



REPUBLIC OF KENYA

THE JUDICIARY

IN THE CHIEF MAGISTRATE'S COURT AT NAKURU

SUCCESSION CAUSE NO. E911 OF 2021

[A. P. NDEGE; SPM]

IN THE MATTER OF THE ESTATE OF STEPHEN GITARA KIMANI

[DECEASED]

VERONICAH MUTHONI NDIRANGU.....

..... APPLICANT

VERSUS

MARY WANJIRU THUO.....

PETITIONER/RESPONDENT

RULING

1. This matter concerns the estate of the deceased Stephen Gitara Kimani, who died intestate on 29/09/2021. Vide her affidavit of protest sworn at Naivasha on 29/06/2023, the applicant herein, **VERONICAH MUTHONI NDIRANGU,**

commenced these protest proceedings which are still pending herein.

2. In the affidavit, the applicant avers that the Respondent/ Petitioner, **MARY WANJIRU THUO**, had concealed material facts when she petitioned for Grants of Letters of Administration and that the same was fraudulently obtained as the Petitioner failed to consult her as a co-wife to the deceased, prior to petitioning the Court. That at the time of his death, the deceased was survived by 2 wives: herself and the Petitioner. That their union with the deceased was blessed with 2 children, **Ayub Mwaka Muthoni** and **Elizabeth Wambui Muthoni**, both adults.

3. While the protest was pending, the Applicant came to court vide an interlocutory application vide a Notice of Motion dated 01/03/2024, pursuant to the provisions of Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Order 51, Rule 1 of the Civil Procedure Rules (2010), Section 146(4) of the Public Health Act, Sections 3(2) and (5) of the Law of Succession Act

and Article 159 of the Constitution of Kenya, 2010, seeking the following substantive orders: -

- a. THAT the deceased's grave situate in Molo Constituency within Nakuru County be unsealed and opened to exhume his remains with a view of taking samples therefrom for purposes of Deoxyribonucleic Acid (DNA) tests.
- b. THAT the Officer Commanding Molo Constituency Station and/or proximate to the late Stephen Gitara Kimani's burial site and the medical officer of Health of Molo Hospital or any other proximate to the deceased's burial site do oversee the implementation of exhumation orders herein.
- c. THAT the officers of the Kenya Medical Research Institute (KEMRI) do undertake and/or oversee the disinterment and do harvest the necessary samples for DNA testing.
- d. THAT the Officer Commanding the Molo Police Station and/or his designated police officers within Molo Constituency do oversee the implementation of the Court Order in offering security during the exhumation exercise.

- e. THAT the Applicant's children namely, Ayub Mwaka Muthoni and Elizabeth Wambui, and the Petitioner's children namely; Joseph Kimani Gitara, Naftali Thuo Gitara and Wangare Gitara, to present themselves to KEMRI within 7 days after exhumation and harvesting of the DNA sample of the deceased for them to submit their respective biological samples to the Government Chemist for purposes of ascertaining their paternity or claim that the deceased is their biological father through DNA testing.
- f. THAT the DNA examination results and/or findings on the paternity of the children be filed in Court by the examining institute within 30 day after the DNA examination.
- g. THAT this Honorable Court be pleased to declare that the Children of the Applicant were sired by the deceased and proceed to enjoin them in the succession cause as beneficiaries to the estate in the instance the paternity tests are declared positive.

4. The application is based on the 10 grounds on the face of it, and the Supporting Affidavit of the applicant, sworn at Naivasha on 01/03/2024; mainly that: -

- a. The deceased is her children's father whom they fully depended on during his lifetime and that he would send the Applicant monies through MPESA to cater for the children's ever-changing needs.
- b. The Petition for Letters of Administration intestate as drawn was not conclusive as it failed to indicate her children sired by the deceased who therefore risk being deprived and denied their rightful inheritance.
- c. All her children were sired by the deceased and the applicant is amenable to carry out DNA examination of her children to determine the disputed paternity of her children to be the deceased's.
- d. All children sired by the deceased be ascertained. The deceased's body is accessible and the applicant prays for exhumation for sample harvesting in the interest of justice.

- e. The Applicant challenges the Certificate of Birth adduced by the Petitioner/ Respondent and avers that there is no scientific proof that the children of the Respondent are indeed biological children of the deceased.
 - f. The samples harvested from the deceased will ensure that there is integrity in the quest to determine the paternity of the deceased's children. It is imperative for the expeditious disposal of the succession cause, that this Honorable Court grants the order of exhumation.
 - g. Justice demands that paternity of children claimed to be sired by the deceased be done to settle the matter and the children be deemed beneficiaries of the estate if the DNA tests are positive.
 - h. No party will be prejudiced if the orders sought for are granted by this Honorable Court.
5. The application was served on the Petitioner/ Respondent who oppose the same vide her Replying Affidavit sworn at Nakuru on 11/03/2024. Parties have filed and exchanged their written submissions. For the Applicant, it was submitted that there does not exist an express clause or statute that bars and/or

prohibits extraction of DNA samples from deceased's body to enable paternity tests be conducted against persons claiming to be beneficiaries of the deceased's estate. That that will guide the Court to determine on whether the Applicant's children are entitled to a share of the Deceased's estate. That the discovery of the truth of the paternity of the Applicant's children is central in articulating their claim to the estate. That 2 children of the Respondent were borne before solemnization of the marriage between the deceased and the Respondent. The Applicant cited the case of **RE ESTATE OF PETER MURAYA CHEGE ALIAS MURAYA CHEGE (DECEASED) [2019] e KLR**, where Justice Ndungu stated as follows on reliance on birth certificates to prove paternity: -

