



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**In re Estate of John Itegi Githinji (Deceased) (Succession Cause  
23 of 2018) [2024] KEHC 16155 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16155 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
SUCCESSION CAUSE 23 OF 2018  
CM KARIUKI, J  
DECEMBER 20, 2024**

**IN THE MATTER OF THE ESTATE OF JOHN ITEGI GITHINJI (DECEASED)**

**BETWEEN**

**ROSE NYAMBURA ITEGI ..... PETITIONER**

**AND**

**ANNE GATHONI KABUCHO ..... ADMINISTRATOR**

**AND**

**JOSEPH GICHUKI MUGO ..... APPLICANT**

**RULING**

1. The Applicant vide a summons dated 28/9/2023 seeks for the following reliefs: -
  - I. That Ephantus Maina Itegi, Elijah Githinji Itegi and Kevin Mugo Itegi do appear at Kenya Medical Research Institute for extraction of Deoxyribonucleic Acid samples for testing and comparison with those of Joseph Gichuki Mugo.
  - II. That in the alternative, John Itegi Githinji's grave situate at Lesirko in Oljoro Orok Division-Nyandarua County be opened to disinter his body with the view of taking samples therein for the purposes of Deoxyribonucleic Acid test.
  - III. That the Director of Kenya's Medical Research Institute or his appointed officer do undertake the disinterment and do obtain the necessary samples for the purposes of carrying out the Deoxyribonucleic Acid test.
  - IV. That the OCS Oljoroorok Police Station do provide security during the exhumation exercise.
  - V. That the Court may grant any other Orders that is deem fit.



- VI. That the costs for his application be provided for.
2. The application is supported by two affidavits, being the supporting affidavit of Joseph Gichuki Mugo, sworn on 28th September 2023 and the affidavit of Magdaline Wangari sworn on 11th April 2024.
  3. On the other hand, the application is opposed by the 2<sup>nd</sup> Administrator/Respondent through her replying affidavit sworn on 18th March 2024. The application is also opposed by Kevin Mugo Itegi through his replying affidavit sworn on 18th March 2024.

### **Applicant's Submissions**

4. The Applicant stated that the application was served on Ephantus Maina Itegi, Elijah Githinji Itegi and Kevin Mugo Itegi as confirmed vide an affidavit of service dated 19/2/2024 and filed in Court on an even date. That it is only Kelvin Mugo Itegi who has opposed the application vide a replying affidavit dated 18/3/2024
5. It was stated that it is not in dispute that the 3 persons mentioned in the application are indeed listed as beneficiaries of the estate in the petition for a grant and in the summons for confirmation of grant dated 6/2/2023 and it is not true that they are not parties in Succession Cause as alleged by Kevin Mugo Itegi in his affidavit. Further, Ann Gathoni Kabuchu has not attached an authority to act granted by Ephantus Maina Itegi and Elijah Githinji Itegi authorizing her to swear the affidavit dated 18/3/2024 in opposition of the application on their behalf. It is thus misleading for her to state that the two are opposed to the prayers in the application whereas they have not filed grounds of opposition or a replying affidavit as per the law required despite them being aware of the same.
6. It was averred that the Applicant and her mother Magdaline Wangari have explained in their affidavits dated 28/9/2023 and 14/4/2024 that the Applicant ought to be considered as a beneficiary of the estate of the deceased by dint of his being a son of the deceased John Itegi Githinji. Further, that the only evidence that can confirm this position all facts and circumstances surrounding his birth taken into consideration is through a DNA testing.
7. The Applicant argued that Ephantus Maina Itegi and Elijah Githinji Itegi are not opposed to submitting DNA samples for testing and comparison with those of the Applicant. The law binds Kevin Mugo Itegi to supply samples too. They cited the case of Re estate of PWM (Deceased) (2016) eKLR
8. In conclusion, they urged the court to allow the application as denying the same shall disentitle a son from inheriting the estate of his deceased father.

