



**In re Estate of David Oyunga Oluma (Deceased) (Succession Cause
2138 of 2014) [2023] KEHC 17445 (KLR) (Family) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 17445 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

SUCCESSION CAUSE 2138 OF 2014

MA ODERO, J

APRIL 28, 2023

**IN THE MATTER OF THE ESTATE OF DAVID OYUNGA
OLUMA (DECEASED)**

BETWEEN

DOMITILA AWANGE OLUMA APPLICANT

AND

MADUSU KAMALA RESPONDENT

RULING

1. This Court has been asked to determine the question of whether a DNA test ought to be conducted to determine whether the minor in question is in fact the child of the Deceased. The Application for DNA test was supported by the Affidavit dated 2nd February 2018 sworn by Domitila Awange Oluma who is the mother of the Deceased.
2. The objector/Respondent Madusu Kamala who is the biological mother of the minor opposed the application for DNA test. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated 31st October 2022 whilst the Objector relied upon her submissions dated 9th November 2022.

Background

3. This Succession Cause relates the estate of David Olunga Oluma (hereinafter ‘the Deceased’) who died intestate on 5th July 2009. A copy of the Death Certificate Serial Number 0031743 is annexed to the Petition for Grant of letters of Administration Intestate dated 24th July 2014.



4. A letter dated 21st November 2013 written by the Chief of East Alego location stated that the Deceased had been married to one Rose Benta Adhiambo who died on 26th June 2008 thereby predeceasing her husband. That the couple were not blessed with any children.
5. The Deceased was said to be survived by the following persons:-
 - (a) Domitilla Awange Oluma - Mother
 - (b) Edward Omondi Oluma - Brother
 - (c) Alfred Ogwanda Oluma - Brother
 - (d) Peter Mauwa Oluma - Brother
 - (e) James Ochieng Oluma - Brother
 - (f) Linus John Nyayieka Oluma - Brother
 - (g) Symphrose Obudho Oluma - Sister
 - (h) Doreen Awuor Oluma - Sister
 - (i) Mary Apondi Oluma - Sister
6. Following the demise of the Deceased Grant of letters of Administration intestate was on 27th April 2015 made to Edward Omondi Oluma (Brother) and Domitilla Awange Oluma (Mother) of the Deceased. The Grant was subsequently confirmed on 1st March 2017.
7. On 5th May 2017 the Objector herein Madasu Kamara filed a summons seeking revocation of the Grant on grounds that the Grant had been obtained fraudulently through concealment of the fact that she was married to the Deceased at the time of his Death and that they had a son BOMO (the minor) who had been born on 22nd December, 2022.
8. The matter was actually handled by Hon. Lady Justice Farah Amin (Retired) who on 17th July 2017 directed that the Objector be appointed as one of the Administrators of the estate. The Grant was accordingly rectified on 17th August 2017.
9. The matter was then to proceed for hearing to determine the questions of whether the Deceased was at the time of his Death married to the objector. During that hearing on 21st December 2017 the Deceased's mother asked the court to order that a DNA test be conducted to confirm whether the minor was infact a son of the Deceased. The court directed that the Applicant file and Affidavit listing the reasons why she wanted a DNA test to be conducted.
10. In compliance the Applicant filed the Affidavit dated 2nd February 2018 in which she averred that the Deceased was once married to the late Rose Benter Adhiambo with whom he cohabited as man and wife for a period of fifteen (15) years. That the couple were not blessed with any children a fact which greatly concerned the Applicant as a mother to the Deceased. That the said Rose Benter Adhiambo passed away in July 2008.
11. The Applicant further averred that the Deceased never informed her that he had married the Objector and also did not inform his mother that he had a son. That the Applicant never met the Objector or her son until after the demise of the Deceased.
12. The Applicant states that it is not normal for the Deceased to have failed to inform his mother of the fact of his marriage and of the birth of his son, knowing very well that the Applicant like any parent was very



anxious to meet her grandchildren. The Applicant concludes that in light of the above circumstances there is need to conduct a DNA test in order to ascertain the paternity of the minor.

