



**In re Estate of MKT (Deceased) (Succession Cause 16 of 2018)  
[2022] KEHC 12969 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 12969 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE 16 OF 2018  
EKO OGOLA, J  
SEPTEMBER 22, 2022**

**BETWEEN**

**SJ ..... 1<sup>ST</sup> ADMINISTRATOR**

**MJT ..... 2<sup>ND</sup> ADMINISTRATOR**

**AND**

**CHEPKOECH TOO ..... APPLICANT**

**AND**

**MKT ..... OBJECTOR**

**SWM AKA KT ..... OBJECTOR**

**AKT ..... OBJECTOR**

**AMB ..... OBJECTOR**

**RULING**

**The Application**

1. The Applicant Chepkoech Too approached this court vide a summons dated February 28, 2022 seeking the following Orders;
  - 1) Spent
  - 2) That the court authorises a DNA examination to be conducted on the applicant and other known children of the deceased to establish that the applicant is a biological daughter of the deceased Mr. Mark Kiptarbei Too.
  - 3) That the deceased’s children namely;ECTMKTJJTDKTSJTKKT,



present themselves at the Kenya Institute of Medical Research within seven days at a date and time so directed for the harvesting of DNA samples for matching and comparisons as the case may be.

4. That the DNA results on the applicant and the above persons be filed in court by the respective examining institute within 30 days after the DNA examination.
  5. That all proceedings in the suit be stayed and particularly the summons for confirmation of grant dated October 21, 2021 pending determination of the DNA process.
  6. That the costs of this application be in the cause.
2. The application is premised on the grounds set out therein and the averments in the affidavit in support of the application.

### **Applicant's Case**

3. The Applicant contends that she is a daughter to the deceased arising from the deceased's relationship with her mother IJK. On the Applicant's own volition to resolve the issue of whether she is a beneficiary, she underwent DNA testing and her sample was compared and confirmed with that of AMB, the 5<sup>th</sup> Objector, who had been confirmed as a son of the deceased. The Respondents rejected those results and for this reason the applicant seeks to have a DNA test conducted on herself and the known children of the deceased to determine paternity.

The Applicant relies on the case of *Re Estate of SKC* (2019) KLR where the Court held that: -

It is clear that the DNA testing will not cause substantial loss of privacy to the respondents expect to inconvenience them briefly which is necessary to finding a lasting solution to the issue raised in this matter.

4. The Applicant also cited the case of *M.W & 3 Others vs D.N* (2018) KLR on the issue of DNA testing and submitted that sibling DNA is a tested process of obtaining DNA in Kenya and would be most appropriate and the Respondents have not shown a basis as to why sibling DNA cannot be used.
5. In her further affidavit dated May 20, 2022 and filed on May 23, 2022 the Applicant stated that she was the daughter of the deceased, and she produced photos of her mother with the deceased as proof of the existence of a relationship between the two. She also attached evidence that she had been in touch with her step-siblings and that she had visited the deceased on various occasions. She provided evidence that she had been present at the funeral of the deceased as well. The Applicant maintained that the only way to ascertain whether she is a rightful beneficiary would be through the DNA test.
6. The Applicant submitted that the birth certificate she adduced as evidence states that the deceased is her father. She relied on *In Re estate of JNKM (Deceased)* 2021 where the Court held that; "it is trite law that a birth certificate is crucial in determination of paternity" and submitted that despite the allegation that the birth certificate is a forgery, there has been no evidence to that effect by the respondents. She cited *Re Estate of PWM (Deceased)* [2016] eKLR where the Court held as follows;  
There is no indication that the provisions of section 12 of the *Births and Deaths Registration Act* requiring the consent of the father as proof of marriage between the mother and the father before the father's entry on the certificate of birth were not complied with in the registration of the minor child herein whose registration was shown to have been done in September 2012 about one year before the death of the deceased.

The Applicant urged the court to allow the application.



## Respondent's Case

7. The application is opposed vide a replying affidavit sworn by Sophia Jelimo Too, the 1<sup>st</sup> Respondent, on April 27, 2022. The 1<sup>st</sup> Respondent states that DNA cannot be ordered as a matter of course and a nexus must be established between the deceased and the Applicant before such an outreaching and invasive order can be made. The 1<sup>st</sup> Respondent states that the Applicant has failed to establish a proper basis to warrant the ordering for a DNA test as not an iota of evidence has been produced to show that there was any relationship whatsoever between the deceased and the applicant as his daughter. The Applicant has not produced even a single receipt to show that the deceased took care of her as a child in any manner whatsoever. There is no receipt of provision for housing, medical bills, food, schooling and even recreation throughout her 30 years when the deceased was still alive.
8. The 1<sup>st</sup> Respondent avers that there must at the very minimum be evidence of a romantic relationship between the deceased and the mother of an Applicant for DNA where an Applicant cannot establish a direct relationship between the deceased and herself like in this case. Further, the respondent deposed that the birth certificate presented by the Applicant was a forgery.
9. The Respondent maintained that if the orders sought were granted they would amount to an intrusion of the named person's rights' to bodily security and integrity as well as the right to privacy, which rights are protected under the Bill of Rights. Further, that the test conducted on the said MAB were not ordered by the court and should not be considered.

The 1st Respondent prayed that the application be dismissed with costs

## Issue for Determination

### Whether the court should order sibling DNA to be conducted

10. I am alive to the intrusive nature of the orders sought herein. Even more intrusive would be an order for exhumation of the body of the deceased especially considering how long he has been dead.

In *WKG vs JWM & Another* [2016] eKLR the Court stated as follows:

“The matrix of the competing interests which involve the Petitioner’s right to have the dispute adjudicated fairly and the Respondent’s interests to have his constitutional rights to bodily integrity and privacy protected, would dictate that the level of certainty to be achieved is not simplified. Rather the court should be satisfied that an appropriate basis has been laid...

... It is true a determination of paternity (or more correctly, non-paternity) puts to rest nagging questions or doubts. A basis however needs to be set for such a test. Such a basis may be set in the preliminary stages of the suit where there is clear and irrefutable conduct pointing towards paternity....”

11. The Court must be satisfied that there exists special circumstances sufficient to warrant the issuance of the orders sought. In the case of *S.W.M vs G.M.K* [2012] eKLR Majanja J stated as follows:

“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.”



In the case of D N M vs J K [2016] eKLR, Onguto J rendered himself thus:

“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.”

12. It is evident that before a Court Orders a DNA test to be conducted there must be establishment of a nexus to warrant the orders sought. I have perused the pleadings and note that the applicant produced a birth certificate as evidence that the deceased was her father. She also produced the results of the test conducted on the 5<sup>th</sup> objector, a proven son of the deceased. In light of this evidence the court has to weigh whether the intrusion of privacy that shall be occasioned is in the best interests of everyone.
13. In the aforesaid circumstances, I find and hold the Applicant has established a nexus to warrant the orders for a sibling DNA test. In the absence of these orders she stands to lose out on her inheritance. Keeping in mind that the purpose of succession proceedings is to ensure that the beneficiaries and dependants of the deceased are adequately catered for, I allow the application. This will sort out the issue of paternity once and for all, something which I gather is in the interests of justice.

The application is allowed as prayed. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 22<sup>ND</sup> OF SEPTEMBER 2022.**

**E. K. OGOLA**

**JUDGE**

