



**In re Estate of ETM (Deceased) EGH (Succession Cause 3 of 2018)  
[2022] KEHC 14407 (KLR) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 14407 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
SUCCESSION CAUSE 3 OF 2018  
JN ONYIEGO, J  
SEPTEMBER 30, 2022**

**BETWEEN**

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

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

**AND**

**SMM ..... OBJECTOR**

**RULING**

1. The deceased herein died testate on June 9, 2018 while domiciled in Mombasa Kenya. Prior to his death, he had executed a will dated April 15, 1983. According to the will, he had appointed Barclays bank Trust Company limited as executor and trustee. In the same will, he appointed his wife prima facie as the guardian of his infant children. However, on October 11, 2011 the executor/trustee renounced their executorship.
2. Consequently, SMM and JCM children to the deceased petitioned for a grant of letters of administration with will annexed on July 26, 2018. Listed in the said petition as beneficiaries are; Mrs PCh (widow), ESH (daughter), EMM (daughter), MMM (son) SMM and LKM (daughter) all of whom signed their respective consents approving the petition.
3. On October 12, 2018 ES and EM both daughters to the deceased filed objections to making of the grant to the petitioners. Consequently, they demanded to be included as co-petitioners/co-executors. Secondly, they claimed that their brothers (petitioners) had failed to compile an account for the estate's assets and liabilities. Thirdly, that the two petitioners had failed to execute ETM family trust to manage the estate property as agreed.
4. At the same time, Campus City Limited, Dupoto Farms Limited and Gitonga Wambugu Kariuki describing themselves as claimants with interest in the estate filed chamber summons on May 13, 2019 seeking to be enjoined in the proceedings as claimants. They also prayed for orders directing the estate



to pay them a sum of Kshs 31,272,000 plus interest at court rates of 12% per annum commencing July 12, 2018 till full payment. That the said amount was as a result of entry of judgment against the deceased as the defendant on July 12, 2018 in Malindi ELC No 239/2015.

5. On the other hand, vide a notice of motion dated April 11, 2019 and filed on April 15, 2019, one Sheila Manga Mzungu filed an objection seeking to be recognized and included in the petition as a beneficiary of the estate on account of being a biological daughter to the deceased. She further sought an order for reasonable provision from the estate of the deceased and that the grant made herein be revoked.
6. The application which is the subject of this ruling was anchored on grounds on the face of it and further amplified with averments contained in the affidavit in support sworn by SMM on April 11, 2019 in which she stated that she was the biological daughter to the deceased and GM who was never officially married to the deceased.
7. She further claimed that; during his life time, the deceased took part in her birth dedication ceremony on July 8, 2019 at St Joseph's church and a baptism card in both parents' names issued. That although her two parents were not married officially, she was fully recognized by the deceased as a daughter at all times. That she got wind of these proceedings after seeing a gazette notice of September 7, 2018. That she is legally entitled to a reasonable provision of the estate of her late father and therefore, it would be fair, just, equitable and constitutional that she enjoys her fundamental rights. She stated that nobody will suffer prejudice if her rights are recognized and enforced.
8. In reply to the application dated May 13, 2019, S filed a replying affidavit sworn on May 30, 2019 thus stating that the intended claimant's claim was misplaced as it was a chose in action hence a property of the deceased's estate.
9. In the same replying affidavit, he purported to respond to S's objection filed on April 15, 2019 terming it as misplaced on account that there was no grant issued yet. The court however allowed the claimants to be enjoined albeit with a limited role of not participating in the proceedings as parties.
10. Following misunderstandings as to who was entitled to take out a grant of letters of administration with will annexed or special limited grant, the court on its own motion vide its ruling dated July 18, 2019 appointed the public trustee as the administrator.
11. Consequently, through a notice of motion dated November 11, 2020 and filed on November 12, 2020, SM on his own behalf and that of his co-petitioner and other beneficiaries to the estate sought to stay and review the order of July 18, 2019 on grounds that; there was no dispute on who was to be the administrator of the estate and that the ruling had generated several suits.
12. In response , the public trustee filed a replying affidavit on November 30, 2020 sworn by Jafred Maliro the assistant public trustee opposing that application on grounds that; it was an after-thought calculated to further delay the administration of the estate; the applicants had not proved the grounds for review of an order under Order 45 of the *Civil Procedure Rules*; the court has powers to appoint an administrator as it deems fit; further delay would expose the estate to further wastage; the orders sought could not issue when there was an appeal filed by E pending against the same ruling ( civil appeal No 92/2019).
13. Parties however agreed to proceed with the substantive objection filed by one Sheila through viva voce evidence.
14. Before the hearing would take off, the court on December 8, 2020 did direct SM to undergo a DNA test to ascertain paternity. At the same time, the petitioners/ respondents filed a preliminary objection dated February 2, 2021 and filed on February 3, 2021 contending that the objector had committed



fraud on the court in that she had claimed to be a beneficiary of the deceased ETM when she knew or ought to have known that she was not; the objector had held a claim as beneficiary in the estate of FJM, deceased in Mombasa P &A No 49/2017 being the last born of the deceased; the objector had perjured herself and ought to be punished by this honourable court ; the objector's proceedings are an abuse of the court process and; the objector had come to court with dirty hands.

