UGANDA / JUDGMENT

Gasa Zoe and Another v Namara (Miscellaneous Application 1205 of 2023) [2023] UGHCFD 110 (27 November 2023)

[2023] UGHCFD 110

COURT
HC: Family Division (Uganda)

BEFORE
Nagawa, J

CASE / FILE NUMBER
Miscellaneous Application 1205 of 2023

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA [FAMILY DIVISION] MISCELLANEOUS APPLICATION NO. 1205 OF 2023

(ARISING OUT OF CIVIL SUIT NO. 315 OF 2021)

1. GASA ZOE ATARA 2. MUKISA NATHAN :: APPLICANTS (THROUGH NEXT FRIENDS MUNYANGABI WILLIAM & HATEJEKA GODFREY)

VERSUS

MOREEN NAMARA KALEMA :::::::::::::::::::::::::::::: RESPONDENT

RULING BEFORE: HON. LADY JUSTICE CELIA NAGAWA

1. Introduction

- 1.1 This Ruling relates to an application brought by way of Notice of Motion under Section 82 and 98 of Civil Procedure Rules, Cap. 71; Section 33 of the Judicature Act, Cap. 13; Order 46 Rule 1 & 2 and Order 52 Rules 1 & 3 of the Civil Procedure Rules, Statutory Instrument No. 71- 1, seeking orders; that: -
- **1. A DNA order issued on 12th September, 2023 be reviewed by substituting the same with an order to exhume the body of the late Enoch Kalema to obtain a sample for conducting a paternity test on all the children Gasa Zoe Atara, Mukisa Nathan, Mwesigwa Enoson Kalema, Kassagga Carlson Kalema, Uwera Enoreen Edith, Kwagala Kereen Akoragye, Kalema Tobia Ariel and Kwera Kayla Adriel.**

- **2. Costs of this Application be in the cause.**

- 1.2 The background and grounds of this application are set out in the Notice of Motion and in the affidavit in support of the application sworn by Munyangabi William, grandfather to the infants and next friend to the infants, briefly that;
- **(a) According to the orders pertaining DNA issued on 12th September, 2023 the best way of proving paternity is comparing samples from all the alleged children of the late and with the deceased, Enoch Kalema.**
- **(b) It is in the interest of justice that this Honorable Court allows this application.**

2.0. Representation and Hearing

2.1. At the hearing of this application on 19th October, 2023, the applicants were represented by Mr. Davis Guma from Guma & Co. Advocates while the Respondent's counsel made no appearance but her response was filed by M/S Kasolo & Khiddu Advocates. Counsel for the Applicant filed this application together with written submission while the Respondent was given a schedule to have her affidavit in reply filed and a rejoinder once found necessary. There was a noted delay by the respondent which led to having the rejoinder filed rather late. All submissions have been considered while determining this matter.

3.0. The Applicant's case.

3.1. Upon an oral application being made by counsel for the defendants in Civil Suit No. 315 of 2021 that a DNA test be conducted on the applicants in this application, this court directed DNA samples be collected from Gasa Zoe Atara and Mukisa Nathan and a paternity test to be done by comparing the DNA samples of Gasa Zoe Atara and Mukisa Nathan as guided by the Department of Government

Analytical Laboratories (DGAL) on the best and most accurate sample collections.

- 3.2. According to the applicants the orders pertaining DNA issued on 12th September, 2023, the best way of proving paternity is by comparing samples from all the children of the late and comparing the same with the late Enoch Kalema. Yet the order issued by this court, is selective on the two minors and a comparison should be made by getting samples from the late so that there is fairness on who is the rightful beneficiary to the estate.
- 3.3. The petition for grant of Letters of Administration presented some children that are doubted and leaving them from this exercise shall in future prejudice the administration of the estate and no injustice shall be occasioned on all the eight (08) children deemed to benefit from the estate if they are subjected to the DNA test unlike having only the applicants tested and once this is not addressed it would lead to multiplicity of suits.