23. The respondents have proffered evidence of a birth certificate of the 7th respondent to show he is a child of the deceased. A funeral program has also been exhibited where the 7th respondent is named as a son in the deceased's eulogy read at his burial.

22. The exhibits at paragraph 21 above are not conclusive evidence of paternity of the 7th respondent. To that extent, an order for a DNA test looks quite inviting to resolve the issue of paternity.

...

39. Proof of paternity through known children or siblings is in my view a subjective test. To begin with one would have to report to the primary test that such a child or sibling DNA sample matches the deceased's.

40. Therefore, when doubts arise about the propriety of samples from such persons, the court must resort to best sample that would establish the truth.

41. As indicated above, the best sample would be the one extracted from the deceased's remains and exhumation becomes necessary.

42. On exhumation, I find refuge in the decision of Thande J in Re Estate of Jacob Mwalekwa Mwambewa (Deceased) 2018 e KLR at Page 5 where the learned judge stated; "The court would wish to keep faith with the deceased herein and not disturb his remains, nevertheless, the pursuit of the truth overrides the supposed wishes of the Deceased. Further family as well as cultural discomfort and outrages must give way to establishing the truth regarding the paternity of the Objector/Respondent which as stated earlier is central to the succession dispute herein. DNA testing will not prejudice the Objector/Respondent if anything it will reaffirm his claim as in the result I am satisfied

that the application dated 29.3.17 has merit and the same is allowed as prayed.”

43. Am satisfied that the best sample is the one extracted from the deceased and this will be achieved through exhumation.

6. That from the foregoing, it could be prejudicial for this Honorable Court to make an assumption that the children of the Respondent are biological children of the deceased so as to have a sibling DNA test conducted. That in the event the DNA tests conclusively demonstrate paternity of the Applicant's children by the deceased, it would be both equitable and just for the Respondent to acknowledge the aforementioned children, Ayub Mwaka Muthoni and Elizabeth Wambui, as beneficiaries of the estate.

7. For the Respondent, it was submitted that exhumation of an interred body causes inconvenience to the bereaved family and consequently a proper basis must be laid before such an order can be made. That an application for exhumation cannot be made in the abstract, a party need to show that there is a foundation for his/her belief that she has filial relationship with a person whose remains have been interred. Counsel further

submitted that the application herein has been made by an incompetent party, as the children referred to herein are adults and it is elementary law that an adult such as the applicant herein cannot file a suit seeking relief for the benefit of another adult unless they demonstrate that the other party suffers from a disability such as age of minority or mental incapacity which renders hi/her incapable of filing a suit. That even under those circumstances, the person filing the suit must be appointed a guardian by the court under order 32 of the Civil Procedure Rules, or the Mental Health Act. That unless such a situation obtains, an adult filing a suit on behalf of another adult who has capacity to file a suit on his own capacity has no locus standi. That in this case, it has not been confirmed that Ayub Mwaka is a minor or a person of unsound mind. That Ayub Mwaka has not claimed that he is a son of the deceased neither has he sought orders for DNA. That the applicant therefore lacks locus to file the present application seeking an order that another adult undergoes a DNA profiling. That in any event, the application herein where the applicant seeks to have a DNA profile done to her alleged adult son contravenes section 25 of

the Data Protection Act which provides that genetic data can only be collected with the consent of the subject. That further, section 26 of the same Act requires that data subject be informed of the use to which his personal data is to be put and to object to the processing of all or part of their personal data. That to that extent, the application herein is incompetent.

8. The respondent further submitted that the applicant's status in relation to the deceased is shifty and nondescript. That the applicant filed a citation dated 28/03/2022 where she described herself as a wife. That the applicant then filed an objection to the making of the grant on 15/08/2022 where she similarly described herself as a wife of the deceased. That in the supporting affidavit herein, she describes herself that she was in a relationship with the deceased out of which the alleged minors were born. That the applicant was simply a lady friend of the deceased. That she is uncertain of whom, among her friends could have sired her children. That by this application, she is staking a gamble on the possibility that the deceased could be one of the potential fathers of her children and that

should not warrant an order for the exhumation of the deceased.

