

UGANDA / JUDGMENT

Tendo v Tumwebaze (Miscellaneous Application 957 of 2023) [2023]

UGHCFD 165 (15 September 2023)

[2023] UGHCFD 165

COURT

HC: Family Division (Uganda)

BEFORE

Nagawa, J

CASE / FILE NUMBER

Miscellaneous Application 957 of 2023

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA
FAMILY DIVISION

MISCELLANEOUS APPLICATION NO. 957 OF 2023 (ARISING OUT OF CIVIL SUIT NO.
102 OF 2020)

TENDO SUNITAH ::::::::::::::::::::::::::::::::::: APPLICANT (THROUGH NEXT FRIEND
KICONCO JANET)

VERSUS

ANNET TUMWEBAZE MUGASHA ::::::::::::::::::::::::::::::::::: RESPONDENT (ADMINISTRATRIX
OF THE ESTATE OF THE LATE FRANK MUGASHA)

RULING BEFORE: HON. LADY JUSTICE CELIA NAGAWA

1. Introduction

- 1.1 This application was brought by way of Notice of Motion under Section 98 of Civil Procedure Rules, Cap. 71; Section 33 of the Judicature Act; Cap. 13; and Order 52 rules 1 & 3 of the Civil Procedure Rules, Statutory Instrument No. 71- 1, seeking orders; that: -
- 1. This court be pleased to grant an order for exhumation of the late Frank Mugasha's body to obtain a sample for conducting the child's paternity test.

2. Costs of this application be provided for.

- 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 in summary that;
- (a) The best way of proving paternity is comparing samples from the claimant with the alleged father.
- (b) It is just and equitable that the order be granted.

2.0. Representation and hearing

2.1. At the hearing, the applicant was represented by Mr. Kamugisha Vicent from Balikuddembe & Co. Advocates while the Respondent was represented by Mr. Tumwesigye Louis of Tumwesigye Louis & Co. Advocates. Counsel for the Applicant filed this application together with written submission while the Respondent's counsel made oral submission during the hearing of the application. All submissions have been considered while determining this matter.

3.0. The Applicant's case.

- 3.1. This court directed a paternity test to be conducted by the Department of Government Analytical Laboratories (DGAL) and on 16th June, 2023 both counsel visited the said offices in Wandegaya to find out the modalities of enforcing this Court's directive about the Child's Deoxyribonucleic Acid (DNA) testing.
- 3.2. While at the Government Analytical Laboratories they were met by Dr. Mugerwa Francis an officer and employee at the facility who took them through the procedure for DNA testing and indicated to them that the only way of establishing 100% of one's paternity is from the father who is the primary source.
- 3.3. The parties were informed that other alternative of testing relatives/siblings are not 100% accurate because one cannot be 100% sure that the said siblings are children of the father they claim to be.
- 3.4. In the circumstances the only valid option is obtaining a sample from the late Frank Mugasha's remains by exhumation. The parties were advised to seek an exhumation order from court hence this application.

4.0. The Respondent's Case

- 4.1. The respondent, Annet Tumwebaze Mugasha (Administratrix of the Estate of the Late Frank Mugasha), filed an affidavit in reply.

- 4.2. The respondent contended that in this Court's ruling delivered on 16th June, 2023, a paternity test was to be done comparing samples of the applicant as guided by the Government Analytical Laboratories on all alternative sample collections. That she had widely consulted and even went to the Government Analytical Laboratory in Wandegeya and confirmed that where there are other siblings/children of a deceased, exhumation is not a desirable alternative. She further contended that she was informed by a medical personnel on condition of anonymity that whereas the sample from the father or the deceased father's mother are the best to determine 100% paternity of a girl child, samples can also be obtained from other children said to belong to the deceased for comparison purposes with samples from the applicant. In addition she was informed by a medical personnel who sought anonymity that whereas samples from other children may not be 100% exact, they determine paternity with sufficient percentage of clarity and there would not be any doubt.
- 4.3. She further averred that exhumation would cause grave shock, stress and psychological torture to her as a spouse, father of the deceased and his children because it would mean breaking the grave and opening the coffin, an act that would inflict permanent and more torture to the already tortured family.
- 4.4. The Respondent stated that she had four children with the deceased and there are two children believed to belong to him which is also not in dispute therefore this court can ably order that samples be collected from the applicant and the six children and their two uncles to avoid a very absurd situation and all the chaos

exhumation would cause to ably determine paternity of the applicant.

