HCK v EJK (Succession Cause 1129 of 2006)
[2008] KEHC 3895 (KLR) (Family) (17 November 2008) (Ruling)

HELLEN CHERONO KIMURGOR V ESTHER JELAGAT KOSGEI [2008] eKLR

Neutral citation: [2008] KEHC 3895 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

SUCCESSION CAUSE 1129 OF 2006

DA ONYANCHA, J

NOVEMBER 17, 2008

BETWEEN

HCK ..... PETITIONER

AND

EJK ..... OBJECTOR

Considerations applicable in an application for exhumation of the remains of a deceased person for purposes of conducting a DNA paternity test of a child

The key issue was whether the court could order the exhumation of the remains of a deceased where there was likelihood that that deceased person could be the father of a child. The court held that the respondent's (deceased's widow) refusal to submit to a DNA test was unreasonable and violated the child's right to know his father which fact in turn would deprive the child the possible enjoyment of the rights and benefits enshrined under sections 4 to 19 of part II of the Children Act. However, since the applicant (child's mother) produced no concrete evidence of cohabitation between her and the deceased, her application could not be allowed.

Reported by Moses Rotich

Family Law *- DNA testing - exhumation - child's paternity in issue - application for the court to order the exhumation of the remains of the deceased for the purpose of getting samples thereof for DNA testing - whether the application could be allowed.*

Evidence *- paternity - proof of paternity - birth certificates - contention that the child's birth certificate and other documents were forgeries - whether the applicants proved their case on the balance of probability - whether there were sufficient reasons for ordering the exhumation of the remains of the body of the deceased for the purpose of obtaining samples for DNA tests.*

Jurisdiction *- High Court - the High Court's jurisdiction to grant orders for exhumation of an interred body - High court's unlimited original jurisdiction in civil matters - whether the court had the jurisdiction to give exhumation orders in the case - section 60 of the Constitution.*

Children Law *- rights of the child - rights of a child to know the father - where an exhumation order was sought for purposes of a DNA paternity test - whether an applicant had established a basis for the exhumation orders to be granted - Children Act, section 4 (3).*

Brief facts

The applicant sought orders for the exhumation of the remains of the deceased for the purpose of getting samples thereof for DNA testing. The application had been brought on the basis that the respondent/ petitioner had denied that the applicant's child was a biological child of the deceased. The application was opposed by the respondents; the deceased's widow and her children. The applicant's case was that a child named as AKC was a biological son of the deceased, Charles Chemimoi Kimurgor. The claim arose from the fact that the deceased had allegedly cohabited with the applicant as wife and husband from which cohabitation the child was conceived and born. She averred further that the child AKC had been born on 17.7.2003 in Nairobi West Hospital and that all expenses arising from the hospitalization of the applicant and the birth of the child were borne by the deceased.

The applicant had earlier on 30.3.07 filed a notice of objection to the issuing of a grant of letters of administration to the estate of the deceased on the ground that she and her child AKC should be enjoined and included as dependants and beneficiaries of the deceased's estate. The respondents objected to the application claiming that the birth certificate and the birth notification documents upon which registration thereof were based, were actually forged, a fact that was not denied by the applicant.

It was asserted by the respondents that the applicant's other four children were sired by different men and the applicant did not deny the allegation. It was also argued for the respondents that the court had no jurisdiction to grant the prayer on the basis that the Law of Succession Act, (cap 160) did not have provisions for exhumation of a body for any reasons. It was argued that in Kenya's jurisprudence only two Acts of Parliament allowed exhumation; the Criminal Procedure Code (cap 75) and the Public Health Act (cap 242). She further argued that only the Minister was empowered to authorize exhumation in issues related to criminal inquiries and since the matter in hand was a civil dispute, the court had no jurisdiction to grant orders for exhumation.

Issues

What were the considerations before granting an application for exhumation of the remains of a deceased person for purposes of conducting a DNA paternity test of a child.

Held

1. The Constitution demonstrated very wide and unlimited powers and discretion given to the High Court. The exercise however depended on the facts and circumstances of each case. Even though the Law of Succession Act did not specifically authorize the court to make an order for exhumation, the court nevertheless had power in a proper case, to make an order for exhumation, in the interest of justice.

2. There was no doubt that the documents adduced by the applicant as evidence were forged. The birth certificate in particular created doubt as to where the child had been born.

3. The assertion by the applicant that she was continually living and cohabiting with the deceased was greatly undermined by the undenied fact that she during the same period she had four other children sired by different men. That discredited her position that she cohabited with the deceased continuously from 1999 until his death in October 2005. It also discredited her main evidence that the deceased, during the same period of alleged cohabitation, sired the child in issue.

4. The purpose of the Children Act in section 4 (3) was to safeguard, conserve, promote and secure the rights and welfare of the child. Under that provision accordingly, the right of the child to live with and be taken care of by his parents was secured.

