



REPUBLIC OF KENYA



**FWK (Guardian ad litem for TK and SN Minors) v MWM & another (Succession Cause E012 of 2021) [2022] KEHC 16610 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16610 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
SUCCESSION CAUSE E012 OF 2021  
FN MUCHEMI, J  
DECEMBER 20, 2022**

**BETWEEN**

**FWK (GUARDIAN AD LITEM FOR TK AND SN MINORS) ..... APPLICANT**

**AND**

**MWM ..... 1<sup>ST</sup> RESPONDENT**

**AMM ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application dated March 24, 2022 seeks for orders that the applicant be enjoined as a beneficiary of the estate of the deceased as a guardian ad litem for the minors who are the children of the deceased.
2. The respondents filed a replying affidavit dated October 7, 2022 in opposition to the application.
3. The applicant deposes that she is the mother of the minors who were recognized by the deceased in his lifetime as his children and that he provided for them. The minors are of tender age and their needs ought to be considered and safeguarded in regard to the estate. The applicant is apprehensive that the interests of the minors in the estate of the deceased are at risk of being sidelined if the application is not allowed.
4. The respondent avers that the certificates of birth annexed do not prove that the deceased was the father of the minors. Further, the minors do not bear the surname of the deceased. Further, that the said documents have no probative value as they do not demonstrate any evidence of paternity.
5. The respondent contends that the statement of accounts annexed from 2016 to 2021 do not depict any proof of paternity, dependency or any recognition of the minors as they merely show debit and credit transactions between the applicant and the deceased which are too irregular and inconsistent. The respondent states that the applicant was in control of all monetary operations as an accountant at the deceased's establishment and nay monies sent were either work related funds or appropriated monies



by the applicant with huge debit entries of Kshs 250,000/- and Kshs 500,000/- to her account from the deceased's business. Particularly page 37 of the statement of account shows the applicant received Kshs 501,236/- which was immediately debited on the same day to the deceased's account with Kshs 448,000/-. The respondent states that the applicant was entrusted and authorized by the deceased to operate the mobile money phones, access to his bank accounts as an accountant/personal assistant and was also operating all accounts of the deceased's clinic after the deceased's death on March 23, 2021. Moreover, the respondent avers that the statement of accounts do not demonstrate any dependency or prove any form of maintenance towards the minors or the applicant. It was simply a transactional activity through her account.

6. Further, the statement of accounts reflect transactions from April 4, 2016 while one of the minors, TK was born in 2009 which shows that the deceased did not maintain the minor for a period of 7 years. The respondent avers that it seems untenable and as such does not prove any dependency.
7. The respondent avers that the applicant has not tendered any evidence as proof of marriage between the deceased and the applicant, neither has she produced fee structures, receipts of purchase of basic necessities made by the deceased in respect of maintenance to the applicant or the issues. Further, the applicant has not provided any photographs to prove recognition of the minors by the deceased. Moreover, the respondent avers that the applicant or the minors have never featured as being part of the deceased's family or even during the time of the eulogy reading.
8. The respondent states that the sale agreement dated April 20, 2005, for Nyeri/Muringato/63XX/ while the statement of accounts, cheques and receipts only reflect transactions from 2016 to 2020. Further, there is no privity of contract between the deceased and the other parties in the transaction in 2005. The respondent further argues that there is no proof from the attached agreements that the deceased purchased LR Nos Mweiga/Block 5/Muthuini/15XX and Mweiga/Block 5/Muthuini/1XX. The respondent avers that the parcels of land were bought by the applicant in her own personal capacity and moreover, purchase of land cannot be proof of dependency of the minors by the deceased.
9. The respondent contends that the counterfoils do not prove dependency as they are written in favour of diverse persons and also have no relation with the cash receipts annexed.
10. The respondent avers that the deceased only has one spouse for all intents and purposes and further that the minors herein are not the children or dependants of the deceased within the ambit of Section 3(2) and Section 29 of the Law of Succession Act since the deceased did not expressly recognize or accept the issues as his own or voluntarily assume any permanent responsibility.
11. The applicant filed a Supplementary Affidavit dated November 14, 2022 and states that she is not a wife to the deceased but they were in a personal relationship out of which they had the two issues. She further avers that she was employed at the deceased's clinic from the year 2002 as an accountant.
12. The applicant states that the deceased erroneously sent her Kshs 501,236/- instead of Kshs 53,236/- which was money remitted to [Particulars Withheld] Academy towards fees of the minor, T and she further avers that she sent back Kshs 448,000/-.
13. The applicant contends that the deceased did not purchase land parcels Mweiga/Block 5/Muthuini/15XX and Mweiga/Block 5/Muthuini/1XX but he financed the purchase. She avers that the deceased's intention towards the transactions was to financially and economically empower her to be able to sustainably take care of the subject minors. The applicant further contends that the funds transferred to her by the deceased on July 23, 2019 were transferred to the seller in the sale agreement



dated July 22, 2019. Additionally, she avers that a further Kshs 500,000/- was paid by cheque issued by the deceased to her account on January 2, 2020.