4.5. In rejoinder, the applicant contended that the Respondent admits that the other alternatives are not 100% sure of the paternity test and prayed that court grants the order for exhumation whereby all doubts will be put rest. That the allegation that the Respondent will be traumatized by the exhumation is just an interval because for seven (7) years the deceased's estate has never been distributed and beneficiaries who are not her biological children including the deceased father have been living in an ending trauma therefore this incident is nothing compared to what they have suffered already. That the Respondent cites anonymous sources that provided her information and failure to disclose sources of information renders her affidavit defective.

5.0. Issues for Determination by the court.

- 5.1. Three issues are up for determination by the court as raised by Counsel for the Applicant, namely;
- a) Whether or not this Honourable Court can grant an order of exhumation of the deceased in order to determine parentage?
- b) Whether there are any remedies available to the applicant?

- c) Costs of the application.

6.0. Determination of this application

This court has considered the submissions of each respective party in determining this application. I intend to resolve one issue which will dispose of all the other issues; *whether this court can grant an order of exhumation of the deceased in order to determine parentage.*

- 6.1. In this instant application both parties seem to agree to the paternity test although there is a disagreement in the methodology of conducting the examination. In her previous response to the application for paternity testing, that is Miscellaneous Application No. 383 of 2023 involving both parties the respondent averred that in the interest of justice, a DNA test should be done to ascertain whether the applicant is a child of the deceased. In this application, the Respondent opposes testing by exhumation. She contends that exhumation would cause grave shock, stress and psychological torture to her as a spouse, father of the deceased and his children because it would mean breaking the grave and opening the coffin, acts that would inflict permanent and more torture to the already tortured family.
- 6.2. Determining a child's father is potentially more complicated. In the case of children born to married parents, common law has presumed that the mother's husband is the child's genetic father and thus legal parent. 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), the same Article, under clause (7) provides that the law accord's special protection to orphans and other vulnerable children.
- 6.3. The parties confirm through their affidavits that they met Dr. Mugerwa Francis who took them through the procedure for DNA testing and indicated to them that the only way of establishing 100% of one's paternity is from the father and this is the primary source. However, a court order was required to enable the officials at Government Analytical Laboratories carry out this exercise.
- Page 5 of 10 6.4. The court order being sought is to establish a couple of issues including genetic parenthood and parental responsibility. Section 6

of the Children Act, Cap. 59 (as amended) provides that where the natural parents of a child are deceased, parental responsibility may be passed on to relatives of either parent, or by way of a care order, to the warden of an approved home, or a foster parent. Of interest here is that parental responsibility may be passed on to relatives of either parent, but in this case to whom?

- 6.5. The core notion of parenthood is genetic parenthood. Genetic parents play a crucial role in self-identity. This then raises a question, is there a right to know one's genetic parentage? "Does a child have a right to know genetic parentage?" The right to be told the names of

genetic parents. The argument here is that there is a right to be informed of one's parentage. The question is whether anyone would choose to live their life on the basis that they have been deliberately deceived about their genetic origin or denied an opportunity to know exactly where they belong. Under Section 4 (1) (c), (f) (j) of the Children Act (supra), Every child shall have a right to access any information to which a parent, guardian or other person in authority deems critical to the child's wellbeing. (j) inherit property where applicable and (j) be treated without discrimination of any kind irrespective of his or her race, color, religion, belief, age, family status, culture, language, ethnicity, nationality, or social origin, citizenship, gender, disability if any, political or social opinion, property or any other condition. Historically, this case emanates from revocation of letters of administration and an order for accountability and distribution of the estate of the late Frank Mugasha and the applicant claiming to belong to the said estate as a beneficiary.

- 6.6. The applicant attached to this application a notification of birth of a child for Registration of persons (NIRA) Form 3 although this is not

conclusive evidence of birth, it just initiates the process of declaration of parentage. The form indicates that the father's name is Mugasha Frank of Rucence, Rakishakizi, Nyakayojo, Mbarara District and the mother's name is Mukibi Shakira. Section 71 of the Children Act, provides that an instrument signed by the mother of a child and by any person acknowledging that he is the father of the child, and an instrument signed by the father of the child and any person acknowledging that she is the mother of that child shall if the instrument is executed as a deed; or if the instrument is signed jointly or severally by each of those persons in the presence of a witness be prima facie evidence that the person named as the father is the father of the child or that the person named as the mother is the mother of the child. In this case, the form reflects that at the time of its completion the child's father was dead.

