



REPUBLIC OF KENYA



**In re Estate of Salim Kimutai Chebii (Deceased) (Probate & Administration
283 of 2023) [2024] KEHC 10326 (KLR) (19 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10326 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PROBATE & ADMINISTRATION 283 OF 2023
RN NYAKUNDI, J
AUGUST 19, 2024**

IN THE MATTER OF THE ESTATE OF SALIM KIMUTAI CHEBII (DECEASED)

BETWEEN

EUNICE JEPKORIR KANDA 1ST PETITIONER

MUSA KOMEN CHEBII 2ND PETITIONER

FRANCIS KIMAIYO MUTWOI 3RD PETITIONER

AND

MARY JACINTA MUMBUA OBJECTOR

RULING

1. Pursuant to this Honourable Court's Ruling of 29th October, 2019 on the application dated 25th October 2019 by the objector/applicant herein. This Court ordered that;
 - a. The applicant's son Michael Chebii Kimutai on the one hand and Weldon Kimwetich Kimutai, Griffins Kiplagat Kimutai, Ray Sogomo Kimutai and Tassia Barsumbat Kimutai do submit to a (DNA test) to determine paternity.
 - b. The DNA test be conducted at the Government Chemist Laboratories at a date to be agreed upon by them and in any event within 14 days of this order.
 - c. Costs of the DNA test to be met by the applicant.
2. The undisputed facts before this Court is that, pursuant to the said Court's ruling dated 25/10/2019 parties were to avail the following persons; Michael Chebii Kimutai (applicant's son), Weldon Kimwetich Kimutai, Griffins Kiplagat Kimutai, Ray Sogomo Kimutai and Tassia Barsumbat Kimutai for a DNA test so as to establish whether the objector/applicant's son shares common paternity to the



four acknowledged sons of the deceased for purposes of succession in respect of the Estate of Salim Kimutai Chebii.

3. Counsel for the petitioners/ respondents submitted that on 27th November, 2020 with the view of undertaking the DNA test as directed by this court, his client reported to the Government Chemist by 10:28 am together with the four dependants. That at 11:16 a.m. they noted that there was no payment or booking that had been made and the order for it had not been served by the objector.
4. He also opposed the notion by Counsel for the objector suggesting that the DNA test should be deemed to be positive due to petitioner's failure to subject themselves to DNA test. The DNA test not having been done, Counsel for the petitioners submitted that the only recourse available to the parties herein is to rescheduled for another test.
5. The objector/applicant's counsel opposed the said averments and submitted that his client was at the Government Chemist with the minor on the said date. That the DNA test payment was to be paid by 11:30 a.m. after ascertaining all the parties present. He further submitted that the objector has a letter dated 27/11/2020 from the Government Chemist confirming that she was in attendance unlike the petitioners who have not supplied Court with their attendance register.
6. The objector further submitted that they could not have paid for the DNA test if the parties were not available. It was the objector's case that payment is done upon collection of samples and no samples were taken as parties did not appear. In view of the foregoing, the objector prayed that DNA test should be regarded as being positive.
7. Due to the contention as to who was in attendance for the DNA test on that scheduled date. This court was to be furnished with the CCTV footage from the Government Chemist but the same was not availed. The objector's Counsel also produced a copy of letter dated 4/2/2021 from the Government Chemist indicating that the CCTV footage was not available.
8. This Honourable Court vide an order dated 3rd May of 2021 and issued on 13th May 2021 by Hon. Justice S.M. Githinji ordered that:
 - a. That the objector/Applicant do book an appointment with the Government Chemist, indicating the date and time the samples will be taken, and invite the Petitioners/Respondents to appear on the said date and time to undergo the process, and if they do fail to comply having been duly invited, the Court will deem the applicant's son, one Michael Chebii Kimutai, to be a son of the deceased, one Salim Kimutai Chebii, entitled to inherit part of his Estate.
 - b. That the parties to attend the Government Chemist in Kisumu.
 - c. That this matter be mentioned on 14/6/2021.
9. The 1st Petitioner filed a Notice of Motion Application dated 6th September 2021 seeking the following orders:
 - a. Spent
 - b. There be stay of the order given on 14/6/2021 pending hearing and determination of this application inter partes and or further orders of the court.
 - c. The order issued on 14/6/2021 be and is hereby set aside and the court to find that the Objector has not complied with the orders of 3/5/2021.