- 3.4. Since it is believed that not all the children were fathered by the deceased, there is a sufficient cause to have the order reviewed and substituted with an order to exhume the remains of the late Enoch Kalema and compare the sample of the deceased with all the eight children hence this application.

4.0. The Respondent's Case

- 4.1. The respondent, Namara Moreen Kalema in opposition of this Application filed an affidavit in reply.
- 4.2. The respondent contended that the applicants filed Civil Suit No. 315 of 2021 against the Respondent challenging the grant and seeking to have the grant revoked claiming that the respondent was

mismanaging the estate of her late husband Enoch Kalema due to exclusion of her children.

- 4.3. In the Petition for letters of administration, the respondent mentioned her six children with the late and herself as the only beneficiaries to the estate of the late since they were the only ones known to her at the time.
- 4.4. The respondent found out about the two alleged beneficiaries to the estate when she was sued by the applicants through their next of friends. Even though, prior to his death, the deceased had neither introduced nor mentioned the two alleged children as his to his wife.
- 4.5. The Respondent further contended that the next friend has falsehoods in his affidavit in regard to the court order and that the essence of the order was to determine the paternity of the minors since it is their paternity that is in question and is what would entitle them to benefit from the estate of the late Enoch Kalema as beneficiaries.
- 4.6. The application is misconceived and a waste of court's time since the professionals have not been consulted as ordered by Court and neither have they advised on the best and most accurate way to conduct the DNA test in these circumstances. The respondent prayed that the application is dismissed with costs since it is an abuse of court process.
- 4.7. The applicant filed a rejoinder whose contents have been considered in determination of this application.

5.0 Parties' written submissions.

5.1. I perused and analyzed each parties' written submissions. I thus appreciate and commend each party's counsel for their submissions

and arguments in their respective endeavour in resolving this application in favour of their respective party. The written submissions have been considered in determination of this application.

6.0. Issues for Determination by the court.

- 6.1. There are two issues for determination by the court, namely:
- a) Whether the applicants are aggrieved persons within the meaning of Section 82 of the Civil Procedure Act.
- b) Whether the application meets the criteria for review.

7.0 Determination of this application

- **a) Whether the applicants are aggrieved persons within the meaning of Section 82 of the Civil Procedure Act.**
- 7.1 The jurisdiction of Court to review its Orders/Judgements is provided for under Section 82 of the Civil Procedure Act, Cap.71 which provides that;

"Any person considering himself or herself aggrieved— (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order on the decree or order as it thinks fit."

- 7.2 Section 82 of the Civil Procedure Act has been enlarged by Order 46 Rule 1 of the Civil Procedure Rules which provides that;
- *i) Any person considering himself or herself aggrieved-*
- *(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*

- *(b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him or her, may apply for a review of judgment to the Court which passed the decree or made the order.*
- 7.3. As per the provisions of Order 46 Rule 1 (b) of the Civil Procedure Rules applications for review can be filed by any person considering himself/herself aggrieved by a decree or order under the following circumstances which include: -

- (a) Discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by the applicant at the time when the decree was passed or the order made*.*
- (b) Some mistake or error apparent on the face of record.
- (c) For any other sufficient reason, but the expression "sufficient" should be read as meaning sufficiently of a kind analogous to (a) and (b) above See **Re Nakivubo Chemists (U) Ltd (1979) HCB 12 and FX Mubuuke Vs UEB High Court Misc. Application No.98 of 2005**
- 7.3 Under Section 82 of the Civil Procedure Act, the court has unfettered discretion to make such orders as it thinks fit on sufficient reason being given for review of its decision. However this discretion should be exercised judiciously and not capriciously.

