



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Njiru Kanyago (Deceased) (Succession Cause
32 of 2016) [2023] KEHC 18278 (KLR) (5 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18278 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
SUCCESSION CAUSE 32 OF 2016
RM MWONGO, J
JUNE 5, 2023**

BETWEEN

FRANCIS MAINA NJERU ALIAS FRANCIS MAINA NJIRU APPLICANT

AND

FLORA MUTHONI NJIRU 1ST RESPONDENT

WESTON MAINA NJERU 2ND RESPONDENT

GLADYS WANJIRU NJERU 3RD RESPONDENT

JUDGMENT

1. The deceased died on September 29, 1985. On February 23, 2016, the 1st Respondent, Flora Muthoni Njiru, the deceased's wife, was granted the Letters of Administration in HC Succ No 649 of 2015. The certificate of grant was issued on March 18, 2016. On 3rd October, she applied for confirmation of grant proposing to distribute the deceased's parcel of land No Kiine/Kibingoti/Nguguine/464 measuring 1.13 hectares as follows:
 - i. Flora Muthoni Njeiru & Weston Maina Njiru - 0.376 Ha
 - ii. Gladys Wanjiru Muraguri & Flora Muthoni Njiru - 0.376 Ha
 - iii. Zipporah Wangeci Murage & Flora Muthoni Njiru - 0.376 Ha
2. A certificate of confirmation of grant was issued in Baricho PM Succ Cause No 271 on December 5, 2016
3. The applicant claims to be the son of the deceased. He had filed a citation dated February 24, 2016, in Baricho PM Succ Cause No 7 of 2016. In response, the 1st Respondent filed a petition in Succ No 271. Subsequently, the Applicant filed the summons for revocation of grant dated December 16, 2016 which is the subject of this Judgment. He claims that the proceedings to obtain the grant are



defective; that the grant was obtained fraudulently by making false statements and concealment of material information; and by use of untrue allegations.

4. From the papers filed there appears to be some confusion as to which court was handling what aspects of the administration of the estate. It is not essential to resolve that confusion for purposes of this judgment.
5. The response to the summons for revocation was filed by Weston Maina Njiru the 2nd respondent and son of the deceased and Flora Muthoni. In the Replying Affidavit sworn on behalf of the 1st and 3rd respondents, he asserts that the 3rd respondent is his sister in law and that the applicant is a stranger to the estate of his father. He denies concealing any information from the court to warrant revocation.
6. The 2nd respondent also denies that the Applicant's mother was married to the deceased; that though the applicant is a stranger to the deceased's estate, they knew the applicant's mother as a neighbour before her death but she never laid a claim on the deceased's estate; that after she died she was never buried in the deceased's land as a wife ought to be.
7. The hearing of the summons was held by way of oral evidence in January and May of 2022.
8. The applicant testified that he is the son of the deceased, his late mother having been the deceased's first wife; that he was a child; and that there were witnesses who knew the relationship between the deceased and his mother.
9. In cross examination, he was hard pressed to show why he took up his ID only in 2015. He produced photographs of his mother's funeral, which, he alleged, the respondents attended. He said she died on 11/4/2004. He stated that the annexed Eulogy of his mother was prepared by Peter Kangethe and Bernard Mwangi who were witnesses in the matter. He stated that the 1st Respondent, Flora Muthoni who is his step mother found him on the deceased's land when the deceased married her.
10. The two mentioned witnesses, Peter Kangethe and Bernard Mwangi, had been indicted as respondents' witnesses and had filed witness statements, but in the were not called by the respondents to testify. It is worth noting, however, that the two statements are quite similar, and inter alia contain the following phrase:

“Since his death in 1985 the applicant or his mother did not visit his home or lay a claim to the estate. It is therefore odd and suspect that the applicant waited until the demise of his mother and alleged wife of the deceased herein to bring the claim herein. If indeed he was a son of the deceased his mother ought to have laid a claim in her lifetime”

The tenor of this statement suggests that the applicant was at fault for not following up on the deceased's estate earlier, and should be ashamed of himself.