15. On their part, the claimants filed a response to the application dated November 11, 2020 through a replying affidavit sworn by Gikandi advocate appearing for the claimants thus supporting the appointment of the public trustee as the administrator to the estate and that it was not necessary to review the ruling of the court appointing the public trustee as an administrator.
16. However, to fast track the hearing of the substantive objection by S, parties compromised their positions thereby entering a consent on March 17, 2021 and issued on March 29, 2012 to the effect that by consent;
  - a. The grant issued by the court on September 12, 2019 appointing the public trustee as an administrator be revoked;
  - b. That SMM and JCM are hereby appointed as the executors of the state of ETM in place of the public trustee.
  - c. The application dated November 11, 2020 by the applicant is marked as compromised and settled.
  - d. That parties do proceed with the hearing of the objector's application dated April 11, 2019'
  - e. That the appointed administrator who have been managing the estate to file a full statement of accounts with 60 days.
  - f. The application dated February 15, 2021 is hereby compromised and marked as settled.
  - g. Proceedings in this file do continue in Mombasa law courts.
  - h. The administrator do reconcile their accounts together with the creditors to facilitate settlement of the outstanding debts by the time this matter appears next.
    - i. That calling of succession No 49/2017 is not necessary
    - j. Hearing of the objection proceedings on May 11, 2021
17. Pursuant to the said consent, the grant of probate of written will instead of a grant of letters of administration with will annexed was issued to the petitioners jointly.
18. Before the hearing would take of, Bamburi Cement LTd through their chamber summons dated May 7, 2012 sought to be enjoined as an interested party having bought part of the estate being Plot No MNxxxx/xxxx and xxxx hence sought transfer of these pursuant to Mombasa ELC civil case No 186/214 judgment delivered on January 22, 2020.
19. Further, on June 15, 2021 parties entered a consent to dispose plot No LR xxxx( Original No xxxx to settle judgment decree in favour of a creditor in Malindi ELC 239/2015.

### **Objector's case**

20. During the hearing, the objector SMM adopted the content contained in her affidavit in support of the objection, witness statement dated November 11, 2020 and list of documents dated November 13, 2020. It was her testimony that she was a biological child to the deceased and one GM now deceased.



She went further to claim that during his life time, the deceased did buy her a house at Kiembeni . Besides, she claimed that the deceased did establish a water distribution business branded as xxxx Water Company Limited. She however told the court that the business collapsed the year 2014.

21. To further galvanize her claim, she relied on a DNA report which linked her to E the undisputed daughter to the deceased as her sibling.
22. She further stated that her mother now deceased was married to one M, with whom she divorced the year 1973. It was her further evidence that she was the 6<sup>th</sup> born on her mother's side.
23. On cross examination by Mrs Wambugu, she told the court that her name was included as a beneficiary in respect of the estate of JM ( succession cause No 49/2017) without her consent. She also admitted that her birth certificate did not bear the deceased's name.

#### **Petitioners' /Respondents' case.**

24. Dw2 EM adopted the content contained in her witness statement dated January 21, 2021, bundle of documents of January 25, 2021 and further bundle of documents dated May 7, 2021. She basically denied the allegation that the objector was her sibling.
25. According to her, she met with the objector at their hotel at Voi town lodge where she (objector) went looking for a job. That the objector was offered a job and subsequently deployed to run xxxx company water depot in Mombasa. She claimed that the deceased was a business man who loved assisting people among them the objector. It was further her evidence that the mere submission of documents to prove the allegation that the deceased bought the objector a house was not sufficient proof of paternity.
26. Dw 3 one SK chief xxxx confirmed that he wrote an introductory letter in respect of the estate of JM, in relation to succession cause No 49/2017 indicating S as a daughter to the deceased JM. That before he became a chief he had taught S as his pupil at Mariakani primary being a daughter of M.
27. Dw4 Daniel Kakuru who adopted as his testimony the content in his witness statement dated January 25, 2021 also stated that he was the manager xxxx one of the deceased's assets hence knew all the children of the deceased. He described the objector as an employee to the deceased in charge of xxxx water depot in Mombasa and not his daughter. According to him, the deceased was a generous person who helped people by buying them properties.
28. Lastly, the petitioners call expert evidence through Mr KM (Dw1) who described himself as the chief executive officer of an organization known as DNA Testing services. He told the court that kinship DNA examination is not a conclusive method of ascertaining paternity and cannot be relied on by the court to determine paternity in the absence of samples being taken from the alleged deceased father.
29. He pointed out that the DNA report prepared by Lancet has a disclaimer on its website hence cannot be taken as a conclusive report.
30. Upon close of the hearing, parties agreed to file submissions.

