



**In re Estate of SMM(Deceased) (Succession Cause 13 of 2018)  
[2022] KEHC 14057 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14057 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
SUCCESSION CAUSE 13 OF 2018  
EM MURIITHI, J  
OCTOBER 21, 2022  
IN THE MATTER OF THE ESTATE OF SMM (DECEASED)**

**BETWEEN**

**HKM ..... PETITIONER**

**AND**

**LKN ..... 1<sup>ST</sup> OBJECTOR**

**BK ..... 2<sup>ND</sup> OBJECTOR**

**AND**

**KM ..... INTERESTED PARTY**

**RMM ..... INTERESTED PARTY**

**RULING**

1. Before the Court are three applications for consideration all related to the central dispute before the court herein whether the 1<sup>st</sup> Objector is a child of the deceased and therefore an heir/dependant who stands together with others to inherit the estate of the deceased.
2. The first application by Summons dated 10/3/2020, seeks to commit the Interested Parties to civil jail for contempt of court for disobeying its orders for DNA testing made in the ruling of the court of 5/12/2019, by specific reliefs as follows:
  - “2. That Mr. KM and Mr. RMM be summoned by this Honourable Court to show cause why they should not be committed and detained in prison for a term not exceeding six months for willfully disobeying and/or breaching the Orders made by this Honourable court on the 5th December 2019.



3. That the failure to show cause the said Mr. KM and Mr. RMM be committed and detained in prison for a term not exceeding six months for willfully disobeying and/or breaching the Orders made by this Honourable court on the 5th December 2019.
  4. That the administrator of the deceaseds estate, HKM be cited for contempt of Court for intermeddling with the estate of the Deceased by channeling and diverting the sale proceeds and the tea bonus accrued to new bank accounts opened after the demise of the deceased and the temporary Orders made by this Court in High Court Misc Cause No. 6 of 2018, wherein she was only allowed a sum of Kshs:- 12,00,000/-” (sic)
3. The second application dated 14/12/2020 is by the 1<sup>st</sup> Objector himself claiming on the ground of dependancy access to certain estate properties as follows:
- “iv. That this Honourable Court be pleased to issue an order granting access, peaceful occupation, possession and use of Deceased’s Nthuguru Tea farms at Igoji comprised of [60] parcels of land numbers [set out here] pending the hearing and determination of this succession Cause and or Confirmation of Grant.
  - v. That this Honourable Court be pleased to issue an order that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, namely HKM , KM and RMM do file in court the accounts in relation to the income they have received from the properties and estate since his demise to date.”
4. The two applications of 10/3/2020 and 14/12/2020 have been responded to and written submissions made but upon considering these applications, the court considers that their hearing and determination should be held in abeyance until conclusion of the hearing of the Objection proceedings.
5. The reasons are threefold.
6. Firstly, there is pending determination an application for stay at the court of appeal against the order of this Court (Mabeya, J.) directing DNA testing on the 1<sup>st</sup> Objector and the Interested Parties. Although no stay orders have been given by that court, it is common ground that there is an application for stay pending appeal before the Court of Appeal. If the court proceeds with the contempt application and the respondents are convicted and jailed in contempt of court while their application for stay is pending determination by the Court of Appeal, their appeal, if successful will have been rendered nugatory. That is the principle of *Wilson v Church (No 2)* [1879], 12 Ch D 454 and 458 adopted in Kenya by *Butt v. Rent Restriction Tribunal* (1979) eKLR and followed in many subsequent decisions such as *Madhupaper International Limited v. Kerr* (1985) KLR 840 that-
- “when a party is appealing, exercising his undoubted right of appeal, the court ought to see that the appeal if successful is not nugatory.”
7. Secondly, there are directions of this Court (Mabeya, J) of 21/9/2020 when he considered that the application for committal for contempt and for account dated 10/3/2020 should await the completion of the trial as follows:

“Court:



The application dated 10/3/2020 seeks the committal of KM and RMM to civil jail for failing to comply with the order of 5/12/2019. There is also a prayer alleging intermeddling with the estate by the administratrix.

Due to the nature of the said prayers, I direct that the application be heard after the trial.

A.Mabeya, J.”