9. It was further submitted for the Respondent that there is no link between the two children and the deceased. That the paternity of the children and their connection with the deceased is a fact in issue. That before any orders for exhumation of the remains of the deceased is made, it has to be demonstrated that there is a link between the deceased and the children. That the birth certificates of the children herein, however, do not bear the names of the deceased as their father.

10. It was further submitted for the Respondent that the applicant should not be permitted to change the nature of her case midstream. That corollary to that, a party cannot seek interlocutory prayers which have no foundation in the substantive cause. That to the extent of the foregoing, the application seeking to establish paternity of the respondent's children lacks foundation in the pleadings.

DETERMINATION

11. I first do agree that the evidence tabled by the applicant with regards to the nature of her dependency herein is inconsistent or contradictory. Is she here as a wife to the deceased, or a girlfriend, concubine, paramour etc.? In the protest filed herein, she described herself as a wife, and hence a co-wife to the Respondent herein. In the application herein, she changes and describes herself as 'having been in a relationship with the deceased'. Such inconsistent and/or contradictory evidence in affidavits within a succession protest often leads to the court dismissing the protest or requiring *viva voce* (oral) evidence to test veracity. I thus find that the interlocutory application herein cannot be determined in favour of the applicant without a proper scrutinization of the evidence presented which is often done through cross-examination in a *viva voce* hearing. That would have been done in the course of hearing the protest herein, and not at this interlocutory stage. It is during the hearing that the applicant could have at least been expected to first lay a link between her children herein and the deceased and the orders sought herein, may have

been applied for once the link was established to the satisfaction of the court.

12. Kenyan succession law distinguishes between a legal wife and a girlfriend concubine/cohabitant regarding inheritance rights. A legal wife (including customary law marriages) is a recognized dependant under Section 29(a) of the Law of Succession Act and is entitled to inherit. A woman who was simply a girlfriend, but not legally married, cannot claim the same rights as a widow, and it is therefore not clear from the contradictory evidence presented in the affidavits herein whether the applicant herein is protesting in these proceedings as a girl friend or as a wife of the deceased.

13. Secondly, and as ably submitted by the learned counsel for the Respondent, while the Children Act of 2022 and the Constitution allow for representation of children (under 18), the rules differ for grown-up (adult) children such as the ones for the applicant herein who are generally expected to bring their own claims as they have legal capacity (*locus standi*). A person may bring a claim on behalf of another (including adults) if the

person cannot act in their own name due to circumstances, such as being mentally incapacitated or incapable of accessing the court, pursuant to Article 22(2)(a) of the Constitution, or in the case of a class action (representative suit) if they are acting in the interest of a group or in the public interest, but this must be justified. In many succession cases, it is expected that all heirs be joined as parties rather than one person acting on behalf of competent adults. I thus do hereby agree that the application herein appears incompetent to that extent. It may therefore be presumed that Ayub Mwaka and Elizabeth Wambui, are not interested in the orders being sought, or in protesting their exclusion in the proceedings herein as they have not lodged any protest to that effect. The orders of DNA sampling being sought on their behalf herein cannot therefore be said to have come from them. Granting the orders sought will therefore infringe on their privacy rights as submitted by the learned counsel for the Respondent herein.

14. Evidence presented in an interlocutory application during protest proceedings must be consistent with the material facts disclosed in the main Affidavit of Protest. In Kenyan law, a party

cannot use a subsequent interlocutory affidavit to introduce new, contradictory, or contradictory evidence that varies the core case set out in the initial protest, as this would violate the principles of fair play and surprise the opposite party. The evidence in any subsequent application, such as the Notice of Motion herein, must therefore support, not contradict, the grounds filed in the original Affidavit of Protest against a grant. Substantially changing these facts through a later affidavit is irregular and inadmissible unless the court grants leave to amend.

15. I have already found that this interlocutory application introduces evidence that contradicts the Affidavit of Protest, and because of this I do find that it should be struck out or considered as lacking probative value because it patches up gaps or changes the basis of the claim.

16. I am bound by the decision **IN RE ESTATE OF PATRICK KINYUA MATHENDU (DECEASED) (CIVIL APPEAL E115 OF 2020) [2023] KEHC (KLR) (24 October 2023) (Judgment)** where the Court held thus: '**22.....In the absence of a prima facie case to show the link between the deceased and**

the minor, there would be no legal basis to subject the minor to a DNA test' and find that the inconsistent evidence herein, has not established any link between the applicant herein and the deceased, and at this interlocutory stage.

17. The upshot is that the application herein has no merit at this interlocutory stage, and I consequently do hereby strike it out for being incompetent in these protest proceedings, and or dismissed, with costs to the Petitioner/ Respondent.

DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT

THIS 31st DAY OF March, 2026

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Applicant's/ Protestor's Counsel: Wairegi

Respondent's/ Petitioner's Counsel: Githui

Applicant: n/a

Respondent: n/a

Githui: We can take a date for the protest.

Wairegi: Praying for a mention with leave to the applicant and the children to move court with a proper application for joinder.

Githui: We have no objection.

CT: Mn. 29/09/26.