MAO v JOO & another (Civil Appeal E034 of 2021)
[2022] KEHC 3364 (KLR) (25 May 2022) (Judgment)

Neutral citation: [2022] KEHC 3364 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL APPEAL E034 OF 2021

RE ABURILI, J

MAY 25, 2022

BETWEEN

MAO ..... APPELLANT

AND

JOO ..... 1ST RESPONDENT

JA'OO ..... 2ND RESPONDENT

(Being an appeal from the Ruling and Order of Hon. J.P. Nandi delivered on 20th August 2021 in Bondo Chief Magistrate's Court Succession Cause No. 430 of 2018)

JUDGMENT

Introduction

1. The appeal arises from and challenges the ruling by Hon. J.P. Nandi, Principal Magistrate, Bondo Law Courts in Succession Cause No. 430 of 2018 delivered on August 20, 2021. The appellant herein filed an application dated March 29, 2021 before the trial court seeking amongst others, an order that the 1st respondent JOO on the one the hand, and the surviving beneficiaries of the estate of POO be ordered to submit to a DNA test so as to determine whether the 1st respondent shared paternity with the deceased's other children.

2. The appellant's application was grounded on the fact that the respondents herein, JOO And Dr JA'O who are co-administrators of the estate of the deceased POO, had failed to take out Summons for Confirmation of the grant issued to them on the March 6, 2019 and further that the 1st respondent had continuously intermeddled in the deceased's estate and further acted in a manner that was prejudicial to the interest of the deceased's estate and that was inconsistent with his remaining a co-administrator.

3. It was the appellant's case that he and his siblings did not share the same paternity as the 1st respondent JOO in view of the latter's character and behaviour and that therefore it was in the interest of justice to determine the 1st respondent's paternity as well as his right to share in the deceased's estate.

4. Opposing the appellant's application in the lower court, the 1st respondent JOO filed a replying affidavit dated April 26, 2021 deposing and contending that the appellant had admitted in paragraph 2 of the supporting affidavit to his application that he was a beneficiary of the deceased's estate; that the issue of his paternity was an issue of law and not one to change based on the appellant's ramblings and further that if his paternity was in issue, then they would need to do a DNA comparison with their parents as it might turn out that they were not children of the deceased but adopted relatives. The 2nd respondent vide his replying affidavit dated April 9, 2021 supported the appellant's application for a DNA test.

5. In his ruling which is impugned herein, the trial Magistrate whilst referring to various court pleadings noted that the appellant and the 2nd respondent had always known and recognized the 1st respondent as a son and beneficiary of the deceased Petro OO's estate. The trial Magistrate therefore dismissed the appellants claim for a DNA as misconceived and an abuse of the court process.

6. Aggrieved by the trial court's ruling, the appellant filed this appeal vide a memorandum of appeal dated September 17, 2021 and filed on March 2, 2022 setting out the following grounds of appeal:

    a) That the learned trial magistrate erred in law and fact by considering issues that were extraneous to the application before him and which were never raised by anybody;

    b) That the learned trial magistrate erred in law and fact by dismissing the appellant's prayer for DNA testing despite the fact that the respondents had stated their willingness to submit themselves to sibling DNA;

    c) That the learned trial magistrate erred in law and fact by failing to wholesomely consider the import and purpose for which the applicant had applied for DNA testing; and

    d. That the learned trial magistrate erred in law and fact by failing to consider the applicant's submissions.

7. The appeal was canvassed by way of written submissions

The Appellant's Submissions

8. It was submitted that the trial magistrate erred in putting too much weight on the Chief's letter when the same was not made the subject of the application. Reliance was placed on the case of *In re Estate of Mukhobi Namonya (Deceased)* [2020] eKLR where the court noted inter alia that the chief's letter in succession proceedings was not a requirement of law but a creation of judicial practice meant to identify the deceased's beneficiaries. The appellant also relied on the case of *Paul Tono Pymto & another v Giles Tarpin Lyonnet* [2014] eKLR where the court held *inter alia* that in matters of administration of estates of deceased persons who died intestate, Chiefs and family members have to appreciate that they have a limited role to play.

9. It was submitted that the trial magistrate further erred by suggesting that third parties not involved in the proceedings had knowledge that the 1st respondent was the son to the deceased whereas no evidence was adduced to that effect.

10. The appellant submitted that the trial court erred in failing to grant orders for a DNA test whereas the 1st respondent had agreed to take the DNA test on the ground that all the other children of the deceased take it as well.

11. The appellant further submitted that the trial magistrate failed to consider wholesomely the import and purpose of DNA testing considering the two extreme positions taken by the proponents and opponents of the application that necessitated scientific proof to provide a lasting solution to the same.