8. Thirdly, the Order for account and access to some 60 plots by the 1<sup>st</sup> objector through Counsel M/ S John Muthomi dated 14/12/2020 is in the nature of a final order which presumes the applicant is entitled to inherit the deceased. The grounds of the application disclose the contention that the applicant is a dependant with full right of inheritance and upkeep from the estate, as follows:

- “a) That the Applicant is currently facing difficult or turbulent financial circumstances which have been exacerbated by the tough economic times prevailing in the country due to Covid-19 pandemic and urgently requires provision of income from the deceased estate for his upkeep.
- b) That the Respondents are solely enjoying income from the deceased estate herein, they are in full control of the same and have denied the Applicant access and benefits thereon.
- c) That since the demise of his father the deceased herein about 3 years ago, the Applicant is undergoing untold hardships fending for himself
- d) That the Applicant has to date adduced overwhelming evidence in this cause to prove on a balance of probabilities that he entirely depended on the deceased in his childhood, he enjoyed immense financial support from him at his adulthood and after his demise the Applicant has gravely been impacted unless this court intervenes urgently.
- e) That orders sought should be granted for the ends of fairness and justice.”

9. The applicant therefore seeks what is clearly a mandatory injunction to access the Estate’s 60 tea farms at Nthuguru, Igoji. It is the cardinal principle of law established *Shepherd Homes Ltd v Sandham (Megarry J.)* (1970) 3 ALL ER 402 at 312, (1971) Ch 340 at 351 that-

“on motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must inter alia feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction.”

and see *Kamau Mucuba -vs- The Ripples* Civil Application No. Nai. 186 of 1992 (unreported) and *M/S Gusii Mwalimu Investment Co. Ltd & 2 others v M/S Mwalimu Hotel Kisii Ltd* [1996] eKLR among others that mandatory injunction shall not be granted in interlocutory stages except in the clearest of cases.

10. The order that the 1<sup>st</sup> objector is entitled as an heir or a dependant to inherit the estate of the deceased shall be made upon the final determination of the objection and the mandatory injunction may be granted in the ensuing administration and distribution of the Estate according to the finding of the Court. At this stage, it is too early to say as urged by the applicant in the ground of the application that



there is overwhelming evidence of paternity or dependency to entitle the 1<sup>st</sup> Objector to the grant of the orders sought in the application of 14/12/2020.

11. The two applications dated 10/3/2020 and 14/12/2020 shall be determined upon, or in the course of, determination of the objections herein Application dated 6<sup>th</sup> April 2021
12. In the third application before the court, the Petitioner who is the applicant in application dated 6/4/2021 seeks a specific order that “this matter be heard de novo and /or start afresh.” In the grounds of the application set out in the Chamber Summons dated 6/4/2021, the application hinges on alleged need to see the demeanour of all the witnesses as follows:

“On the grounds

- (i) That the previous judicial officer heard only one objector and his witnesses in this matter before he was transferred.
- (ii) That the matter is still pending for hearing of the 2nd objector case and the petitioner case.
- (iii) That the current court will not have the opportunity to see the demean or facial expressions and the character of the 1st objector and his witnesses.
- (iv) That it is important for this court to see all the witnesses firsthand as they testify instead of seeing witnesses for only 2 sides.
- (v) That the notes taken by the now on transfer judicial officer might be comprehensive but the same do no comprise or capture the character and demeanor of witnesses.
- (vi) That if the matter state de-novo, it will render the pending application dated 10/3/2020 and the pending appeal spent to enable the parties begin from a clean slate.
- (vii) That no party will be prejudiced by this application and the matter starting de-novo since they will have an opportunity to present their case and examination to witnesses.”

13. The application is opposed by the Objectors who see it as a ruse to delay the fair hearing of the case and to defeat the orders of the court already made for the DNA testing on the 1<sup>st</sup> Objector and the Interested Parties by its ruling of 5/12/2019.
14. While the trial court in the course of hearing civil or criminal case has discretion to order for denovo, it must be exercised judiciously in a proper case where the circumstances of the case call for starting afresh. It should not be used to defeat orders made in the course of hearing by the previous court nor should it be made to reopen a case after an inordinately long time has passed so that witnesses may not be available or their memories as fresh.
15. In the decision cited by Counsel for the 2<sup>nd</sup> Objector, *Re Estate of Mumunya Njogu Deceased* Succession Cause No. 113 of 1994 Nyeri, (In Re estate of Mumunya Njogu (Deceased) [2008] eKLR), Makhandia, J. (as he then was) refused an order for review and setting aside of an order for dismissal on the ground that doing so would be “assisting a party who is hell bent on obstructing and or delaying justice.”



