



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Jacob Mwalekwa Mwambewa (Deceased) (Succession Cause 116 of 2009) [2021] KEHC 12533 (KLR) (30 April 2021) (Ruling)

Neutral citation: [2021] KEHC 12533 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 116 OF 2009
JO NYARANGI, J
APRIL 30, 2021**

IN THE MATTER OF THE ESTATE OF JACOB MWALEKWA MWAMBEWA (DECEASED)

RULING

1. The deceased herein died intestate on October 16, 2008. On March 30, 2009, one KMK (son) and MMK (widow) petitioned for a grant of representation. On May 25, 2009, a grant of letters of administration was issued to the petitioners jointly. Subsequently, on December 14, 2009, one MMM who claimed to be the only biological son to the deceased filed an application seeking to have the said grant revoked. He dismissed the claim by the petitioners and other listed beneficiaries that they were children to the deceased. The court proceeded to hear evidence *viva voce* to determine the application.
2. During the hearing of the revocation application *viva voce*, the applicant filed another application dated March 29, 2017 seeking orders to exhume the body of the deceased for purposes of extracting samples and conducting DNA on the body of the deceased by KEMRI to ascertain the objector's paternity claims against the deceased. That the objector to present himself to KEMRI for extraction of DNA samples for testing.
3. In its ruling delivered on November 24, 2017, the court allowed the application and made orders as follows;
 - a That the late JMM grave situate in Mrughua Sub-location Bura Location be opened to exhume his body with the view of taking samples therefrom for purposes of deoxyribonucleic Acid (DNA) test.
 - b That the officers of the Kenya Medical Research Institute do undertake disinterment and do obtain the necessary samples for DNA test.
 - c That the objector MMM do present himself at the Kenya Medical Research Institute for extraction of DNA samples for testing
 - d That the results from the above DNA test in regard to the paternity of the objector be forwarded to this Honourable court by the Kenya Medical Research Institute



- e That the costs of exhumation and DNA test shall be shared by the petitioner /applicants while the costs of the application will abide final determination of the matter.
4. When the orders were presented to KEMRI, they allegedly declined to act arguing that their mandate does not involve exhumation of bodies and extracting samples for DNA tests. According to them, that is the work of the Government Chemist analyst.
 5. Stuck with the orders, the applicant again came to court vide Chamber Summons dated January 8, 2021 and filed on February 3, 2021 seeking orders that the court does amend its orders of November 24, 2017 to direct the Government Chemist representative Mombasa to conduct the exhumation and extraction of DNA samples of the deceased's body in place of the KEMRI.
 6. The application is premised upon grounds stated on the face of it and an affidavit sworn on January 18, 2021 by Simon Mutugi counsel for the applicant in which he averred that; upon presentation of the said court order to the KEMRI, they declined to act on grounds that it was the duty of the Government Chemist Analyst to disinter bodies and conduct DNA tests. He averred that it was a mistake on their part to have prayed in their application that KEMRI was the right department to conduct DNA.
 7. In response, the respondent filed grounds of opposition dated March 5, 2020 claiming that the application amounts to abuse of the court process; it was an afterthought and, it had failed to disclose material facts. When the application came up for hearing, the respondent did not attend. The same proceeded ex parte. Mr Mutugi reiterated the content of his affidavit in support of the application.
 8. I have considered the application herein, affidavit in support and grounds of opposition. The application is brought under Section 47 of the Laws of Kenya seeking a review of the orders directing KEMRI to exhume and conduct DNA tests upon the body of the deceased and that of the applicant to determine paternity. The applicant is arguing that they erroneously sought for orders directed at KEMRI instead of Government Chemist analyst.
 9. The application herein is basically seeking review orders. Under rule 63 of the *PEA rules*, order 45 previously Order 44 is applicable in succession matters. Order 45 provides for review of court orders in circumstances where there is discovery of new and important matter or evidence which after due diligence, was not within the knowledge or could not be provided by him at the time the decree was passed or made or on account of mistake or error apparent on the face of the record.
 10. Section 47 of the Law of Succession also gives the high court wide powers to make any orders it deems fit for the ends of justice to be met.
 11. The only issue for determination is whether the order directed at KEMRI was by mistake. Mr Mutugi has admitted that it was a mistake as they did not know who between the KEMRI and Government Chemist Analyst had the mandate to exhume bodies and conduct DNA. I do agree that, it was a mistake which is curable under Article 159 (d) of the *Constitution* as courts are bound to determine matters without undue regard to technicalities. The respondent will not suffer any prejudice by amending the order.
 12. Accordingly, I am satisfied that the application is merited and the same is allowed to the extent that the orders made and issued on November 24, 2017 be amended to read Government Chemist Analysts Mombasa office to exhume the body of the deceased JMM and conduct DNA test on the same as well as the applicant/objector one MMM to determine paternity in place of KEMRI.

Order accordingly.



**DATE, SIGNED AND DELIVERED AT MOMBASA VIRTUALLY THIS 30TH DAY OF APRIL,
2021**

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J N ONYIEGO

JUDGE

