



REPUBLIC OF KENYA



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**In re Estate of JKN (Deceased) (Succession Cause E017 of 2022)  
[2024] KEHC 12340 (KLR) (13 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 12340 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
SUCCESSION CAUSE E017 OF 2022  
G MUTAI, J  
AUGUST 13, 2024  
IN THE MATTER OF THE ESTATE OF JKN (DECEASED)**

**BETWEEN**

**ANK ..... 1<sup>ST</sup> PETITIONER**

**FMK ..... 2<sup>ND</sup> PETITIONER**

**AND**

**MM (SUING AS THE MOTHER AND NEXT FRIEND OF KK) ..... OBJECTOR**

**JUDGMENT**

1. The deceased died on 16<sup>th</sup> May 2014 at Port Reitz in Mombasa. According to the Assistant Chief of Port Reitz sublocation, he was survived by his two wives, AWK and JNK, and nine children: MK, ANK, JNK, PK (now deceased), KFM, TNK, PK, BMK, and CWK.
2. The petitioners filed a petition for letters of administration intestate on 2nd March 2022, seeking to have the grant issued to them. Due to conflict between family members, the grant was not issued within the usual timelines, and it was only on 12<sup>th</sup> June 2023 that the grant of Letters of Administration Intestate was issued to ANK and FMK.
3. The Petitioners filed the Summons for Confirmation of Grant dated 6<sup>th</sup> March 2024 on 10<sup>th</sup> March 2024. In the Joint Supporting Affidavit sworn by the Petitioners, it was noted that PKK was deceased (paragraph 2(c)). In paragraph 7 of the said affidavit, the Petitioners deposed that:-

“PKK died on the 5<sup>th</sup> day of January 2024, his shares in the estate to vest in his son KK through his guardian ad litem CWK, but after taking into account all the medical and personal expenses/debts incurred by the said PKK prior to his death.”



4. The Summons for Confirmation of Grant of Letters of Administration Intestate wasn't heard. Vide a Notice of Motion dated 20<sup>th</sup> March 2024, the Objector sought three orders to wit, stay of confirmation of grant until her application is heard, her appointment as the guardian ad litem of her son, KK, and for her to hold the son's interest to in the estate and for provision for costs of the application. The basis upon which she filed the said application was that she is the mother of KK, who is the beneficiary of his father, PKK (deceased), who on his part was the beneficiary or the estate of the deceased herein. The Objector was unhappy with the proposal in paragraph 7 of the Supporting Affidavit to have the minor's interest held by CWK on the ground that she had not consented to it in her capacity as the minor's biological mother and that no disclosure of the arrangement was made to her. She averred that she has actual legal, physical and sole custody of the minor and that no reason had been provided for her exclusion. She urged that it would be in the child's best interest that she, rather than CWK, is appointed as the child's guardian ad litem. The applicant annexed to her application a birth certificate of "KK", which shows that his father is PNK, while the mother is MMN.
5. The Petitioners objected to the application. In response thereto, they filed a Notice of Preliminary Objection dated 3<sup>rd</sup> April 2024. The said objection cast doubt on the paternity of KK. It urged that even if he was the son of PNK alias PKK, he could only inherit from his father, not the grandfather. It was urged that the grant be confirmed and that the shares of PKK be set aside until the parentage of the minor was established and a guardian ad litem appointed. It was also averred that the Notice of Motion dated 20<sup>th</sup> March 2024 did not disclose material information.
6. The Petitioners also filed a Replying Affidavit sworn by CWK on 4<sup>th</sup> April 2024. C stated in paragraph 2 of her affidavit that it was her brother who appointed her as the legal guardian of KK "in a desperate bid to identify with fatherhood and to acknowledge K as his son, despite the drama surrounding his paternity originating from his biological mother. MM". In paragraph 4, she deposed that "... our deceased brother gave me the said certificate ... and asked me to keep it safe on his behalf. This was because he lived in fear that MM would one day change the certificate of birth and remove his name as his father..." Further, in paragraph 5, she stated that she was in the process of creating a trust for the benefit of the minor.
7. C accused the Objector of mistreating her brother, forcing him into depression and alcoholism, and that he died from liver cirrhosis. She further deposed that the Objector herself cast doubt on the paternity of the child. In those circumstances, she urged that the child ought to be subjected to a DNA test so that his paternity could be established with finality.
8. C urged the Court to confirm the grant to alleviate the family's hardships. She stated that PKK's hospital and funeral expenses were paid partly through loans from shylocks, whose repayment attracted the interest of Kes.200,000.00 per month and ought, therefore, to be paid quickly so that the estate is not dissipated. The deponent stated that the Objector was actuated by ill will and averred that "when our brother passed away, she publicly stated that "nitakula hiyo pesa ya P, wapende wasipende."
9. Vide Notice of Motion dated 10<sup>th</sup> May 2024, the 1<sup>st</sup> Applicant sought to have the grant confirmed so that the administrators could pursue payment from the National Land Commission. She prayed that the amount due to the estate of PKK be sequestered and deposited in Court and that the child be subjected to a DNA test.
10. The grounds upon which the application is based is that the family had executed a deed of family agreement setting out now that the deceased's estate would be distributed. Further, the illness, hospitalization, and funeral of PKK caused the family to incur expenses of Kes.4,041,135/-. To enable the family to bury him, money was borrowed at great cost. The monthly interest due on account of the