#### **Objector's submissions**

31. Through the firm of Ambwere and company advocates, the objector filed her submissions on November 10, 2021. Learned counsel submitted on the aspect of paternity of the objector. According to him, DNA test conducted by Lancet laboratories had established that the objector had blood relationship and therefore half-sister to E who is also a daughter to the deceased. According to counsel, the objector is as a matter of right entitled to a share of the estate. He dismissed the testimony of Dw1 as it was not based on expert knowledge but testimony of a quack.



32. Mr Amwberere further submitted that the purchase of a house worth 3 million on June 8, 2016 was further evidence to prove father daughter relationship. Learned counsel submitted that the establishment of a water distribution business for the objector was enough proof that the objector depended on the deceased and that there was no evidence adduced by the petitioner to prove that the objector was a mere employee.
33. While addressing principles governing disposition of assets in a testate estate, counsel made reference to clause 7 (b) of the will of the deceased in which he bequeathed his estate to his wife Priscilla and in case of her death, the same to devolve to his living children in equal share. That the deceased did not specify the names of his children who were to benefit although all the children were already born by the time the will was made.
34. Mr Ambwere further urged the court in the alternative to find that the deceased was a dependant to the deceased pursuant to Section 26 and 29 of the Law of Succession Act and therefore make reasonable provision for her. In counsel's view, even if the objector was not specifically provided in the will, being a biological child to the deceased, she was entitled to reasonable provision out of the estate. To buttress this position, counsel referred to the holding in the case of In the estate of Ezekiel Mabeya Kegoro (deceased) 2019) e KLR where the court made provision for daughters who were not provided for in their father's will.
35. The court was further referred to this court's holding in the matter of the *estate of Jacobus Petrus Nicolas (deceased) (2021) e KLR* where a daughter and the mother who had been excluded from the will were provided for as automatic relatives who could not be excluded from the father's / husband's inheritance.

#### **Petitioners' /Respondents' submissions**

36. The petitioners through the firm of Ms Wambugu filed their submissions on December 10, 2021 submitting on 3 issues namely;
  - a. Whether the objector was a lawful beneficiary of the estate of the deceased.
  - b. If the answer to the above is in the affirmative, whether the objector is entitled to reasonable provision from the estate of the deceased
  - c. Whether the grant of probate should be revoked
    1. It was the petitioner's submission that the objector did not prove that she was a daughter to the deceased or the dependent to the deceased hence not entitled to a share . In this regard, the court was referred to the holding in the case of *RNM VS RMN (2017) KLR* and *Rose Wambui Kiarie Vs Jane Njeri Ngaruiya (2019) e KLR*
38. Counsel further submitted that the objector having been listed as a daughter to Mwachiti in succession cause no 49/2017 cannot turn around and claim to be a daughter of the deceased. That the will did provide only for the deceased's wife priscilla and her children.
39. As to the DNA test results, counsel submitted that being a kinship DNA, it was not conclusive. Lastly, it was submitted that there is no good ground adduced to revoke the grant.

#### **Determination**

40. I have considered the objection herein, grounds in support and response thereof. I have also considered parties' respective submissions. Issues for determination are;



- a. Whether the objector was a daughter to the deceased and therefore beneficiary to the estate;
- b. Whether the grant herein should be revoked.