11. Weston Njiru testified for the respondents. His affidavit and annexures were adopted by the court as his evidence in chief. He denied that the applicant at any time lived on the suit land.
12. In cross examination, he admitted that he used to see the applicant, but did not say where. When referred to the pictures of the applicant's mother's funeral he identified himself in the top Photo annexed as FMN 7 to the Applicant's Further Affidavit, as the person in a grey coat on the second left. He identified the applicant on the second right in a blue coat. His deceased brother Onesmus Wanjohi Njiru was on the far right. He also identified his other brother Kennedy Murage Njiru in brown. He said they were all seated in an ordinary bar.



13. Shown the middle photograph in FMN 7, he stated that this was at a funeral but was evasive when asked whose funeral it was. He identified himself in the picture as the one on the far right in a blue jacket and blue trousers; he identified his mother in a red-brown sweater and white headscarf; he however, declined to admit having attended the funeral of Margaret Wangeci Njeru, the applicant's mother.
14. Shown the bottom photograph in FMN 7, the witness identified his mother Flora Muthoni Njiru as the lady in red; he identified the tall man in the brown coat as the applicant. He said he couldn't tell if the bottom picture and the middle pictures were taken on the same date, although any reasonable lay person looking at the two pictures would clearly see that the coffin, coffin cloth and tent appear to be virtually the same. Indeed, even the attire of the lady in the red-brown sweater and white headscarf, identified by the 2nd Respondent as his mother Flora Muthoni Njiru, is virtually the same in both pictures.

Conclusion and Disposition

15. After hearing the evidence, whilst I was not satisfied that the applicant had made out a case that he was the deceased's son, I was able to appreciate the following: first, that 1st respondent was untruthful when he stated in his Replying Affidavit that he never knew the applicant (paragraphs 5 and 10 of the affidavit); second, that there was some type of familial relationship between the applicant and the 1st and 2nd respondents to warrant them being in the same funeral picture with such centrality; and third, that if there was any familial relationship, even a birth certificate could not ascertain it precisely.
16. I agree with the respondents' submissions that DNA is the only conclusive evidence of paternity when he argued that the applicant failed to produce the only conclusive evidence of paternity and cited the following case:

“*in re Estate of Peter Muraya Chege (Deceased)* [2019] eKLR the court held:

‘...In this time and age of considerable scientific discovery, development and achievement, where a dispute arises as to the paternity of an individual, there is no better way to settle it than through a dependable DNA test

Where a proper basis is laid, such test should be ordered.

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The power of the court to make an order for a DNA test is not in doubt. In *EWG v JMN & Another* [2017] eKLR it was held that a court may exercise its inherent jurisdiction and direct that a party submit to a DNA test in order to determine the truth of the paternity where such determination will serve the interests of justice”

17. Accordingly, I am satisfied that the applicant has laid a basis sufficient enough for me to order, as I hereby do, that a DNA test be conducted. A DNA test will be the surest way of identifying conclusively, whether the applicant had a blood relationship with the deceased.
18. Accordingly, I think the proper orders to make in the interests of the justice of this case are as follows:
 - a. That a DNA test be conducted as between the applicant and the 2nd respondent to identify the sibling relatedness of the two;



- b. That the costs of the DNA test shall be shared equally between the 1st Respondent and the applicant initially;
- c. That the said DNA test be done within ninety (90) days from the date hereof.
- d. That ultimately, the court reserves pronouncing itself on costs of this application

19. Orders accordingly

Dated at Kerugoya this 5th day of June, 2023

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R. Mwongo

JUDGE

Delivered in the Presence of:

Munene - holding brief for Ngige for Applicant

Muturi - holding brief for Magee for Respondent

Murage, Court Assistant

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