said loans was Kes.215, 000.00, which had accrued since January 2024. Due to default in repayment, there was a great risk of recovery action being taken against family members. It was urged that the National Land Commission was holding Kes.57,856,483.00, which could not be paid until the grant was confirmed. Regarding what is due to PK the Petitioners urged that the same be deposited in Court “pending the hearing and determination of the various issues surrounding the said objection”. It was stated that K is not a dependant of the deceased, and thus, the objection was grossly unfair.

11. The Objector filed a Replying Affidavit sworn on 30<sup>th</sup> May 2024, in which she averred that the payment of medical bills could only be discussed after the objection application was determined. She stated that determining what share K is entitled to cannot be done without the correct guardian ad litem. Ms M averred that CWK had admitted paternity of the minor by PK in paragraphs 2, 3, 4 and 5 of her affidavit. She thus stated that a demand for DNA was baseless.
12. The petitioners filed a Supplementary Affidavit sworn by ANK, which averred that the Objector stated that K was not the child of PK. In the circumstances, she urged that it was necessary to establish his real paternity.
13. HMK, FMK, TNK, and JNK filed Grounds of Opposition in opposition to the objector's Notice of Motion dated 20<sup>th</sup> March 2024. They stated that this Court lacks jurisdiction to hear the same. They urged that the application refers to a separate estate of PKK and not that of the deceased herein. It was urged that the entitlement due to PKK should be determined in separate succession proceedings. Therefore, it was urged that the application be dismissed as it was fatally defective. They stated that PKK's portion of the estate be deposited in Court to await proper administration of his estate.
14. Parties filed written submissions regarding both applications, which were highlighted on the 1st and 4th of July 2024.
15. Mr Tindika, learned counsel for the administrators, submitted in his written and oral submissions that the Notice or Motion dated 10<sup>th</sup> May 2024 be allowed. Counsel identified issues coming for determination as being:-
  1. Why the grant of letters of administration needs to be confirmed urgently;
  2. Whether the Court can rewrite the deed of family agreement;
  3. Whether K was a dependant of the deceased and the son of PK;
  4. Whether the net share of PK should be preserved pending the hearing and determination of the objection; and
  5. Whether a DNA test should be done on K.
16. With respect to the first issue, it was urged that due to the onerous financial obligation entered into by the family following the death of PK, the grant needed to be confirmed without delay. Regarding the second issue, it was submitted that the deed of family agreement was entered into freely by the family members and that it was binding. Relying on the case of *Pius Kimaiyo Langat vs Cooperative Bank of Kenya Ltd* [2017]eKLR, Mr Tindika submitted that the Court could not rewrite an agreement entered into by the parties.
17. It was urged that under section 29 of the *Law of Succession Act* K was not the dependent of the deceased as he had never met him nor was he maintained by him. It was urged, relying on the decision of the Court of Appeal in *Pacific Frontier Seas Ltd vs Kyengo & Another* (Civil Appeal No 32 of 2018) [2022]KECA 396 (KLR), that the Court could only interfere with the confirmation process only if



it were alleged that K was alleged to be a beneficiary. Counsel submitted that this was inapplicable as it hadn't been alleged that K was.