- 7.4 The applicants consider themselves aggrieved on the grounds that; the best way to prove DNA paternity should have been comparing samples from all the children of the late Enoch Kalema and comparing them with the samples of the late Enoch Kalema. The applicants feel aggrieved in as far as the order is concerned because it is selective on only two minors.
- 7.5 According to the applicants they submitted that they discovered new facts/evidence which was not within their knowledge at the time when the order was issued. That the children mentioned in the petition for the grant of letters of administration as beneficiaries are doubted as children of the deceased and they should not be excluded from the paternity test.
- 7.6 In response the respondent submitted that the applicants are not aggrieved persons since they have not suffered a legal grievance nor is the order against them or their legal interests. The paternity of minor applicants has to be determined in order to substantiate their claim in the estate of the late Enoch Kalema and establish their locus standi in bringing the main suit against the respondent.
- 7.7 **Analysis by this court**

Section 112 of the Evidence Act, Cap. 6 provides that; "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.*

7.8 Any child born during wedlock is presumed to be the seed or product of that marriage. This presumption is sometimes known as *pater est quem nuptial demonstrant* (or *pater est* for short). It does not apply to unmarried cohabitants. If the birth takes place during the

marriage but conception took place before the marriage the *pater est* presumption still applies. The presumption also applies if it is clear that the conception took place during a marriage, even if death or divorce has ended that marriage by the time the birth occurs. Thus, DNA test is not needed to prove paternity if there is a clear evidence of valid and subsisting marriage at the time of death of the spouse. Unless proof has been adduced during the marriage that indeed the alleged child does not belong to the husband.

- 7.9 The Respondent upon the petition for Letters of Administration for the Estate of the late Enoch Kalema stated that she was a widow and attached a copy her Marriage Certificate and that before the demise of her husband they resided at Ngandu Local Council 1 Mukono, the deceased died intestate and he was survived by Mwesigwa Enoson Kalema aged 20 years, Kasagga Carlson Kalema aged 18 years, Uwera Enoreen Edith aged 15 years, Kwagala Kareen Akoragye aged 13 years, Kalema Tobia Ariel aged 6 years and Kalema Kayla Adriel aged 5 years.
- 8.0. The applicants are interested and feel entitled to a share of the deceased's estate as beneficiaries and for that reason they sued the respondent claiming that she did not include them as beneficiaries of the late Enoch Kalema and yet the deceased was their father. The respondent disputes this allegation and therefore made an oral application for paternity which was ordered by the court though now the applicants demand that all children should be tested because it is rumoured that some children might not actually belong to the deceased.
- 8.1. I have already mentioned that children born in wedlock are legally presumed be to children of the husband and wife in marriage. The applicant's need a share of the estate and there is an existing order

that they should be tested. They did not adduce evidence of their birth certificates in this application and they is no proof of a valid marriage existing between their mothers and the deceased.

- 8.2. In as much as the applicants want the children born to the respondent to be tested, some of the children are now adults for example Mwesiga Enoson Kalema who is now aged 22 years, Kassanga Carlson Kalema now aged 20 years and Uwera Enoreen Edith who is soon turning 18 years old. The court will not order DNA test to determine the paternity of a full blown adult who does not complain about his/her parenthood as that will be a clear violation of the right to privacy. Conversely, an adult is 100% presumed to know his/her true father.
- 8.3. And where the paternity of the said adult is in contention, except the adult surrenders himself for a DNA test, upon the application of one of the parties, the court cannot and should not order a DNA test to be conducted to determine the father of the Adult.

- 8.4. I therefore find that it is not necessary for the children mentioned in the petition for grant of letters of administration to be subjected to a paternity test because it is not in dispute that these children were born during wedlock and no one has come up to state with proof that there was no subsisting marriage at the time of passing on of the late Enoch Kalema.
- 8.5. In addition, the said rumours have not been substantiated since no name has been placed on a particular child as their alleged father to be tested upon. This court will not serve on rumours. In all civil matters like the present application, he who alleges bears the burden to prove his/her case on a balance of probabilities. The Applicants in this case have the burden to prove the facts alleged by themselves in the Application by virtue of **Section 101, 102 and**

103 of the Evidence Act, Cap.6. Section 101 of the Evidence Act, (Supra) provides that;

"Whoever desires any Court to give judgment as to any legal right or liability, dependent on the existence of the facts which he or she asserts must prove that those facts exist".

