REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. E416 OF 2021

IN THE MATTER OF THE ESTATE OF THE LATE JEREMIAH NGIGE KAMAU (DECEASED)

JULIA WAMBETI NDWIGA …….
APPLICANT/RESPONDENT

VERSES

ALICE WANGUI KAMAU ……. 1ST RESPONDENT/APPLICANT

VIVIAN RACHEL WANJIRU KAMBA …….. 2ND RESPONDENT

KAMAU NGIGE …… 3RD RESPONDENT

EDWIN HIRAM KIRATHE NGIGE …… 4TH RESPONDENT

JULIET MARTHA NYAMBURA NGIGE ……. 5TH RESPONDENT

JOSEPH MBUGUA NGIGE …… 6TH RESPONDENT

RULING

1. In her application dated 17th March 2025 the Applicant Alice Wangui Kamau seeks the following orders:

(a) That the court be pleased to review and or set aside the consent order No. 3 recorded on the 12th November 2024 that states as follows;

"That the following persons to undertake DNA procedures; Rachel Wanjiru Ngige, Eliud Kamau Ngige and Vivian Rachel Wanjiru at the Government chemist within 60 days from this date."

(b) That the court do allow results of Eliud Paul Kamau Ngige to be admitted before the court but those of Lina Rachel Wanjiru Ngige to be disregarded.

2. The application is based on the grounds thereof and the Applicant's sworn affidavit dated the same date.

3. The gist of the Applicant's application is Section 118 of the Evidence Act which provides for the conclusivity of paternity. The Applicant argues that the paternity of one Lina Rachel Wanjiru Ngige was not in dispute and thus no DNA exercise ought to be undertaken.

4. That this was in line with Joseph Njeru Ngarari claim that he was the biological father and thus any DNA test will constitute violation of her rights.

5. Further that at the time she was born his marriage with Julia Wambeti Ndwiga was still subsisting hence there was no need to undertake the scientific exercise. She was therefore their legitimate child.

6. The Respondent filed grounds of opposition dated 9th July 2025 stating among others that the consent was entered mutually without any coercion or fraud and misrepresentation the only reason to set aside is when the same can be proved.

7. That the DNA exercise is a conclusive prove scientifically and thus the parties cannot escape the same.

8. The court directed the parties to file written submissions which only the Applicant complied.

9. I have perused the same and it mirrors save for the cited authorities, the supporting affidavit on record and I need not reproduce the same here.

10. The main issue before this court and which the Applicant has hinge her application is whether in light of the provisions of Section 118 of the Evidence Act the consent must be set aside.

11. First of all, the consent which is impugned was signed in the presence of all the parties and after closing the substantive oral hearing of the case. The parties entered the same willingly and mutually.

12. The consent apart from Lina touches on other parties who apparently have not raised any issues.

13. This court has not been told that the same was procured under any misrepresentation, fraud or coercion. It was agreed by all the parties including the Applicant.

14. To turn around and cite Section 118 of the Evidence Act is an ingenious way of defying the consent.

15. The parties as a matter of fact went as far as complying with the terms of the consent by submitting themselves for DNA analysis and were awaiting the results when she discovered Section 118 of Cap 80.

16. In my view the Applicant ought to have raised this before the consent and made an issue for determination. To argue otherwise at this juncture is prejudicing what they had signed as a consent before the court.

17. Section 118 states as follows:

"The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten. "Underlining mine.''

18. First of all the Act presupposes that the child was born during coverture. In this case the parties are not in agreement when they began separating and the only certain issue is the divorce decree which was presented to the court.

19. It therefore makes sense to argue that the parents may have heard their intimacy at a period none of the parties herein know. It is a factual issue and only science can confirm whether an issue was born out of that intimacy and I think that is what the Applicant is missing.

20. More significantly and in relations to the cited authorities by the Applicant, it is not lost to the court that in an adversarial system we are in, there is nothing unique and embarrassing when one needs to benefit from an estate. The aid of science will help to weed out some characters who may have imposed themselves as legitimate heirs of the deceased.

21. In any case solace will always be found under dependency clauses of Cap 160 in the event that paternity does not suffice. So, in essence in an estate none of the parties will go home with nothing unless one's claim is hopelessly vexatious and meant to embarrass the estate or genuine beneficiaries for that matter.

22. In the case at hand, I find that the reasons advanced by the Applicant are not plausible. The order came out of a legitimate consent and as stated above nothing has been shown that the same was procured illegally.

23. Besides, there is nothing unconstitutional for one to prove legitimacy. If the same turns out negative then the other sections of the Act will kick in as earlier mentioned.

24. In my humble view therefore, each party should take advantage of scientific advancement which invariably has

helped to shorten litigation. The courts will usually come in if the exercise is such that it aims at embarrassing a party or group of persons. In the case at hand the parties are fighting over an estate and there is nothing embarrassing about it. If one feels that his rights will be violated in such an adversarial environment then the best way is to take a walk out of the arena and let others muddle in the legal mud.

25. I think to hide under the clothes of rights as enshrined in various Acts of parliament as well as the Constitution and at the same time seeking to benefit from a deceased estate is not efficacious in the circumstances. Once one thinks that he has a legitimate interest in the estate, then he has to prepare for a bruising legal battle with the attendant consequences however unpalatable they may be.

26. I appreciate several authorities cited by the Applicant but I think that the situation at hand is distinguishable since it was a mutual agreement by the parties on record and unless otherwise the court will respect their wishes.

27. **The application is otherwise disallowed with no order as to costs.**

Dated signed and delivered via video link this 30th day of October 2025.

H K CHEMITEI

JUDGE