18. On the last issue, it was submitted that since it was necessary to determine K's paternity, the share of the estate due to PK could be set aside until the said determination was made. Reliance was placed on Rule 41 of the Probate & Administration Rules.
19. Mr Tindika submitted that the Objector had, during the lifetime of PK, denied that the latter was the father of K. That being so, it was necessary to have a DNA test so that the issue could be put to rest. Counsel stated that PK's mother was ready to provide a sample. Reliance was placed on the decision of the Court of *Wilfred Koinange Gathiomi vs Joyce Wambui Mutura & Another* [2016]eKLR.
20. Counsel thus prayed that I allow the application.
21. Regarding the application dated 20<sup>th</sup> March 2024. Mr Tindika urged that the same should be dismissed. He submitted that the application was brought to frustrate the administration of the estate.
22. Counsel submitted that it was necessary to have a DNA test done on K to establish his paternity. He urged that the estate of PK cannot be administered under that of JKN and that it should be subjected to separate proceedings pursuant to the applicable procedures. Lastly, it was submitted that the Objector wasn't fit to be appointed as the guardian ad litem on the grounds that her conduct disqualified her. It was urged that she fraudulently raised funds ostensibly for the funeral of PK, which she never remitted, mistreated and humiliated him, and her conduct was unbecoming and unsuitable. He urged that I dismiss the said application and allow that of 10<sup>th</sup> May 2024.
23. In her oral and written submissions, the learned counsel for the Objector urged that the minor lives with the Objector and had done so since birth. She stated that the objector's character had been questioned only because "there was an estate to be shared."
24. Ms Mulago submitted that the question before the court was about who, between the mother who had lived with the child since birth and an aunt who had been absent in his life, had the child's best interest at heart. She urged that there was no reason to unseat the objector from the position of a guardian ad litem. The allegation against the objector was not backed by evidence.
25. Ms Mulago urged the Court to consider and apply the doctrine of the best interest of the child and "reject sideshows and the aggressive display of personal vendetta aimed at the objector". She relied on Article 53(2) of the *Constitution* of Kenya, 2010 and sections 8 of the *Children Act*, 2022.
26. Regarding the application dated 10<sup>th</sup> May 2024, counsel for the Objector stated that the prayer for a stay of proceedings had been overtaken by events as both applications were heard on 1st July 2024. She submitted that the administrators could not be trusted to act in the child's best interest.
27. Ms Mulago submitted that since the duties of the guardian ad litem included scrutinizing and determining what is owed by the estate of PK, she doubted the real motive behind the petitioner's application and prayed that I decline to issue the prayers they were seeking.
28. Counsel stated that K's position had been both appropriated and reprobated as the minor's paternity was recognized in paragraph 7 of the affidavit in support of the summons and that he had thereafter been attacked as not being a child of his father. The counsel thus urged that the application be dismissed.
29. Mr Otieno learned counsel for H, F, TN and JNK supported the Summons for Confirmation of Grant. Counsel stated that family members had entered into a deed of family agreement, which had not been set aside, nor had the grant been revoked. He submitted that the minor had a claim for a different



estate and that a petition for a grant should be made pursuant to separate proceedings wherein the beneficiaries of the estate of PK could be ascertained.