- 8.6. In rejoinder the next of friend Mr. Munyangabi William deposed that he has contacted the Government Analytical Laboratory where he was guided on what the process of examining the applicants would entail. He averred further under paragraph 5 of the rejoinder that he does not oppose to carrying out a DNA on the applicants but at the time when the late Enoch Kalema passed on, the respondent put the body of the late to undisclosed location, and denied access to the relatives from identifying or viewing the body to ascertain whether indeed that was the actual body of Kalema that was going to be buried on a pretext that the late died of COVID-19 with all the uncertainties it is prudent that a DNA be carried out on all the children including the applicants and the children of the respondent such that if there is any foul play that the body which was buried did not belong to the Kalema or some of the children were not fathered by this the DNA results shall be conclusive to determine who is the rightful beneficiary to the estate than relying on assumptions that are in place.
- 8.7. In the Kenyan case of *MMM v ENW M. A No. 7 of 2016, the court cited with approval the Indian case of BPs v CS Civil Appeal No. 6222 – 6223 of 2010 to the effect that ". . . the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA is eminently needed . . . DNA should not be directed by court as a matter of course or in a routine manner, whenever, such request is*

made, whether it is not possible for the court to reach the truth without use of such test. . ."

8.8. I find that the applicants have not given any sufficient reason as to why they believe that they are aggrieved with the order dated 12th September, 2023. It is an opportunity for them to prove, if anything that they deserve a share in the estate because they belong to the family of the late Enoch Kalema. Not to ascertain whether the human remains that were buried indeed belonged to the late William Kalema nor to treat hunger within the soul as expressed in paragraph 5 of the affidavit in rejoinder. Whether or not the other children are scientifically examined, it is their case to prove that they merit and meet the category of beneficiaries to the estate. The applicants are not aggrieved persons within the meaning of Section 82 of the Civil Procedure Act, Cap. 71 and they should proceed and be scientifically examined.

9.0. Issue 2: Whether the application meets the criteria for review.

- 9.1. This is an application for Review of the orders issued by this court on 12th September, 2023. In this review, the court is tasked with the duty to examine whether the points raised by the applicants above are indeed errors apparent on the face of the record warranting review. The **East African Court of Justice (Appellate Division) decision of Independent Medico Legal Unit v. The Attorney General of the Republic of Kenya {Application No. 2 of 2012; Arising from Appeal No.1 of 2011} cited in MK Creditors Ltd vs. Owora Patrick MA No. 143 of 2015** explaining an error on the face of the record in the following terms as it should be cautiously defined.
- i) The "error apparent" must be self-evident; not one that has to be detected by a process of reasoning.

- ii) No error can be an error apparent where one has to "travel beyond the record" to see the correctness of the judgment.
- iii) It must be an error which strikes one by mere looking at the record, and would not require any long drawn process of reasoning on points where there may conceivably be two opinions.
- 9.1.1. The court went on to give examples of a clear case of error apparent on the face of the record as those where without elaborate argument, one could point to the error and say, here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it. In summary, it must be a *patent, manifest and self-evident error which does not require elaborate discussion of evidence or argument to establish.*

- 9.2. The Applicants further averred that "*sufficient reason*" exists to warrant review. On this ground they contended that the affidavit sworn by Munyangabi William ably demonstrates that this application is proper for orders sought and ought to be granted. The Applicants aver that new evidence has emerged in as far as paternity of all the eight (8) children of the late Enoch Kalema is concerned which was not within their knowledge and this ground justifies the court to review its orders as demonstrated by the deponent.
- 9.2.1. The applicants moved ahead to ascertain the procedure of the examination on the applicants. This is averred in the affidavit in rejoinder on how the testing would be conducted. The order dated 12th September, 2023 item 3 and 7 directed that; *"A paternity test to be done by comparing the DNA samples of Gasa Zoe Atara and Mukisa Nathan as guided by the Government Analytical Laboratories on the best and most accurate sample collection";* and "*the process of the DNA test shall be monitored by both the parties and their respective counsel so as to avoid any would be false DNA test*

results". One wonders whether they complied or partially complied with the orders of this court. Since this has not been disclosed in this application or they are in contempt of the court order.