13. The Objector filed a Replying Affidavit dated 16th September 2022 in which she averred that the paternity of the minor had already been admitted by the Administrators of the estate vide their letter dated 28th June 2017.
14. The Objector finally stated that the request for a DNA test was merely an after thought, was unnecessary and in the circumstances was superfluous. She urged the court to dismiss the application.

Analysis and Determination

15. I have considered this application for a DNA test, the Reply filed by the Objector as well as the written submissions filed by both parties. The only issue for determination is whether the court should order for a DNA test to be conducted on the minor.
16. The Applicant has denied that the minor is a son to the Deceased she states that the Deceased never informed any family member of his purported marriage to the Objector neither did he inform the family that he had a son.
17. The Applicant asserted that the Deceased during his life time married only one wife the late Rose Benter Adhiambo and that the couple had no children.
18. The Respondent on her part insists that the Deceased prior to his demise lived and worked for the United Nations in Sierra Leone where he met and married her in accordance with the customary practices of the Yalunka Tribe to which the Objector belonged.
19. The Objector further insists that the Deceased did introduce her and their son to his family and that she participated fully in the burial rites for the Deceased as a wife.
20. Section 107 of the *Evidence Act* Cap 80, Laws of Kenya which deals with “Burden of Proof” provides thus:-
 - “(1) whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”
21. Therefore a party who alleges the existence of a fact is under a legal obligation to prove that fact.
22. The objector has annexed a copy of the minor’s Birth Certificate Serial Number 175481 which document names the Deceased David Olunga Oluma as the father of the minor.
23. Section 12 of the *Registration of Birth and Deaths Act* Cap 149 laws of Kenya provides as follows:-

“No persons shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or in accordance with recognized custom”
24. The fact that the Deceased was named in the Birth Certificate as the Father of the minor proves that the Registrar was satisfied by the evidence availed to him/her as set out in Section 12. There has been no



allegation much less proof that this Birth Certificate was acquired otherwise than in accordance with the law. No evidence to controvert the entry in the Birth Certificate has been availed by the Applicant.

25. The Applicant and the family of the Deceased have all along accepted and recognized the minor as the son of the Deceased vide a letter written “without Prejudice” dated 28th June 2017 the Administrators of the Estate stated as follows:-

“We refer to the above matter and to our letter dated 9th June instant. We have now taken instructions on this matter and wish to advise that:-

- i. There is no dispute that the minor herein is a son of the deceased.
- ii. There is no dispute that your client had a relationship with the deceased before and at the time of his death.
- iii. The alleged marriage is disputed and should be proved by your client to the required standard.
- iv. Being the mother of the deceased’s son we do not object to her being included as an administrator of the deceased’s estate.
- v. Whether or not she is a beneficiary of the deceased estate will depend on proof of her alleged marriage.
- vi. There are other dependants of the deceased’s estate.” [own emphasis]

26. The Administrators did not deny having written this letter neither did they object to reference to the said letter by the Objector.

27. Additionally the minor was recognized in the Eulogy prepared for the funeral of the Deceased and the Objector has annexed several photographs of the Deceased with herself and the minor.

28. As stated earlier the Applicant has all along recognized the minor as the son of the Deceased. No reason has been given for her sudden about turn. A DNA test would only be necessary where paternity has been denied. In this case paternity had already been admitted.

29. I find that this application for a DNA test is merely an after thought, an attempt by the applicant to throw a spanner in the works. The hearing of the suit had already commenced and no application for DNA testing had been made prior to the commencement of the hearing.

30. In the light of pervious admission made by the Administrator the application is superfluous I find no merit in the same and I decline to order that a DNA test be conducted to determine the paternity of the minor. The application is hereby dismissed and the Applicants will bear the costs for this application.

DATED IN NAIROBI THIS 28TH DAY OF APRIL, 2023.

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MAUREEN A. ODERO

JUDGE