### **2<sup>nd</sup> Administrator's Written Submissions**

9. The 2<sup>nd</sup> Administrator stated that the instant application seeks for extraction of samples from the persons named therein for DNA testing for purposes of establishing whether the Applicant is a child of John Itegi Githinji (deceased). That the High Court has variously in the past dealt with applications for DNA testing in succession matters, including applications for exhumation of the deceased's body for purposes of taking samples for DNA testing, for purposes of establishing paternity, whereby the factors to be considered in such applications have been laid down. Reliance was placed on Re Estate of the late Simeon Kiptum Choge (2017) eKLR where the cited with approval the case of DNM vs JK (2016) eKLR, In re Estate of John Itegi Githinji (deceased) [2020] eKLR
10. It was argued that Ephantus Maina Itegi, Elijah Githinji Itegi and Kevin Mugo Itegi have not been joined as parties in the instant application and there is no evidence to show that each one of them was served with the instant application and all subsequent processes, including hearing notices, relating to



- the instant application. That the instant application touches on the privacy and bodily integrity of the said Ephantus Maina Itegi, Elijah Githinji Itegi and Kevin Mugo Itegi, who have clearly not consented to the instant application and the said Kevin Mugo Itegi has in his replying affidavit confirmed as much.
11. In the circumstances and on the strength of the ruling of Hon. Lady Justice R.P.V. Wendoh J. In re Estate of John Itegi Githinji (Deceased) (supra), the 2<sup>nd</sup> Administrator stated that the application should not be granted.
  12. It was contended that the question that arises is whether the Applicant has presented tangible evidence to connect him with the deceased and whether the Applicant has established an undoubted nexus and sufficient link between him and the deceased, so as to persuade this Honourable Court to find it desirable or imperative to make the orders for DNA testing sought by the Applicant.
  13. The 2<sup>nd</sup> Administrator asserted that the Applicant claims that he is a son of the deceased yet the Applicant has not filed any supporting documents to substantiate his claim. Magdaline Wangari, who claims to be the Applicant's mother, in her said affidavit, sworn on 11 April, 2024, deponed that she had a friendship and love affair with the deceased out of which the Applicant was born on 18th November, 1978 and that the deceased occasionally helped in raising the Applicant. Further, it was stated that the said Magdaline Wangari also deponed that her relationship with the deceased and the fact that she and the deceased had a son was well known to the deceased's family. The said Magdaline Wangari goes on to say that the Applicant is the biological son of the deceased.
  14. It was submitted that Magdaline Wangari has not filed any supporting documents of her friendship and relationship with the deceased, for instance, photographs and love letters. That she has not filed any documents, for instance, receipts for payment of school fees or bank statement(s) or Mpesa statement(s) to show that the deceased was sending money to her for support or maintenance of the Applicant.
  15. Additionally, none of the deceased's family members has sworn an affidavit and no affidavit has been filed from a member or members of the deceased's family to support or substantiate Magdaline Wangari's claim that her relationship with the deceased and the fact that she had a son with the deceased was well known to the deceased's family. Likewise, no affidavit has been filed from a member or members of the deceased's family to show that the deceased had acknowledged the Applicant as his son, as alleged. In the circumstances of this case, the evidence filed by the Applicant to support this application for DNA test is very scanty and weak and does not establish an undoubted nexus and sufficient link between him and the deceased
  16. The 2<sup>nd</sup> Administrator submitted that the evidence presented by the Applicant is not tangible, clear or sufficient to limit Kevin Mugo Itegi's constitutional rights to bodily integrity and privacy, and the same case applies to Ephantus Maina Itegi and Elijah Githinji Itegi.
  17. It was argued that the Applicant is an adult as shown by his National Identity Card Number 20273386, which is attached to the Applicant's earlier application dated 30 May 2023 and filed on 31 May, 2023. The Applicant is not a minor and consequently, the case of Re Estate of PWM (deceased) (2016) eKLR cited by the Applicant is clearly distinguishable as it involved a minor, whereby the provisions of the [Children Act](#) were invoked and whereby the best interest of the minor child were paramount. They cited the case of In Re Estate of John Itegi Githinji (Deceased) (supra)
  18. On the strength of the ruling in Re Estate of John Itegi Githinji (Deceased) (supra) and the case of Hellen Cheron Kimurgor vs. Esther Jelagat Kosgei (supra), it was stated that the Applicant has failed to establish a sufficient link between him and or his mother with the deceased, during the deceased's lifetime, to persuade this Honourable Court to find it desirable or imperative to make the drastic order