- 9.2.2. I have already mentioned that the adult children by virtue of their age need not to be tested and the other children it is presumed that they were born in wedlock and therefore no need to test them.
- 9.3. Where a person is a minor and his/her paternity is in issue, the court can order the conduct of DNA test in the overall interest of the child, to ascertain where he/she belongs. Children need to know and be cared for by their parents or those entitled to bring them up and this is a Constitutional right as provided for under Article 34 (1).
- 9.4. Section 98 of the Civil Procedure Act, Cap. 71 and Section 33 of the Judicature Act, Cap.13 provides this court with unlimited powers but these inherent powers should not be used as an abuse to the court process. The court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, a DNA is eminently needed.
- 9.5. It is in the best interest of the child to have his/her parentage determined at the earliest opportunity. Being a parent of a child carries with it certain rights and obligations for example financial support of the child. However, the key concept in determining what rights and duties a parent has in relation to the child is not parentage, but parental responsibility.
- 9.6. The next friends have not mentioned the whereabouts of the mothers of these children and they are required to consent on behalf of the minors to have the test conducted. Unless the next friend have a guardianship order in place. They should therefore avail the mothers of these children before the examination is conducted. For

it is the mother to consent unless there is a court order stating otherwise in place.

- 9.7. I agree with the deponent that the girl child samples can only be matched with the primary source in this case the father to ascertain paternity. That being the case since one of the applicants is a girl child then the DNA examination can only be conducted by exhumation.
- 9.8. The minors are interested in having a share of the Estate of the Late Kalema William, they are unknown to the Administratix who is supposed to distribute the estate equally, it is key that their paternity is established and this can only be conducted by exhuming the remains of the alleged father. It is also evidenced that a DNA test in the circumstances would enable the administratix to determine who the beneficiaries of the deceased are and thereby be able to administer the estate.
- 9.9. In as much as there is no error apparent on the face of the record, in the interest of justice and to save court's time on back and forth applications. I will allow this application partially since the test has to be conducted anyway. The end result of the order given on 12th September, 2023 might have had an order for exhumation. I am alive to Article 126 (2) (e) of the Constitution of the Republic of Uganda. This court will grant the order to exhume the human remains of the late Kalema William to enable the exercise to be completed accurately and to avoid likely multiplicity of cases. I note action as already taken place at the Government Analytical Laboratories therefore the human remains of the late Enoch Kalema will be exhumed for sample collection and examination of the applicants (minors).

10.0. Conclusion

- 10.1. Accordingly, this application is partly allowed in the following orders; that:
- 1. An order for exhumation of the deceased to determine parentage is hereby granted.
- 2. The remains of the late Enoch Kalema shall be exhumed to obtain samples for conducting the paternity examination.
- 3. The paternity test shall be conducted by the Government Analytical Laboratories, Wandegeya, Kampala District.
- 4. The minors Gasa Zoe Atara and Mukisa Nathan through their next friends and each child's biological mother shall be available for testing within 7 (days) days from the date of this ruling.
- 5. The Paternity test results shall be submitted to Court by 15th day of January, 2024.
- 6. The costs of the Paternity test shall be met by the estate of the late Enoch Kalema.

- 7. The process of the Paternity test shall be monitored by both parties and their respective counsel.
- 8. Each party shall bear its own costs of this application.

Dated, Signed and Delivered by email this 27th day of November, 2023.

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