Whether the objector was a daughter to the deceased and therefore a beneficiary to the estate

41. The crux of the objection herein is paternity of the objector. It is not in dispute that, when the petitioner petitioned for a grant of representation after the appointed executor/Trustee renounced their executorship, they did not list the objector as one of the beneficiaries.
42. The objector one Sheila has raised four grounds to anchor her paternity claim. Firstly, she has cited the fact that the deceased did buy her a house worth Kshs 3,000,000 situate at Kiambeni Mombasa . The house on plot No Sub division xxxx(Original No xxxx/xxx/Section1/MN was bought in the year 2016 and registered in the name of the objector. There was no dispute that the house was bought in S's name by the deceased. However, the petitioners argued that the purchase of the house in the name of the objector was one of the philanthropic acts of the deceased. That it was not unique as the deceased was generous and therefore used to gift people and even bought properties including land to several persons.
43. I will therefore hold that the objector was during the life time of the deceased gifted with a house. However, I will later in this ruling make reference to the effect of such gifting in so far as the distribution of the estate is concern.
44. Regarding ownership of xxxx Water distribution as the second ground of proof of paternity, the objector claimed that it was one of the businesses the deceased established for her although the same collapsed in 2014. On the other hand, the petitioners claimed that they were the directors to the water company. They attached a memorandum of association to prove ownership. The petitioners claimed that the objector was an employee posted at the water distribution depot in Mombasa. This fact was corroborated by Dw 1 one of the deceased's managers.
45. The objector did not tender any proof that the property was hers. It was incumbent upon her to establish that the property was indeed hers. On a prima facie basis , the objectors did not put forth evidence of ownership of the property hence the explanation by the petitioners that the objector may have been an employee is probable. It is trite law that he who allege must prove. See section 107 and 108 of the *Evidence Act*.
46. The 3<sup>rd</sup> ground relied on is a baptismal/dedication certificate where the objector claimed that the deceased attended her dedication ceremony on July 8, 1978. However, the dedication certificate was issued on April 1, 2019 while this case was already in progress. The timing in issuance of the certificate was questioned by the petitioners. In the absence of any corroboration from the issuing authority i.e St Joseph's church xxxx, I would share the doubts cast by the petitioner and therefore hold that the dedication certificate may have been obtained conveniently to prove this case.
47. Regarding the issue of proof of paternity by use of DNA as the fourth ground, the court ordered extraction of DNA samples from E the undisputed daughter to the deceased and one JM a brother to the deceased. According to the DNA examination report of December 17, 2020 conducted by Lancet Kenya laboratories, it concluded that;

' Based on the DNA evidence alone, it is 20 times more likely that EM and SMM are related as half siblings and sharing the same father'



48. What is the purpose of conducting DNA examination where paternity is in dispute? There is no doubt that science is an enabler and a tool through which hidden evidence of truth which is not possible to unearth through ordinary natural human effort can be unearthed
49. In the case of *Mutemi Mwendwa Vs Rachael Sala Kilungu (2012) e KLR* the court had this to say;
- ' Where paternity is denied, a different approach must be employed. In my view, one of the approaches would be to call for scientific evidence in the form of DNA sampling to establish paternity. To my mind, it would be perfectly in order for the court to order this evidence and where necessary to compel a party who is not willing to undergo this test to take it, all in the best interest of the child.'
50. Similar position was held in the case of *FKW ( suing as the mother and next friend of GDW ( minor ) Vs DMM (2015) e KLR* where the court stated that;
- ' I do not see any other way that the court came to this conclusion other than by subjecting the putative parent to a scientific examination of his deoxyribonucleic acid ( DNA) and determine whether it is consistent with that of the child and therefore whether, as the case may be, he is the father of the child. I may be wrong on this, but I suppose that a man who thinks or is certain that he has for some malicious or mischievous or for any other reason, been implicated into fatherhood that he has nothing do with would readily embrace such an opportunity, if not anything else, to prove his tormentors wrong'.
51. In the instant case, the petitioners argued that the only reliable method would have been extraction of tissue samples from the deceased thus dismissing DNA samples extracted from the alleged sibling to the objector.
52. I must state that sibling DNA examination cannot be described as a useless method of determining paternity the way Dw1 tried to explain. In fact, exhumation of the deceased's body for extraction of DNA samples would have been more drastic, punitive and stressful to the family.
53. Forensic evidence the world over including use of DNA samples from close relatives to identify dead bodies have reliably been applied with a high degree of success in identifying deceased persons that cannot be identified with a naked human eye. To classify siblings DNA examination as totally unreliable is to be dishonesty. Courts have held time and again that disinterment of a deceased's body should be used sparingly and as a last resort and only where there is no other available option.
54. In the case of *SCW alias CWG succession case No 1379/2006* Ougo J held that exhumation to determine paternity or maternity is a drastic order which must only be made in exceptional and compelling circumstances.
55. Equally, in the case of the *estate of Julius Kiragu Kiara (deceased)(2018) e KLR* the court had this to say;
- ' My opinion is that , DNA profiling for purposes of proving paternity may be the best option. The court retains discretion to order such profiling in asuitable case. However, from time immemorial, it's a known fact that the place of the dead is to remain in the grave undisturbed. Once the body has been interred in my view, a court should be slow to order disinterment of a body unless in clear and desirable circumstances'.