16. In this case, the interested Parties who benefit from the application for de novo hearing have declined to comply with the court's order for DNA testing to determine the paternity issue, and the application of 10/3/2020 seeks to commit them for contempt of court for disobedience of the order. There is clear nexus between the application for de novo hearing as shown in ground (vi) of the application where, the applicant urges that-

“(vi) That if the matter state de-novo, it will render the pending application dated 10/3/2020 and the pending appeal spent to enable the parties begin from a clean slate”

If this court started on a clean slate as sought by the applicant, it would have effectively set aside the orders of a competent court of equal jurisdiction without an appeal, and with an appeal therefrom pending before the Court of Appeal! This court cannot render its process to abuse by a litigant who seeks to circumvent its orders in this manner!

17. It is noteworthy that the application for de novo hearing in Mumenya was consequent upon a prayer for setting aside of an order for dismissal, not, as in he case here in the course of trial merely upon the transfer of the presiding officer. The criminal law equivalent for possibility of a de novo trial upon change of the trial court under section 200 of the Criminal procedure Code is not replicated in civil cases.

18. No legal basis for de novo hearing of civil cases in the procedure Rules. In civil cases, Order 17 rule of the Civil Procedure Rules, it is an exception rather than a rule that a party may seek de novo trial and such an applicant must demonstrate that a fair hearing as required under Article 50 (1) of *the Constitution* is not possible in circumstances of the case. Indeed, Order 17 Rule 1 of the *Civil Procedure Rules* requires day to day hearing once hearing opens

“(1) Once the suit is set down for hearing, it shall not be adjourned unless a party applying for adjournment satisfies the court that it is just to grant the adjournment”

19. And a de novo order is not contemplated, save in review application under 45 rule 5 of the Civil Procedure Rules, upon grant of an order for review, as was sought in Mumenya.

20. Indeed, there is express power under Order 18 rule 8 of the Civil procedure Rules to deal with evidence taken by another court as follows:

“8. Power to deal with evidence taken before another judge [Order 18, rule 8.]

(1) Where a judge is prevented by death, transfer, or other cause from concluding the trial of a suit or the hearing of any application, his successor may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down by him or under his direction under the said rules, and may proceed with the suit or application from the stage at which his predecessor left it.

(2) The provisions of subrule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 18 of the Act”

21. There is limited power to recall witnesses under Order 18 rule 10 of the Civil Procedure Rules but that is not what is sought before this court!



22. De novo trial should not, in my respectful view, be ordered where, as here, the case depends on technical evidence which will not change despite repeated starts of the hearing. In this case, the paternity issue at the centre of the dispute has been directed to be settled by DNA testing. The application for de novo trial urges that the court should avail itself an opportunity to see the demeanor of the witnesses. No demeanor or conduct in the witness box will alter the scientific finding of a DNA report order to be taken by the Court. It is sought to overrule the court's order for DNA testing through the backdoor.

### **Orders**

23. Accordingly, for the reasons set out above, petitioner's application for de novo hearing dated 6/4/2021 is declined. The Court directs that the Case shall proceed to hearing on a date(s) to be fixed in consultation with the counsel. For that purpose the mater shall be mentioned for directions on 26/10/2022.

24. Costs in the Cause.  
Order accordingly.

**DATED AND DELIVERED THIS 21<sup>ST</sup> DAY OF OCTOBER, 2022.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

M/S Gichunge Muthuri & Co. Advocates for the Petitioner and Interested Parties.

M/S Thuita Kiiru & Co. Advocates with M/S John Muthomi & Co. Advocates for the Objector/Respondent.

M/S J.A. Guserwa & Co. Advocates for the 2<sup>nd</sup> objector