14. The applicant states that the transactions are in line with the school terms and she further avers that the deceased was in contact with the minors and actively involved in the schooling since 2016. The applicant contends that the petitioners are aware of her relationship with the deceased and of the existence of the minors.
15. The applicant states that the lack of photographs of the deceased and the minors is not sufficient reason to dispute paternity as the deceased was a very private person. She contends that she is willing to avail the children for DNA testing if the court requires definitive proof of parentage.

### **The Applicant's Submissions**

16. The applicant relies on Section 3(2), (3) and 29 of the [Law of Succession Act](#) and submits that the minors are children of the deceased and hence dependants pursuant to the said provisions. The applicant submits that the respondent has not outrightly denied that the minors are the deceased's children but has instead pointed out that the birth certificates do not bear the deceased's name as the father and that the transactions are too inconsistent to show an assumption of paternity.
17. The applicant further submits that it is clear that the respondents are aware of the applicant's relationship with the deceased. She contends that it was their evidence that she was the one who provided them with the list of the deceased's assets, liabilities and bank accounts, information which the applicant states that ought to be within the 1<sup>st</sup> respondent's knowledge.
18. The applicant argues that the fact that the deceased's name was not included in the minors' birth certificates as their father does not in itself negate the claim for paternity. She further states that she is ready to present the minors for DNA testing to ascertain paternity and ultimately prove dependency.
19. The applicant submits that she has provided sufficient evidence of paternity and dependency and thus her application ought to be allowed.

### **The Respondents' Submissions**

20. The respondents submit that the applicant filed a miscellaneous application No E007/2022 to be appointed as guardian ad litem which was allowed by the court and thereafter the applicant filed the current application.
21. The respondents submit that the applicant did not seek prayers on the issues of paternity or dependency within the ambit of Section 26 and 29 of the [Law of Succession Act](#) but instead the applicant brought the current application under Rule 49 and 73 of the Probate and Administration Rules which only relates to procedure. There being no substantive prayers in the application, the court cannot issue orders for prayers that have not been pleaded. To support their contention, the respondents rely on the case of [Fertilizer Corporation of India Ltd vs Sarat Chandra Rath AIR 1996 SC 2744](#).
22. The respondents rely on the case of [Njoki vs Motbara and Others Civil Appeal No 71 of 1989 \(UR\)](#) and submit that the standard of proof in proving paternity and dependency is on the party who claims it. The respondent further submits that if the applicant sired children with the deceased, they would have featured as being part of the deceased and even in the time of eulogy reading, she would have protested her exclusion from the important undertaking. The respondents further argue that the applicant was not involved in any burial arrangements and she was therefore not known to have any relationship with the deceased except that of employer – employee.



23. The respondents further argue that the certificates of birth produced do not bear the surname of the deceased. Moreover, the respondents contend that birth certificates are proof of paternity but not the only and final proof. The only other proof of paternity is DNA, however the applicant did not seek for the orders of DNA testing in her application. She relies on the case of *Re Estate of Julius Kiragu Kiara (Deceased) [2018] eKLR* and submits that the applicant has not proved her case to the required standard that would warrant the court to exercise its discretion to order for DNA profiling.
24. The respondents submit that the applicant did not bring any witnesses to attest or testify to the issue of dependency. The respondents further argue that the applicant has not furnished any proof of residence or payment of utility bills by the deceased.
25. The respondents submit that the receipts attached dated January 5, 2017, August 29, 2017, January 8, 2018 and April 30, 2019 do not tally with the figures indicated in the applicant's statement of account. The dates when the fee deposits were allegedly paid do not tally with the figures in the transaction date columns in the statement of account which accounts for the periods between January 1, 2016 and March 29, 2021 and thus cannot be proof that the deceased paid the same. Further, the same school fees receipts are cash receipts which cannot be attributed to the deceased.
26. The respondents further submit that in respect of the sum of Kshs 501,236/- which the applicant claims was erroneously sent to her instead of Kshs 53,236/-, the said transaction was dated January 4, 2021 while the school fees receipts annexed are from 2017 to 2019 and further the receipt or remittance of Kshs 53,236/- for school fees is not captured in any of the receipts. Moreover, the respondents argue that one of the minors, TK was born in 2009 while the applicant asserts that the deceased was involved in schooling since 2016, cannot be tenable to say that in a gap of 7 years, the deceased was not paying school fees for his alleged child.
27. The respondents argue that the applicant has not demonstrated that the deceased took up the minors as part of his own family in accordance with Section 26(b) of the *Law of Succession Act*. Further the applicant ought to show that the deceased was not only paying the minors' school fees but that he brought the children as part of his own family.
28. The respondent further submits that the applicant is being economical with the truth and facts in claiming that the deceased sent her Kshs 500,000/- via cheque for purchase of the land. The respondent further relies on the case of *Evans vs Bartlam (1937) 2All ER 649* and submits that the applicant is on a fishing expedition meant to derail the administration of the estate as she is being economical with the truth and which does not aid the court in drawing any logical inference or conclusion.
29. The respondent argues that by failing to prove cohabitation, it cannot be inferred that nay funds advanced to the applicant cannot be used to prove her dependency. The respondent further argues that the applicant has not availed any witness to prove that there was a relationship between her and the deceased and as such she cannot allege that it was common knowledge to everyone. To support their contentions the respondents rely on Section 107 of the *Evidence Act* and the case of *Anne Wambui Ndiritu vs Josphe Kiprono Ropkoi & Another (2005) 1 EA 334*.