- 6.7. In as much as an alternative to exhumation is sought, the Applicant avers that the other alternative of testing the relatives/siblings is not 100% accurate because one cannot be sure that the said siblings are children of the father they claim to be. The Respondent contends that she has been informed by a medical personnel who sought anonymity that whereas samples from other children may not be 100% exact, they determine paternity with sufficient percentage of clarity and there would not be any doubt.
- 6.8. The key principles in determining legal parenthood are commitment to truth; individual autonomy and priority for rights and interests of those primarily affected- the individual who results from reproduction. 7.0. In my view, conferring legal parenthood truth, rather than the "fiction" of social parenthood best protects these core values.

To this court, the key question on present day paternity disputes is whether the court should make the direction for tests so that the truth about the child's genetic parentage can be established with the certainty science now offers by exhuming the remains of the late Frank Mugasha.

- 7.1. It is important to conduct a paternity test for the purpose of determining the main suit in as much as the applicant is not a party to the suit but she claims to be a beneficiary of the estate. This scientific exercise will aid in proof of paternity.
- 7.2. It is at such a time that the court should address the vacuum of when and how should the tests be ordered? More commonly, courts find that it is best for the child to know his or her genetic heritage in the long term. The tendency is for courts "to assume that (genetic) truth is better than (relational) fiction and that "the addition of more genetic kin through these means is inevitably seen as producing a positive outcome for children (and possibly adults). Paternity testing would be the child's considered certainty to be in her long –term best interests.
- 7.3. Any proper initiative to resolve the issue of paternity must be proactive rather than reactive. Therefore, for the Respondent to argue that the late husband is survived by a father aged 94 that resides in a house constructed by the deceased and the grave is next to the home is reactive. I guess the deceased's father is equally interested in knowing that he is truly the grandfather of the applicant.
- 7.4. Paternity testing through exhumation, are extremely specialized, calling for highly trained personnel as well as expensive equipment and facilities. The entire process of exhumation is intricate and

delicate, requiring well trained and highly skilled personnel with the expertise in various disciplines of forensic science. This therefore saves the respondent fear and anxiety that she will suffer grave shock, stress and psychological torture as a spouse once the process is conducted. The applicant is only interested in confirming her parentage which the Respondent would equally be interested to resolve.

- 7.5. In the case of **Sserunjogi Charles Musoke & Katamba John Ssemakula Versus Tony Nkuubi Originating Summons No. 07 of 2019** *Hon. Lady Justice Ketrah Kitariisibwa Katunguka* citing the case of **MW V KC Kakamega High Court Misc. Application No. 105 of 2004** stated that; " Courts have held that in exercising its discretionary power to grant or not to grant the relief (DNA testing), court should be convinced that the application is in good faith, and that it not actuated or designed to economically exploit or embarrass or is otherwise an abuse of the process of court".

- 7.6. 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. It is against that background in as much as litigants seek justice it should be determined in accordance with the law.c
- 7.7. The applicant is a child interested in knowing her paternity this can only be established by exhuming the remains of the alleged father. It is also evidenced that a DNA test in the circumstances would enable the administrators to determine who the children of the deceased are and thereby be able to administer the estate. This

court will grant this order to enable the exercise to be completed accurately and to avoid likely multiplicity of cases. I find that this application has merit and therefore succeeds.

8.0. Conclusion

- 8.1. Accordingly, this application is 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 Frank Mugasha shall be exhumed to obtain samples for conducting the paternity examination.
- 3. The paternity test shall be conducted by the Government Analytical Laboratories, Wandegaya, Kampala District.
- 4. The minor (Tenda Sunitah) shall avail herself for testing within 5 (five) days from the date of this ruling.
- 5. The Paternity test results shall be submitted to Court by both parties by 31st day of October, 2023.
- 6. The costs of the Paternity test shall be met by the estate of the late Frank Mugasha.
- 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 15th day of September, 2023.

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