5. Section 84 of the Constitution of Kenya was relative to the enforcement of the fundamental rights of the individual. However, to invoke the child's rights under the Act the applicant required to show that in the circumstances of the child's case there was a likelihood that the respondent could be the father of the child. The respondent's refusal to submit to a DNA test was unreasonable and violated the child's right to know his

father which fact in turn would deprive the child the possible enjoyment of the rights and benefits enshrined under sections 4 to 19 of part II of the Children Act.

6. On the issue of exhumation, the societal view was that after death, bodies should not only be decently and reverently interred, but should also remain in the grave undisturbed which was to be respected by the courts of law. Occasions however arose when unforeseeable circumstances made it desirable or imperative that a body should be disinterred for good reasons.

7. The probable burden to convince the court to order exhumation lay with the applicant.

8. There was no evidence and no grounds before the court upon which the court could make the draconian and unpleasant orders for exhumation of the deceased's remains. The applicant had failed to produce probable evidence to show that there was a close relationship between her and the deceased which could have led to the biological origin of the child AKC. She produced no concrete evidence of cohabitation between her and the deceased.

9. Notwithstanding the fact that the applicant did not approach the court through the Children Act or other legal provisions, the court would have in a suitable case, made the reasonable order for the protection of the rights of the child.

10. The interest of the child was paramount. However it's the facts and the circumstances of a case that guided the court in coming to the rescue of a child. No reasonable court would order for a DNA test against a person in circumstances which did not appear to link the person with the child intended to be protected.

11. It was unnecessary to make a finding as to whether or not the court could have successfully made a disinterment order without subjecting the order to a permit issuable by the relevant Minister under section 146 of the Public Health Act, cap 146.

Application denied.

Citations

Cases

Kenya

1. *Apeli v Buluku* Civil Appeal 12 of 1979; [1980] KECA 39 (KLR); [1985] KLR 777 - (Explained)
2. *MW v KC* Miscellaneous Application 105 of 2004; [2005] KEHC 3172 (KLR); [2005] 2 KLR 246 - (Explained)

United Kingdom

Re Matheson (deceased) [1958] 1 All ER 202 - (Mentioned)

Statutes

Kenya

1. Children Act (cap 141) sections 2, 4(3); 6; 22(1)(2)(3) - (Interpreted)
2. Constitution of Kenya (Repealed) section 84 - (Interpreted)
3. Criminal Procedure Code Act (cap 75) In general - (Cited)
4. Law of Succession Act (cap 160) In general - (Cited)
5. Public Health Act (cap 242) section 146 - (Interpreted)

International Instruments

1. International Covenant on Civil and Political Rights (ICCPR), 1966
   article 26
2. Universal Declaration of Human Rights (UDHR), 1948
   articles 7, 25

RULING

1. The application before the court is dated 7.11.2007. It seeks the following major orders:-

   (3) That the late Charles Chemimoi Kimurgor's grave situated on LR No Uasin Gishu/Ilula/3, be opened to disinter his body with the view to take samples therefrom for the purpose of Deoxyribonucleic Acid (DNA) tests.

   (4) That officers of Kenya Medical Research Institute do undertake the disinterment and do obtain the necessary samples for DNA test.

   (5) That the child, one AKC, do also be presented at Kenya Medical Research Institute for extraction of DNA samples for testing.

   (6) That costs be provided.

2. There were other prayers but the same have already been dealt with and exhausted.

3. The ground(s) for seeking the above orders can be summarized in one sentence as follows:- that on the basis that the respondent/petitioner denies that the child, one AKC, is a biological child of the deceased, the court should order for the exhumation of the remains of the deceased for the purpose of getting samples thereof for DNA testing, to be carried out by Kenya Medical Research Institute.

4. The application is based on the grounds on the face of the said summons and upon the supporting affidavit of Esther Jelagat Kosgei sworn 7.11.2007, together with all the annextures thereto attached as read with her supplementary affidavit sworn on 23.11.2007.

5. The application is strongly opposed by the respondents who are the deceased's widow and her children. They have all filed replying affidavits and further replying affidavits which they have urged the court to rely on.

6. The applicant/objector was represented by the firm of Yano & Company and the application was argued by Mr Otieno assisted by Miss Kamar. Mr Kibet represented the respondent/petitioner while the beneficiaries, other than the petitioner were represented by Mr Kibet and Mr Katwa, respectively.

7. To persuade the court either way parties presented a lot of material including legal authorities. Whether all such materials were necessary will be determined in a while.

8. The applicant's case, in a summary, is that a child named as AKC is a biological son of the deceased Charles Chemimoi Kimurgor. That this is so because the deceased cohabited with the applicant as wife and husband in various places in Kenya during which cohabitation, the child was conceived and born. The applicant named the place of their final cohabitation as Tassia Estate in Nairobi where she asserted she lived with him until 9.10.2006 when he was shot dead by thugs. She averred further that the child A K C was born on 17.7.2003 in Nairobi West Hospital and that all expenses arising from the hospitalization of the applicant and the birth of the child were borne by the deceased.