- d. Alternatively, DNA be carried out in Kisumu Government Chemists failing which the Objector's son be deemed not be an heir entitled to inherit.
 - e. Costs be borne by the Objector.
10. This Application was opposed by the Objector vide her replying Affidavit dated 16th September 2021.
 11. This Honourable Court vide an order dated 20th September 2021 by Hon. Justice S.M. Githinji, ordered that;
 1. The Objector have only one person producing the sample while the Petitioners have 3 children. It is therefore easier and cheaper for the one person to travel to MTRH for the sample to be taken.
 2. I therefore direct the samples be taken at MTRH in two sets to have independent tests done at Nairobi Government Chemist and Kisumu Government Chemist.
 3. Objector as earlier on stated is to meet the costs for the tests.
 4. Mention on 27/10/2021 to confirm when parties can avail themselves at MTRH for extraction of samples. The hospital should confirm date.
 12. Similarly, this Honourable Court vide an order dated 27th September 2021 by Hon. Justice S.M. Githinji, ordered that;
 1. Mention on 1/11/2021.
 2. Parties to avail themselves at MTRH on 8/10/2021 for samples extraction.
 3. Objector to meet Costs of DNA in the two Government Chemists. The Objector was also not willing to pay costs for Kisumu alone.
 13. The Objector vide her Replying Affidavit dated 24th April 2024 averred as follows;
 1. That I am aware of the Court order requiring us to take samples at MTRH and have the tests done at Nairobi and Kisumu government chemists.
 2. That in the previous order, the samples together with the processing of the DNA was to be done at Nairobi government chemist.
 3. That I appeared together with the minor on the two occasions but the Petitioner with her 3 children did not show up.
 4. That there has been a delay in taking the samples and conducting the DNA because of arising issues including threats from the Petitioners and the issue of my security and that of the minor.
 5. That I am aware that this was the last chance to ensure that the samples were taken.
 6. That since I am the one who is tasked to take care of the costs, I am unable currently because of the tough economic times.
 7. That I am financially unstable now and need time to organize myself.



8. That I humbly pray that I be given time until August when schools will have closed which I can then avail the minor for the samples to be taken and I will be able to pay for the costs at that time.
9. That the results will greatly determine if the minor will be included in as a beneficiary which is paramount and in his best interest and future.
10. That I kindly pray for the indulgence of the Court in this matter and an extension of this date to ensure that we comply with the court order.
14. I have considered submissions by learned counsels and it is vivid from the onset that no DNA test was undertaken by the parties. I also acknowledge the fact that on 27th October, 2020 the date when parties herein allegedly claim to have reported to the Government Chemist, none of their samples were taken for testing.
15. At the center of this dispute is the issue of paternity of the objector's child of which I am convinced that justice will prevail if the said DNA test is undertaken to conclusively determine paternity of the said child for purposes of Succession in respect of the Estate of Salim Kimutai Chebii.
16. The DNA test will establish whether the objector's child share common paternity with the known and the undisputed children of the deceased. The establishment of the truth on the issue of paternity of the objector's child is central in articulating his claim to the estate. Am further persuaded that the only way parties in this matter will fairly move forward is if the DNA test is conducted as earlier on directed by this Court.
17. In the case of *DNM v JK* [2016] eKLR, the court held that:

“The bid to establish the truth through scientific proof must however not be generalized and should never so lightly prevail over the right to bodily integrity and right to privacy until it is clear that such rights ought to be limited. The clarity is only established where an undoubted nexus is shown as well as a specified quest to protect or enforce specific rights. Untested and controverted affidavit evidence, may not suffice.”
18. The court in Constitutional & Human Rights Division petition No 133 of 2015 *DNM v JK* [2016] eKLR observed as follows:

“Even though the court's core role is to determine disputes, the courts often deploy methods of compulsion not necessarily to get to the truth but to help determine disputes fairly. It is thus common to see witnesses being summoned and also being compelled at the risk of jail, to answer questions. In all instances though, the party seeking the court's assistance must lay a firm legal and factual foundation for his case. It is not different where DNA testing is sought. In the case of DNA testing the basis must be laid even where a child is involved, as ordering DNA testing is not a mere procedural matter but is substantive enough given that an individual's constitutional rights may be limited through such testing.”
19. Aroni J in *M.W & 3 Others - Vs- D.N* [2018] eKLR held that:

“The beneficiaries named in the application may suffer some inconvenience and intrusion to their privacy. This has to be weighed against the need to resolve the outstanding issue. Secondly quite obvious the issue of inheritance is at stake. If the results favour the applicant she stands to benefit, if not the deceased will stand vindicated and the estate's status quo maintained. I therefore find that the most efficacious and justifiable way to resolve the issue



is to order that the applicant D.N and the beneficiaries named in the application P.S.K, V.N.K and A.S.K do submit to sibling DNA test to determine paternity at the Government Chemist at a time to be agreed upon but not later than 14 days of the date hereof’.

20. I have anxiously weight this matter in light of the provisions of the *Constitution* and in particular the issue of privacy under article 31 of the *Constitution*. The courts as seen from the above authorities have been very careful to allow such an application without laying down the basis and sufficient reasons.
21. The favoured position by the Court as per the ruling of 03/05/2021 is not yet met. Parties blame each other for the failure. There is need to establish the correct position in relation to paternity of the objector’s son of which will resolve the central issue in this matter.

Consequently, I order as follows:

- a. That the objector/Applicant do book an appointment with the Government Chemist, or any convenient Kenya Medical Research Institute (KEMRI) indicating the date and time the samples will be taken, and invite the Petitioners/Respondents to appear on the said date and time to undergo the process, and if they do fail to comply having been duly invited, the Court will deem the applicant’s son, one Michael Chebii Kimutai, to be a son of the deceased, one Salim Kimutai Chebii, entitled to inherit part of his Estate.
- b. Costs be borne by the Objector.

DATED SIGNED AND DELIVERED VIA EMAIL AT ELDORET, THIS 19TH DAY OF AUGUST 2024

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R. NYAKUNDI
JUDGE

