OF THE ESTATE OF M'RINKANYA KIAGA (DECEASED)**

**AND**

**JENIFFER KANYUA .....1<sup>ST</sup> ADMINISTRATIX**

**MATHRICE ITHIRU M'RINKANYA.....2<sup>ND</sup> ADMINISTRATIX**

**RULING**

1. Before me are two applications one dated **8<sup>th</sup> February, 2017** made by **Agnes Mukwairu M'Rinkanya (protestor)** and another one dated **21<sup>st</sup> February, 2017** made by the **1<sup>st</sup> administratix Jennifer Kanyua**. This court directed the two applications to be argued contemporaneously because a decision in the first application dated **8<sup>th</sup> February, 2017** would affect the **2<sup>nd</sup>** application dated **21<sup>st</sup> February, 2017**. This court will therefore concentrate more on the issues raised in the first application.

2. The protestor/applicant in her summons dated **8<sup>th</sup> February, 2017** has moved this court for the following orders namely;

- i. That this court be pleased to review, vary, set aside and or vacate its orders issued on **15<sup>th</sup> December, 2016** and order the matter to proceed by way of ***viva voce evidence***.
- ii. That this court be pleased to allow and or permit the applicant to offer or adduce her evidence ***de benne esse*** (as per her present and future needs).

3. The grounds upon which this application has been brought are as follows:

- a. That the applicant is elderly and sickly
- b. That a **DNA order** to be performed is impracticable
- c. That this cause should be determined as a matter of urgency

4. In her supporting affidavit sworn in support of this application the protestor has deponed that she is **94 years old** and sickly and is afraid that unless she testifies quickly enough she may not get a chance to give her testimony owing to her advanced age. She has further deponed that it has become **impracticable to comply** with the orders issued in court on **27<sup>th</sup> July, 2016** as **DNA** samples of the deceased herein

were not obtained in order to facilitate marching of blood samples of the litigants herein.

5. At the hearing of this application, **Mathrice Kathure** speaking on behalf of the applicant asked this court to fastrack the hearing and disposal of the cause due to the age of her mother (the protestor/applicant herein). She added that her late father (deceased herein) died long ago and buried and that **no DNA** samples were obtained from the deceased before burial. She further claimed that the respondent and other relatives asking for **DNA** samples to be taken **have no blood relations to the deceased**.

6. The protestor herself also added that as far as she was concerned the deceased was married to two wives herself included. She faulted her step children of trying to grab all the estate excluding her and her daughter.

7. The respondent **Jennifer Kanyua**, opposed this application. It is her contention that the application is incompetent for having been presented by **Agnes Mukwairu** yet in her view she was substituted by her daughter (**MATHRICE KATHURE**). She has contested the fact raised by the applicant that she was the wife of the deceased.

8. The respondent has however conceded the prayer to have this matter fast tracked due to the advanced ages of the parties in this cause. She however has faulted the applicant for frustrating the effort to have **DNA done** by failing to avail herself for sampling.

9. The respondent has further deposed that the **DNA sampling** was agreed by consent to determine if **Mathrice Kathure** is a **biological daughter** of the deceased because she disagrees that she is a daughter to the deceased and that doing away with **DNA test** is like an admission on her part that she is not a daughter of the deceased in this cause. She has further deposed that the consent order issued should have read or indicated that **five instead of four** persons were to present themselves to the **Government chemist for DNA** testing and sampling. The applicant has been faulted for not contributing towards the **DNA test** and in her view that is the only way to determine;

i. Whether the applicant was married to the deceased and

ii. Whether **Mathrice Kathure** is a daughter and therefore a beneficiary of the estate herein.

10. **Mr Mugo learned counsel** for the respondent contended that the only way to determine if **Mathrice Kathure** was a daughter of the deceased was through the input of experts which he submitted was the government chemist after conducting **DNA test**. He accused the applicant and her daughter for changing their minds after initially agreeing to undergo a DNA test. He submitted that in support of the application dated **21<sup>st</sup> February, 2017** that there was an error in the order issued on **13<sup>th</sup> December, 2016** because the order omitted the name of the applicant (**Agnes Mukwairu M'Rinkanya**) by mistake because the order of **3<sup>rd</sup> October, 2016** included her as the persons to attend or present herself for **DNA test** at government chemist Nairobi.

11. I have considered both applications dated **8<sup>th</sup> February, 2017** and **21<sup>st</sup> February, 2017** and arguments advanced by both parties. I have also gone through the record of proceedings in this cause and have noted the following steps or events that have so far taken place in this cause.

The record shows that on **14<sup>th</sup> June, 2016**, by consent of both parties the following person were appointed joint administratrixes of the estate of the late M'Rinkanya Kiaga;

i. Jannifer Kanyua

ii. Mathrice Ithiru M'Rinkanya

The two by law are now **joint administratixes** of the estate in this cause. The two were required to

administer the estate in accordance with the law and apply for confirmation of grant upon expiration of statutory period. It is not correct that **Agnes Mukwairu M'Rinkanya** (the widow and the applicant in the application dated **8<sup>th</sup> February, 2017**) or any other interested party is barred by law from presenting any application before this court. She was at liberty to make the application dated **8<sup>th</sup> February, 2017** and to that extent, I find the application competent and properly before court.