12. Reliance was placed on the case of *Wilfred Karenge Gathiomi v Joyce Wambui Mutura & another* (2016) eKLR where the court considered the issue of ordering for a sibling DNA test and found it to be the best way to determine the issues between the parties therein.

The 1st Respondent's Submissions

13. It was submitted on behalf of the 1st respondent that there must be clear unequivocal reason to order a paternity test as was held in the cases of *DNM v JK* (2016) eKLR and reiterated *in Re Estate of JSM (Deceased)* 2019 eKLR and that in the instant case, all that was presented before court was the appellant's strong belief that he shared with undisclosed persons.

14. It was further submitted that where judges have ordered for paternity testing of siblings, it is usually where an objector or beneficiary appeared out of the wood work laying claim to the deceased's estate which was not the case in the instant case. The 1st respondent urged the court to consider the case of *In Re Estate of SMM deceased* (2019) eKLR where the court ordered a paternity and sibling test so as to avoid including a stranger in the distribution of the deceased's estate.

15. The 1st respondent submitted that the appellant's prayer as couched was mischievous as it did not reveal the reason for the sibling test but was meant to exclude the 1st respondent from benefitting from the deceased's estate. It was submitted that there must be a nexus or purpose for which the prayer sought seeks to serve.

16. It was submitted that the 1st respondent fit as both a biological child of the deceased or one recognized by the deceased as his son in line with the provisions of a child in section 3 (2) of the *Law of Succession Act*.

17. The 1st respondent submitted that the Chief's letter identifying the deceased's beneficiaries could not be impugned without calling the Chief as the Chief was the one best suited to help the court identify the deceased's genuine beneficiaries.

18. It was further submitted that third parties referred to by the appellant included the 2nd respondent, the appellant himself as well as their sister Caroline who all signed consent forms admitting that the 1st respondent was a son of the deceased during the initialization of the petition for letters of administration.

19. It was further submitted that this case was distinguishable from that of *MW & 3 others v DN* relied on by the appellant, as the 1st respondent was not a stranger to the appellant otherwise he, the 2nd respondent and their sister would not have consented to the 1st respondent petitioning and obtaining grant of letters of administration intestate to administer the estate of the deceased POO.

The 2nd respondent's Submissions

20. It was submitted that the finding of the trial magistrate was erroneous since at no point during the petition for grant and filing of summons for confirmation was the issue of paternity raised by any

party or beneficiary and further that the appellant herein was not a party in the petition for grant in Succession Cause No. 430 of 2018 or in Siaya HC Misc. Application No. 31 of 2020.

21. It was further submitted that the trial magistrate failed to advance convincing reasons for disallowing the prayer for DNA tests and instead adopted the 1st respondent's submissions whereas the parties in the case had agreed to subject themselves to sibling DNA test.

22. It was further submitted that in cases where paternity is in issue, the most cogent evidence is to carry out DNA tests as the Chief's letter as well as the opinion or knowledge from the relatives or neighbours cannot conclusively determine the matter as was held in the case of In the Matter of the Estate of Jackson Kingarua Maina alias Kingarua Maina (Deceased) Nairobi Civil Appeal No. 109 of 2016.

Analysis and Determination

23. I have considered the grounds of appeal, the respective parties' positions before the lower court in the application subject of the ruling that is impugned, as well as the submissions and case law cited by counsel for the parties hereto.

24. This being a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence adduced before the trial court to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. This duty is captured by section 78 of the *Civil Procedure Act* which espouses the role of a first appellate court which is to: '..... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.'

25. The Court of Appeal in the case of *Peter M Kariuki v Attorney General* [2014] eKLR stated as follows concerning the duty of the first appellate court:

> " We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and revaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence..... (See *Ansazi Gambo Tinga & another v Nicholas Patrice Tabuche* [2019] eKLR)."

26. Taking the above principles into consideration and having scrutinised the appellants' memorandum of appeal and submissions for and against this appeal, I find that the only issue for determination is whether the appellant merits grant of orders for a siblings' DNA tests, in order to determine the 1st respondent's paternity.

27. There is no consensus from the courts in cases where the courts have been asked to order for DNA tests to determine paternity on matters involving adults some of whom are non-consenting. Some courts hold the view that for an order for DNA test to be made, a basis must be laid; and that a nexus or connection between the applicant and the person the order is being sought against must be established.

28. The other school of thought is that DNA test is to be allowed in fact-finding, to establish the truth and reach a just conclusion even where no nexus or connection has been established, if the need is eminent.