56. In the case of *In the re estate of IMK ( deceased) (2021) e KLR* the court recognized sibling DNA examination to determine paternity. The court further observed that the body of a deceased person should not be disturbed once buried. It went further to state that;

' I therefore find the most effective and justifiable way to resolve the issue is to order as I hereby do that;

i. The applicant clients to adopt any of the following methods-

1. That a sibling deoxyribonucleic acid ( DNA) test be undertaken with the view of ascertaining the paternity of the children of SWN , EW and LWG using samples from any known siblings of the deceased within 21 days.
2. Any two known children of the deceased to avail themselves at the government chemist together with children of the objector to give samples for the sibling DNA test within 21 days from the date of this order.'

57. The approach of sibling DNA examination to determine paternity was equally used in the case of *James Kanyotu (deceased ) ( 2019) e KLR*

58. In the instant case, DNA samples were extracted from E the undisputed daughter of the deceased and when compared with those of the objector, it was found to be more than twenty times probable that they were step sisters. It could not be a coincidence that the two shared the same DNA without sharing a common source.

59. I am convinced from the DNA result which was not rebutted by any other forensic or medical evidence that the objector and E were on a prima facie basis step- sisters and their only possible bond in view of the evidence on record is the father who is the deceased herein. I am not persuaded by the evidence of DW1 which is more of an hypothetical and theoretical explanation. With this conclusion, it is highly probable that the house bought by the deceased for the objector which is not challenged was not in the nature of an ordinary gift given in the course of the deceased's philanthropic acts but rather an intervivos gift given to a daughter. I therefore hold that the objector was the biological daughter to the deceased and not an ordinary employee as the petitioners would want the court to believe.

60. Having held as above, the next question would be, whether she is a beneficiary having benefited from the estate of M the official husband to her mother who is now deceased.

61. Being a biological child, the objector is automatically classified as a dependent to the deceased / pursuant to section 29 of the Law of Succession which provides-

For purposes of Section 29 of this part: Dependant means-

- (a) The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- (b) Such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
- (c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.



62. In view of that provision, the objector is a defendant hence a beneficiary to the estate. See *In re estate of the late Annelie Anna Graff (deceased) (2019) e KLR*
63. What is the effect of her being listed as a child in respect to the estate of one M? The fact that she is a step daughter to M by virtue of her mother being married to Mr M does not take away her relationship with the deceased ( biological father )
64. Having held that the objector was a child and a beneficiary to the deceased and considering that the deceased left a will bequeathing his estate to the trustee for the benefit of his wife absolutely for specific properties and on her death or being remarried, the income derived therefrom to be shared equally between the children, she can only claim reasonable provision which not necessarily an equal share to that of the widow the sole beneficiary according to the will. As to the residual net testate, the deceased directed creation of a trust company from which the widow was to draw income until her death. Fortunately, she is still alive and upon her death children are expected to share equally income earned by the trust company.
65. To that extent, at the objection stage, the court cannot distribute the estate as an application for confirmation is yet to be filed. The children of the deceased the objector included can seek reasonable provision out of the estate as none of them was provided under the will. It is at that stage that the court will determine the effect of the gift given to the objector (house) during the deceased's life time and whether it amounts to reasonable provision in the circumstances of the case.
66. Equally, it is at the confirmation stage that the court will determine in case there is no agreement as to what reasonable provision will be appropriate to award. For the court to adequately make a determination, the estate must be valued before confirmation to ascertain its net estate after paying all liabilities(debts).
- Whether the objector has established grounds for revocation of a grant
67. The objector sought revocation of a grant that was nonexistent as at the time the objection was filed. Subsequently, parties by consent agreed for the two petitioners herein to be issued with a grant of letters of administration with written will annexed. With that consent in place, the grant cannot be revoked as the grounds for revocation under Section 76 of the Law of Succession will not arise.
68. In view of the above holding, the objection herein is upheld to the extent that ;
- a. The objector herein is declared as a biological daughter to the deceased and therefore a beneficiary of the estate
  - b. That the prayer for revocation is disallowed.
  - c. That the petitioners shall file an application for confirmation of the grant within 30 days from the date of this ruling.
  - d. That any aggrieved person with the application for confirmation and proposed mode of distribution shall be at liberty to file a protest
  - e. The petitioner to value the estate to determine its value and then provide for liabilities before distribution.
  - f. Costs shall be in the cause.
  - g. Mention on November 7, 2022 to confirm compliance.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2022**



.....  
**J. N. ONYIEGO**  
**JUDGE**