12. I have also noted that there was an order issued on the same date (**14.6.2016**) directing that both the administratixes do present themselves to the government chemist to establish whether they are related. This was followed up by a further directive on **11<sup>th</sup> July, 2016** that the **DNA** test would further include **Joyce Mukwandeke** and **Harrison Mukwairu** besides the administratixes herein. Again the purpose was to establish if the two appointed administratixes were related. The order was reaffirmed on **3<sup>rd</sup> October, 2016** though the judge added a rider that "for whatever reasons I direct the mother of **Mathrice Ithiru** to attend the government chemist on a date to be agreed upon by the parties." This court further added that the four named individuals,

i. Jennifer Kanyua

ii. Joyce Mukwandeke

iii. Harrison Mukwandeke and

iv. Mathrice Ithiru were to present themselves to **AgaKhan Hospital** Nairobi on a date that was to be agreed for **DNA profiling** to confirm if the **4 named persons were related**. The costs for the tests were to be shared. The court later on same date **13<sup>th</sup> December, 2016** reviewed the place or the venue for the **DNA test** from **Aga Khan Hospital to Lancet Pathology Centre Nairobi** upon requests by parties in this cause.

13. The above proceedings/orders clearly show that the orders sought to be reviewed here were not given by consent but rather the orders were used when the parties prompted the court to have the DNA conducted to ascertain if the two administratixes were related with each other and by extension with the other 2 children of the deceased **Joyce Mukwandeke** and **Harrison Mukwandeke**.

14. I have noted that the orders made by this court on **3<sup>rd</sup> October, 2016** were issued or **signed** by the **Deputy Registrar** on **15<sup>th</sup> December, 2016** and order directed the named four person to attend or present themselves to **Aga Khan Hospital** and "for whatever reasons" the widow of the deceased was to attend the government chemist on a date to be agreed. As indicated above the court made the order upon hearing both counsels and issued the directive in the interest of justice. The applicant now wants those orders reviewed for the reasons aforesaid.

15. This court has considered the submissions made by both parties in this cause. It is important to note that this court has wide powers under section **47 and Rule 73 of Probate and Administration Rules** to make any such orders as may be expedient and necessary for the ends of justice. Reviewing its own orders is covered by the said section and the rule. I have looked at the reasons advanced by the applicant to expedite the determination of this cause and looking at the circumstances obtaining in this cause this court is in full agreement with both the parties on this score I have also looked at the basis for directing the old widow for **DNA test in Nairobi** and opine that the same will only serve to delay this matter. The orders must have been made in good faith upon request by parties but the same appears to have had an undesired effect of delaying the determination of this cause. In view of the fact that the powers given to this court under **section 47** are wide enough to cover and include preventing abuse of process of this court by any of the parties for whatever reasons, I find basis to invoke those powers in this matters for the interest of justice. My positing is informed by the provisions of **section 107 of the evidence Act** which provides that whoever alleges has the burden of prove. I am also persuaded that the term used by the Hon. Judge "**for whatever reasons**" implied that the reasons for DNA profiling in the first place was murky or cloudy and the court just allowed the parties to carry out the tests for what would be worth. That has now proved to be an impediment to the finalisation of this matter and that does not serve the ends of justice.

Consequently, this court shall proceed with speed to determine this matter on the basis of the evidence presented before it in accordance with the law. After all the issue of dependency under **section 29 of Law of Succession Act** is not only be established through biological evidence because that certainly is not the position of law. Of course I am not saying that parties are precluded from adducing evidence whether expert or otherwise to prove or disapprove paternity which is contested in this cause. Any party is at liberty to adduce the same but it is not in the interest of time and expediency of justice to insist that hearing can only take place if **DNA test is administered**. It is not disputed that the deceased herein died and **buried in 1978** which is more than **35 years ago**. There were no DNA samples kept to exactly verify if all or any other children in this cause were his biological children. It is a mere speculation and skewed assumption to consider paternity of one as opposed to the other is an indisputable fact. This is because it is common knowledge that men at times bring up children thinking that all are his biological children but we all know that if test and when tests have been carried out that issue at times has been discounted. It is therefore imperative that in the circumstances such as obtaining in this cause, parties realistically have to perhaps find better ways of supporting their respective positions on instead of relying on a futile and costly exercise.

16. In the premises, this court finds no merit in the application dated **21<sup>st</sup> February, 2017**. The same is dismissed. On the other hand find merit in the one dated **8<sup>th</sup> February, 2017**. The same is allowed under the following terms;

- i. The orders made on **11<sup>th</sup> July, 2016 and 3<sup>rd</sup> October, 2016 and 13<sup>th</sup> December, 2016** are hereby reviewed and set aside.
- ii. The administratrixes herein are given liberty and are directed to move the court for confirmation of grant and if they are not in agreement, either can make the application while the other if dissatisfied can file a protest to enable this court determine the issue with the requisite expediency.
- iii. This matter shall be mentioned in a week's time from the date of this ruling for further orders/directions.
- iv. Each party to bear own costs.

**Dated and delivered this 20<sup>th</sup> day of July, 2017.**

**R. K. LIMO,**

**JUDGE.**

20/7/2017

Ruling dated, signed and delivered in the open court in presence of Mr. Mugo for Applicant and Respondent in person.

**R.K. LIMO**

**JUDGE**

20/7/2017