29. In *S.W.W. v G.M.K.* (2012) eKLR where the petitioner sought as one of her prayers, for the respondent to be subjected to a DNA test to ascertain whether he was her biological father, in declining the prayer, the court was of the view 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."

30. In *RMK v AKG & Attorney General* (2013) e KLR the court had this to say on the issue of whether or not to order for a paternity DNA test:

> " The petitioner stated that the court should order a DNA test nevertheless as the facts in the deposition have not been challenged. As I have observed, the burden remains on the petitioner to establish by pleadings and evidence sufficient nexus between him and the respondent in order to persuade the court to grant the orders. In this case there is no evidence to support such a course."

31. In *Wilfred Karenge Gathiomi v Joyce Wambui Mutura & another* (2016) eKLR, the court stated that:

> " Therefore, since under our law sections 107 108 & 109 of the *Evidence Act* cap 80 mandates that he who alleges must prove; the applicant is the one who raised the issue of paternity against the 1st respondent. He did not prove. The 1st respondent claimed in spite of the date contained in her ID card she was born in 1950. She did not prove the same. Therefore, the only option is to result to scientific method for conclusive results. Both parties should undergo a sibling DNA testing to confirm if they are of the same father or not.
>
> The court finds that the DNA testing will not cause substantial loss to the applicant, except inconvenience that is less important to finding a lasting solution to the issue raised in the first place...
>
> In light of above-cited authorities that DNA is intrusive and interferes with the right to privacy, this court finds basis for the DNA testing. Paternity is central to the dispute at hand, whether the 1st respondent is one of the beneficiaries of the estate of the deceased's estate. It is the only way to resolve the paternity issue, the applicant raised and is now reluctant to pursue the matter to its logical conclusion. The DNA testing will not prejudice the applicant's case pending appeal, as he has not advanced any proposal on how to resolve issue it was his word against his."

32. In the instant case, the appellant sought for orders of DNA testing of the 1st respondent and the other siblings. Sections 107,108 & 109 of the *Evidence Act* cap 80 Laws of Kenya mandates that he who alleges must prove. The Appellant is the one who raised the issue of paternity against 1st Respondent. The question is, what evidence did he adduce against the 1st respondent to warrant a DNA testing?

33. One of the grounds that the appellant raised in support of his application for a DNA test was that the 1st respondent had failed, together with the 2nd respondent as administrators of the estate of the deceased Petro OO to take out Summons for Confirmation of the grant issued to them on the March 6, 2019 and further that the 1st respondent had continuously intermeddled in the deceased's estate and acted in a manner that was prejudicial to the interest of the deceased's estate and that was inconsistent with his remaining a co-administrator.

34. It was the appellant's assertion that the respondent did not share the same paternity with them as evidenced by his queer character, devilish behaviour and intensified antagonism against the deceased's family.

35. It is an undisputed fact from the pleadings lodged in support of the petition for grant in the succession matter in the lower court that the appellant and his sister Caroline Atieno Owino both signed

Form 38 granting the respondents herein consent and priority to petition for the grant of letters of administration intestate of the estate of the deceased Petro OO whom they all acknowledged as their father in Form 80 which is the Petition itself. Further, the 1st respondent was listed as the deceased's son and beneficiary in both Form P & A 5 being the affidavit in support of the petition for grant as well as the Chief's introductory letter dated June 22, 2018. The gazette notice no. 430 A of 2018 dated December 28, 2018clearly states that the 1st respondent and the 2nd respondent had petitioned for grant of letters of administration intestate as sons of the deceased POO who died at Kenyatta National Hospital on 2/11/2008.

36. The appellant faulted the trial magistrate's reliance on the Chief's letter, for not being a requirement of law but a creation of judicial practice meant to identify the deceased's beneficiaries. Indeed, that is true and for that matter, courts do take judicial notice of the Chief's letter as an introductory letter identifying beneficiaries of the deceased's estate because the Chief is expected to have known the deceased and his close family members, unless there is a dispute that the Chief's letter included strangers as beneficiaries or dependants of the deceased and evidence to the contrary adduced to that effect.

37. The other significant question is whether the 1st respondent is a stranger who has appeared from the blues or the woods and claimed that he is the son to the deceased Peter OO and that by virtue of that appearance from nowhere, he now claims to be a beneficiary of the estate of the deceased thereby putting pressure on the appellant and the 2nd respondent to demand for proof of his paternity.

38. The appellant further submitted that the 1st respondent was in agreement that a DNA test ought to be done and as such, the trial court ought to have granted their prayer. I have perused the trial court record. position of the 1st respondent was that that if his paternity was in issue then they would need to do a DNA comparison with their parents as it might turn out that they were not children of the deceased but adopted relatives.