30. Regarding the Objector's application, Mr. Otieno reiterated his submissions. He urged that the grant be confirmed and the proceeds due to PK's estate be deposited in Court until his heirs are determined.
31. I have considered the two applications and the responses thereto. I must now determine if the child KK is a son of PK and, if so, whether he is a beneficiary of his grandfather's estate. Further, since K is a minor, I must appoint a guardian ad litem who shall manage his properties until he reaches the age of majority.
32. The urgent need to confirm the grant is self-evident. The annexures attached to the affidavit supporting the application dated 10<sup>th</sup> May 2024 are clear that the estate will be wasted unless the grant of representation is confirmed. There was no serious contestation on this point.
33. Was K the son of the deceased? I note that the supporting affidavit of MM, sworn on 20th March 2024, has an annexure "MM2", which is the birth certificate of KK, a child born on 15<sup>th</sup> May 2012. His parents are indicated as being PNK and MMN. A copy of the said birth certificate is annexed to the affidavit of CWK as annexure "CWK1."
34. The Court in *NEO v HWK* [2018] eKLR stated that  

"suffice it to note that a birth certificate is proof of paternity but not the only and final prove..."
35. The paternity of the minor does not appear to be in serious contestation. C, in her affidavit in paragraph 2, states that "the decision to make me the legal guardian of KK was made by our late brother PNK alias PK in a desperate bid to identify with fatherhood and to acknowledge K as his son despite the drama surrounding his paternity originating from his biological mother, MM".
36. It is thus clear that the deceased, PKK, saw K as his own child and held him out as such. Section 3(2) of the *Law of Succession Act* states that:-  

"reference in this Act to "Child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and in relation to a female person, a child born to her out of wedlock, and in relation to a male person, a child whom he has expressly recognized, or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility."
37. Given the contents of the Summons for Confirmation of Grant, it is evident that the Petitioners do not doubt the child's paternity. It would appear to me that the deep animus between them and Objector, which is evident from the averments made in the affidavits filed, drove them into filing the application dated 10<sup>th</sup> May 2024.
38. Thus, in light of the evidence before me, I do not doubt that K is the child of PKK and that he recognized him as such. There would have been no need for him to make the arrangements he is said to have made with C regarding the welfare of the child if he had any doubt. Given the foregoing, there is no need for the child to be subjected to a DNA test. Such a test is unnecessary and oppressive. The request for it does not appear to have been made in good faith. I, therefore, decline to issue an order to that effect.
39. Can K inherit from his grandfather now that his father is deceased? Mr Tindika and Mr Otieno submitted that he cannot. I do not agree with them. I rely on the persuasive authority of the decision



of W Musyoka, J in *In the Matter of the estate of Veronica Njoki Wakagoto (Deceased)* [2013] eKLR where he held that:-

“Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1<sup>st</sup> July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit from their grandparents indirectly through their own parents, the children of the deceased. The children inherit first, and thereafter, grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren’s own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”

40. The Petitioners clearly understood this and it is for that reason that they sought to have C step in as the guardian ad litem of K until he attains majority.
41. Who should represent the minor in these proceedings? The Petitioners prefer CWK. The biological mother prefers that she be appointed guardian ad litem. With respect, I do not see why an aunt should be appointed when the child’s mother is alive.
42. In any case, there is a good reason why C may not be a good guardian: the fact that it is said that there are medical claims to be paid out of the entitlement of PKK. In such a situation, C’s interest as a beneficiary on her own account would conflict with that of K.
43. I allow prayer 2 of the Notice of Motion dated 20<sup>th</sup> March 2024. As a guardian ad litem, I direct her to take out letters of administration for the estate of PKK so as to ensure that the minor gets his full entitlement in respect of any other properties PKK may have owned.
44. Having made the above determination, I now turn to the Notice of Motion dated 10<sup>th</sup> May 2024.
45. As parties agree, I confirm the grant issued on 12<sup>th</sup> June 2023. The estate will be distributed in accordance with the deed of family agreement dated 15<sup>th</sup> October 2021. The entitlement of PKK will devolve to KK and be held in trust for him by his mother.
46. I order the Petitioners and the appointed guardian ad litem to negotiate to determine what debts are due from the estate of PKK (deceased). If the parties are unable to agree, either is at liberty to apply to this Court for ascertainment of the figures.
47. I make no orders regarding costs as this is a family matter.

Orders accordingly.

**DATED AND SIGNED AT MOMBASA THE 13<sup>TH</sup> DAY OF AUGUST 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of: -

Mr Tindika, for the Petitioners;

Ms Mulago, for the Objector;

Mr Otieno BN, for HK, FK, TK and JK; and

Arthur - Court Assistant.