**Whether the applicant is entitled to the orders sought.**

31. I have carefully perused the application. Although the applicant has sought to be enjoined as a beneficiary of the estate as a guardian ad litem for the minors, in essence the application seeks to determine the issue of dependency or paternity of the minors. The *Law of Succession Act* in Section 29 deals with dependency and it provides:-

For the purposes of this part dependent 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, grandparents, 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.
32. Section 3(2) of the [Law of Succession Act](#) describes a child to:-
- Include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, any child whom he expressly recognized or in fact accepted as a child of his own or of whom he has voluntarily assumed permanent responsibility.
33. The applicant is required to demonstrate that the minors, TK and SN were dependants of the deceased during his lifetime and are therefore dependants under Section 26 of the [Law of Succession Act](#). Further that the children are minors and require a guardian ad litem to sue on their behalf.
34. The standard and burden of proof provided by the [Evidence Act](#) ought to be discharged; he who alleges must prove. Section 107 of the [Evidence Act](#) places the burden of proof on the party that alleges. In [Gatirau Peter Munya vs Dickson Mwenda Kithinji & 3 Others \(2014\) eKLR](#) the Supreme Court held inter alia:
- The person who makes such allegations must lead evidence to prove the fact. She or he bears the initial legal burden of proof, which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence of a fact in issue.
35. It is thus incumbent that the applicant do prove on a balance of probabilities that the minors were the biological children/dependants of the deceased. See [Re Estate of George Musau Matbeka \(Deceased\) \[2010\] eKLR](#) where the court held that on proving dependency, the onus lies on the claimant to prove paternity of the deceased.
36. The applicant did not annex an affidavit from a witness to the alleged paternity to support her case. Before the court is only her evidence which this court will consider in view with the respondents. Two birth certificates were annexed which did not bear the name of the deceased as their father at the time of issue.
37. On perusal of the statement of accounts, the remittance of the money allegedly paid to the applicant from the deceased's account is from 2016 to 2021. As pointed out by the respondents, the transactions are inconsistent to support a claim of dependency. Moreover, the respondents gave evidence which was not denied that the applicant was employed as an accountant in the deceased's clinic and thus all the transactions were business transactions which were passing through her account. The applicant admitted that she has been an accountant in the deceased's clinic since 2012. However, she disputed the transaction of the sum of Kshs 501,236/= to which she stated that the deceased meant to send her school fees of Kshs 53,236/= and that is why she refunded the Kshs 448,000/=. The applicant attached



the school fees receipts but no receipt in respect of that amount was attached. From the statement of accounts the said transaction took place on January 4, 2021 while the school receipts annexed by the applicant date from 2017 to 2019.

38. The birth certificates of the children show that TK is aged thirteen (13) years while SN is three (3) years. The said documents do not bear the deceased's name as their father. The statement of accounts annexed by the applicant does not indicate the purpose of the funds sent to the bank account. The statement is of the period commencing in the year 2016 to 2021. It does not cover the first seven (7) years of the life of T. This means that the deceased was not supporting the child but no explanation has been given by the applicant. The statement does not indicate the purpose of the funds sent to the applicant of Kshs 501,236/= or Kshs 53,236/=. Neither was any evidence annexed to support the bank transactions.
39. The applicant annexed land sale agreements and submitted that the deceased helped her to purchase the three parcels of land for her for the benefit of the minors. The deceased was not a party to the sale agreement. No evidence to prove that the deceased actually paid the consideration as alleged by the applicant. The applicant produced a statement to the effect that the deceased issued her with a cheque of Kshs 500,000/=. The said document bears very limited information in that it does not even indicate from whom the cheque came from and what its purpose was. In any event, none of those documents produced by the applicant paternity or dependency. Furthermore, the law is clear that the applicant ought to show a reasonable degree of permanency in the responsibility that the deceased to the minors. In the case of *EMM vs IGM & Another [2014]eKLR* the court observed:-  
  
Additionally, the definition of a 'child' in Section 3(2) of the *Law of Succession Act* includes a child whom the deceased has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility. We agree with the respondent that the appellant has to show a reasonable degree of permanency in the responsibility that the deceased is alleged to have voluntarily assumed over the appellant. Episodic support, as is the case here will not suffice.
40. It is my considered view that the applicant having failed to establish the grounds relied on in this application as to paternity and dependency, cannot claim a legal basis of being enjoined in this cause to represent the interest of her two minors. No degree of permanency has been demonstrated as was held in the EMM case.
41. I find no merit in this application and I dismiss it accordingly.
42. Each party to meet their own costs.
43. It is hereby so ordered.

**DATED AND SIGNED AT NYERI THIS 20<sup>TH</sup> DAY OF DECEMBER, 2022.**

**F. MUCHEMI**

**JUDGE**

**Ruling delivered through video link this 20<sup>th</sup> day of December, 2022.**