39. I note that other than the appellant's and 2nd respondent's sentiments that the 1st respondent is not their sibling and this coming after the 1st respondent allegedly became devilish and stubborn and an intermeddled in their late father's estate, hence his alleged queer character ruling him out from being one of their blood brother, no other evidence has been placed before this court to sway the court towards ordering a DNA test.

40. This court must state that it has found it quite suspicious and outrageous that the appellant and 2nd respondent who are not young people, in that from the trial court record are copies of their national identity cards showing that the appellant herein was born on 2/9/1968 as per his Id Card Number xxxx while the 2nd respondent was born in 1955 and who have all along over the years grown up as siblings with the appellant and even consented to the 1st respondent petitioning on their behalf to administer the estate of their late father, have all over a sudden at this stage of the succession proceedings, after the appellant and other beneficiaries had consented to the 1st respondent petitioning for letters of grant in their stead, the appellant and 2nd respondent have found it appropriate to challenge the paternity of the 1st respondent. As earlier noted, no evidence has been presented to show that the 1st respondent is a stranger into the family of the deceased and that he just popped from nowhere to demand to be recognized as a child of or beneficiary of the estate of the deceased POO.

41. There are lawful procedures for removal of an administrator who does not administer the estate of the deceased in accordance with the law. Seeking for paternity DNA test of such administrator simply because he has turned to be queer or devilish in character is not one of the solutions to the issue.

42. Furthermore, the appellant himself in his own supporting affidavit to his application for orders for a DNA test at paragraph 2 acknowledged that the 1st respondent was a child of the deceased. Therefore,

the appellant cannot in law be allowed to approbate and reprobate his own affidavit and consent duly sworn and executed, by being inconsistent and putting forward such a demand for DNA paternity test of the 1st respondent just because he finds the 1st respondent stubborn.

43. On the part of the 2nd respondent, he cannot be allowed to purport to be on both sides of the divide. He is named as a respondent and not an appellant or interested party. He never appealed the ruling of the trial court. What that means is that he was satisfied with the outcome of the application since he has no appeal before this court.

44. The appellant further avowed that it would be in the interest of justice to allow the DNA test to be carried out. However, I find that this case is distinguishable from those relied on by the appellant and that the intention of the appellant at this stage of these succession proceedings in raising such an issue is intended to unduly embarrass the 1st respondent. This is so because the appellant himself in this case states that the questions over the 1st respondent's paternity are as a result of his "queer character, devilish behaviour and intensified antagonism against the deceased's family." No such questions or grounds were subject of the decisions that he relied on in urging this appeal or the application before the lower court.

45. The assertion that 1st respondent cannot be a blood brother to the appellant simply because his character is questionable is in my view a personal opinion of the appellant which opinion not sufficient to warrant grant of the orders sought. Needless to say that even Siamese twins are not always persons of the same character or even mind. Furthermore, one does not choose a bad or good brother or sister for a sibling. To say that the 1st respondent cannot be the appellant's brother because of his alleged queer character is in my humble view, being judgmental and disrespectful.

46. The 1st respondent cannot cease being the deceased's child merely because he has become arrogant or hard headed otherwise. If this court were to hold such a view as held by the appellant herein, then most people would be disinherited for being stubborn or antagonistic or litigious and against the wishes of the majority in the family set up.

47. The courts exist to resolve disputes in a fair, just and impartial manner. The courts should never be drawn into matters of personal characteristics of parties which are not overtly demonstrated to the court for its observation in the proceedings before it and where one of the disputants is antagonistic, it does not render such person ineligible to inherit. Once the dispute is before a court of law, it will be resolved one way or the other and whoever is aggrieved, the avenue for challenging that decision is available in law.

48. The 1st respondent failing to take out summons for confirmation of the grant issued to him jointly with the 2nd respondent on the March 6, 2019 and further that the 1st respondent continuously intermeddling in the deceased's estate and further acting in a manner that is prejudicial to the interest of the deceased's estate and being inconsistent with his remaining a co-administrator can only be a ground, upon proof, for removal of an administrator but not a ground for seeking that a DNA or paternity test be undertaken on such an administrator to establish his blood relations with the rest of the beneficiaries of the estate of a deceased person.

49. I also observe that from the filed record of appeal, the appellant and the 1st respondent herein have had long standing disputes both civil and even criminal in nature emanating from issues relating to the estate of the deceased POO, right from 2019 and in all those very serious disputes, including one filed in this court vide HC Misc Civil Application No. 31 of 2020 seeking to transfer Succession Cause No. 480 of 2018 from Bondo PM's court to this court for hearing and final determination, the appellant never claimed that the 1st respondent was not a child of the deceased.

