

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 450 OF 2012

IN THE MATTER OF THE ESTATE OF JOEL ELIJAH DOLFUS NYASEME(DECEASED)

RULING

1. The application dated 13th March 2014 seeks two principal orders – that directions be given by the court as to the specific time and date within which the parties in the matter ought to have complied with the orders made on 6th February 2014 and that should there be failure by the respondents to comply with the directions to be given the applicant be deemed to be a beneficiary of the estate of the deceased.
2. The grounds upon which the application is premised are set out on the face of the application, while the facts are detailed in the affidavit in support sworn by the applicant on 13th March 2014.
3. It is averred that the court had on 6th February 2014 issued orders directed at the respondents, Franklin Eric Odhiambo Nyaseme and Barbara Herine Nyaseme, ordering them to provide their biological samples to the Government Chemist to determine the patriarchal deoxyribonucleic acid (DNA). The court had then fixed the matter for mention on 4th March 2014 for further orders, but the matter was not listed. The respondents are said to have failed to comply with the order to date, which misconduct has delayed the finalization of the matter. The applicant asks the court to state timelines within which the test ought to be conducted, and in the event the respondents persist in ignoring the order the court do proceed to deem the applicant a beneficiary of the estate.
4. The application was initially placed before me on 14th March 2014, when I directed that the same be served and mentioned on 24th March 2014 for directions. On 24th March 2014, advocates the applicant and the respondents attended court and recorded a consent, whose effect was that the respondents and the applicant were to present themselves at the Government Chemist on 10th April 2014 at 10.00 AM for the DNA process to be carried out to determine the paternity of the applicant.
5. Samples from the parties were not taken on 10th April 2014 as envisioned on 24th March 2014 and the DNA test was not conducted, and a fresh date was then given on 14th July 2014 for the test. The fresh date was 31st July 2014. When the matter came up last on 6th October 2014 the said orders had not been complied with. The matter was then reserved for directions as to which of the two applications ought to be disposed of, as between the applicant's application of 13th March 2014 and that of 23rd July 2014.
6. The application dated 23rd July 2014 seeks the setting aside of the order made on 14th July 2014 directing that a DNA be conducted on 30th July 2014, the respondents propose to have the issue of paternity be resolved by examining the records from the registry of persons to be produced by the Registrar of persons.
7. The critical order in these proceedings is that made by Kimaru J. on 29th January 2014 and which was formally extracted on 6th February 2014. It is this order which is the subject of the application dated 13th March 2014. The said application remains valid and awaits compliance. The said order directed the parties to go back to court on 5th March 2014 for further orders, which should be taken to mean that the parties were expected to have complied with the order in the intervening period. The order in paragraph 7 above has not been complied with to date, despite extensions being granted subsequently.
8. The application dated 23rd July 2014 in my view has been overtaken by events, to the extent that it

sought the setting aside of the order of 14th July 2014 which had directed the conduct of a DNA test on 30th July 2014. The said application does not seek to have the principal order varied, the order that gave rise to the order made on 14th July 2014.

9. Looking at the circumstances generally, and especially the reply to the application dated by the respondent, as well as the sentiments in the application dated 23rd July 2014, it is clear that respondents are not keen on complying with the order of 29th January 2014 for the 2nd respondent to the application dated 13th March 2014, despite being within jurisdiction has not presented himself at the Government Test for the test, and is clearly using the alleged unavailability of the his sister to avoid complying with the said order. That is so despite there being an order by consent.

10. To obtain compliance with the order of 29th January 2014, I do hereby direct that the persons named in the said order do comply with it within thirty (30) days from the date of the delivery of this ruling, failing which it shall be deemed that the respondents have conceded that the applicant is a child of the deceased and is entitled to a share in the estate of the deceased.

DATED, SIGNED and DELIVERED at NAIROBI this 3RD DAY OF JUNE, 2016.

W. MUSYOKA

JUDGE