of exhumation of the deceased's body for purposes of a DNA test. Moreover, the Applicant has not shown or demonstrated exceptional or special circumstances to warrant the exercise of this Honourable Court's discretion to issue the drastic order for exhumation of the deceased's body.

19. Additionally, the 2<sup>nd</sup> Administrator submitted that the timing of the Applicant's application dated 30th May, 2023 and the application dated 28th September, 2023 is suspect. The deceased passed away on 9th January, 2006. It therefore took the Applicant 17 years to file the said applications. Before the Applicant's advocate's letter dated 24th March, 2023, which is annexure "JGM 2" in the application dated 30th May 2023, there is no evidence to show that the Applicant had taken any step or action to follow up on and participate in succession proceedings for administration of the deceased's estate. The instant application and the Applicant's application dated 30th May, 2023 were hence brought belatedly. In the circumstances, it cannot be ruled out that the Applicant is working in cahoots with the 1<sup>st</sup> Administrator and or some beneficiaries from the first house of the deceased to delay the full administration and distribution of the deceased's estate.
20. Ultimately, they submitted that the application dated 28th September, 2023 has no merits and the same should be dismissed with costs.

### **Analysis and Determination**

21. I have considered the instant application, the affidavit in support, the replying affidavit and the rival submissions. The main issues for determination in the application is whether the court should grant orders for the extraction of Deoxyribonucleic Acid from samples from Ephantus Maina Itegi, Elijah Githinji Itegi and Kevin Mugo Itegi for testing and comparison with those of Joseph Gichuki Mugo and in the alternative the disinterment of John Itegi Githinji's body with the view of taking samples therein for the purposes of Deoxyribonucleic Acid test.
22. Having perused the instant application, I note that the Applicant did not enjoin the said Ephantus Maina Itegi, Elijah Githinji Itegi and Kevin Mugo Itegi despite seeking orders that they do appear at Kenya Medical Research Institute for extraction of Deoxyribonucleic Acid samples for testing and comparison with those of Joseph Gichuki Mugo.
23. In the case of S.W.M vs. G.M.K [2012] eKLR, the court stated that:-

“ Ordering the respondent to provide DNA for whatever reason is an intrusion of his right to bodily security and integrity and also the right to privacy which rights are protected under the Bill of Rights. The petitioner bears the burden of demonstrating to the court the right she seeks to assert or vindicate and which the court would consider as overriding the respondent's rights.
24. Accordingly, I agree with the 2<sup>nd</sup> Administrator's submission that Ephantus Maina Itegi, Elijah Githinji Itegi and Kevin Mugo Itegi have not been joined as parties in the instant application and there is no evidence to show that each one of them was served with the instant application and all subsequent processes, including hearing notices, relating to the instant application. Further, the instant application touches on the privacy and bodily integrity of the said Ephantus Maina Itegi, Elijah Githinji Itegi and Kevin Mugo Itegi, who appear not to be aware of the existence of the instant application. The Applicant is basically seeking orders against parties who are not parties to the instant application.
25. Consequently, it is my considered finding and order that;
  - i. The application is untenable and is therefore dismissed with no orders as to costs.

**DATED AND DELIVERED AT NYANDARUA THIS 20<sup>th</sup> DAY OF DECEMBER 2024**



.....  
**CHARLES KARIUKI**  
**JUDGE**