50. In addition, the issues raised by the 1st respondent regarding the need to collect all the deceased's estate for distribution are in line with his duties as an administrator of the estate and unless proven otherwise, the 1st respondent is within the law to pursue that line within the tenets of the law as there can be no succession of an estate of the deceased by instalments, where there is no evidence that the deceased left behind an estate which is partially probate and partially intestate. Nonetheless, where the appellant is aggrieved by the conduct of the 1st respondent in the pursuit thereof, he is at liberty to challenge the conduct through established legal means. That kind of a dispute cannot be resolved through DNA testing.

51. I further find that no third parties were found to be legitimizing the 1st respondent herein as he was referring to the family members who agreed to have him administer the estate of the deceased POO.

52. From the record of appeal, the deceased died aged 90 years on 2/11/2008 and the succession proceedings were initiated in 2018, ten years later. How it turned out that throughout this period, the appellant and the 2nd respondent never had paternity issues with the 1st respondent until March 2021 after they disagreed over the estate properties is quite strange.

53. In my view, If indeed, for the lifetime of the 1st respondent and in the full view of the appellant and the 2nd respondent herein, the 1st respondent was well known and being supported by the deceased POO and the appellant now, 14 years later, after the demise of POO and three years after filing for succession cause; and wrangling with the appellant over the estate of the deceased, renders the 1st respondent not a child of the deceased hence calling for mandatory DNA exercise as prayed by the appellant, this, in my view, is unethical and intended solely to cause mental anguish and generally humiliate the 1st respondent and subject him to public scandal.

54. In *DNM vs JK* 2016 eKLR Onguto J [RIP] persuasively stated as follows and I concur that:

> " a) "The law on the topic of compulsory blood or DNA testing in paternity disputes, which is also partly an issue in the petition here, is yet to be completely and satisfactory developed locally. There is no express legislative framework, which specifically regulates the position in Civil cases. The few Judicial pronouncements on the topic do not appear unanimous in approach or principle.
>
> b) Whereas in relations to children, the courts have occasionally been quick to act in the child's best interest and ordered DNA testing, with regard to non-consenting adult the Jurisdiction has been left hazy ---"
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> c) In conclusion I hold the view that where paternity is in dispute then with reasonable limits and in appropriate cases DNA testing of non-consenting adults may be ordered even at an interlocutory stage. 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."

55. As was held by Majanja J in *SWM v GMK* [2012] eKLR:

> " 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.

56. I am totally in agreement with my brothers Onguto and Majanja JJ that a party seeking DNA test must demonstrate a nexus as well as a specified quest to protect or enforce specific rights. In the present case, it has been demonstrated that a relationship did exist between the 1st respondent and the deceased. The 1st respondent is not a total stranger who has emerged from nowhere and decided to claim that the deceased is the biological father.

57. Munyao, J. of the Environment and Land Court had occasion to consider this very contentious issue of DNA in *Benjamin Kibiwot Chesulut v Mary Chelangat & another* [2015] eKLR. The learned Judge stated:

> " I interpret this test to mean that, DNA ought only to be permitted where it is necessary for the determination of the issue before court. Where it is not going to determine a key issue in the case, then DNA ought to be denied. This is because DNA is seen as an intrusive procedure that has the effect of invading one's right to privacy.

58. I further agree with Munyao, J. that DNA should be permitted where it is necessary to determine an issue before the court. Recognising the intrusive nature of a DNA test, the same should be denied where it would not determine a key issue in a matter. I find that DNA testing is not the Key issue in the succession proceedings which began way back in 2018. If that had been the case, then the appellant would not have waited until three years after consenting to the 1st responded to be administrator of the estate of the deceased to raise the issue on account of the alleged queer character of the 1st respondent.

59. Taking all the above circumstances into consideration, it is my humble view that the appellant failed to demonstrate any basis for the grant of orders for a DNA test to establish the paternity of the 1st respondent herein JOO.

60. For all the above reasons, I find and hold that this appeal is devoid of any merit. I dismiss it and uphold the order of the trial magistrate dismissing the application by the appellant seeking that a DNA test be undertaken on the 1st respondent to establish his paternity.

61. I order that each party bear their own costs of this appeal, the dispute being between and among family members, trusting that the parties hereto will find reason to co-exist and conclude the succession process devoid of such disgraceful denigrations against each another, and that they have to abide by the rule of law in the administration of the estate of their deceased patriarch.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT SIAYA THIS 25TH DAY OF MAY, 2022**

R.E. ABURILI

JUDGE