9. The applicant also deponed that cohabitation with the deceased was a well known fact by the respondent and the members of the deceased's household. She indeed asserted that the cohabitation was so commonly known that the deceased did not attempt to hide it. The applicant annexed a photograph Exh EJK 1 which she claimed reflected the deceased sitting next to the applicant and holding the disputed child by the shoulders while surrounded by applicant's other children. She did not explain where and when the photograph was taken or by whom.

10. The court observes that before this application before the court was filed the applicant had earlier on 30.3.07 filed a Notice of Objection to Making of Grant dated 29.3.07 seeking that she and her child AKC be enjoined and included as dependants and beneficiaries of the deceased's estate in the Succession Cause No 1129 of 2006.

11. In paragraph 3 and 4 of the supporting affidavit to the said application, the pplicant herein had deponed that the said child was the child of the deceased. She had introduced a birth certificate Exh EJK 2 allegedly obtained in relation to the birth of the said AKC with a view to support her claim that the deceased was the biological father. The said birth certificate was apparently investigated by the petitioner/respondent herein and the result of the investigation according to the respondent/ petitioners view, put the credibility of the birth certificate in doubt. The respondent in particular averred and argued that the birth certificate was a pure forgery, a culmination of a scheme hatched by the objector/applicant to cook-up facts tending to show that the child's birth was properly notified and eventually registered according to the requirements of the law. That on the contrary the truth is that the birth of the said child was never notified as registered and as originally intended to be portrayed and that this exercise to falsify documents should expose the objector/applicant for what she is ie a liar and a person determined to go to any length, using any information, whether false or not, to convince the court that the said child, AKC, was sired by the deceased.

12. To summarize this issue about the forgery of the birth certificate and the documents related to it, the court observes that the applicant herein, in response to allegations of forgery against her, responded with bafflement and shock. She wondered how the respondent managed to dig out the forged certificate and other related forged documents or how they managed to obtain the information.

13. It was noted by the court however, that she did not deny the fact that the birth certificate and the birth notification documents upon which registration thereof were based, were actually forged. She admitted further in her supplementary affidavit sworn on 23.11.2007 that the registration serial number 260338266 and the birth certificate, belongs to a different child's birth certificate. She also admitted that the registration of birth documents in Nairobi City Council which were produced by the respondentsherein, were no better since they were also clearly forged. She finally conceded in the same affidavit, that although she had introduced those documents to confirm the birth of, AKC, the documents were not of much use in proving that the child was born in Nairobi West Hospital as earlier asserted since they were most probably forged.

14. The court became anxious while it considered the facts of this case because it by and by realized that this application was brought independently amidst the other main proceedings such as the objection and the crosspetition which were already in place and pending. The question which troubled the court's mind was whether the issue of cohabitation between the applicant and the deceased and the issue as to whether the child out of such cohabitation both of which form the core of this application are not at the same time, the direct substances of the objection and crosspetition, still pending. If the answer is yes, as I think it is, why then did the applicant herein decide to file this interim proceedings on an issue which might clearly interfere with the main suit before it is heard? The court will however, revert to this point later.

15. The applicant relied on her supporting affidavit sworn on 7.11.07 with the exhibits annexed thereto. She also relied on her supplementary affidavit sworn on 23.11.07, together with annextures.

16. The court noted that the relevant material on it are in paragraphs 3 and 4. Also in the supplementary affidavit the court noted that the relevant paragraphs are found in paragraphs 3 - 17.

17. I have carefully perused the materials in the relevant paragraphs of the two affidavits. The said material can be summarized as follows:-

(a) that the applicant cohabited with the deceased at different places inclusive of Kipsoya in Rift Valley, Silver Springs Hotel Nairobi and Tassia Fedha Estate in Nairobi.

(b) that the result of such cohabitation was the birth of AKC on 17.9.2003 at Nairobi West Hospital.

(c) that the said birth was properly notified and registered and a birth certificate was issued and dated the 27.10.2005 - see exhibit EJK 1(a) annexed to applicants affidavit sworn on 29.3.2007.

(d) that the applicant has lately discovered that the certificate of birth aforementioned is a forgery and that all other documents related to the notification and registration of the said birth were also forged by someone whose reasons for doing so are unknown to the applicant.

18. I have carefully perused the material supporting this application and the other related applications in this file. I will now deal with the first issue - ie whether I am satisfied that there are sufficient reasons for ordering the exhumation of the remains of the body of the late Charles Chemimoi Kimurgor for the purpose of obtaining samples for DNA tests.

19. The respondent, apart from strenuously opposing this prayer, argued that this court has no jurisdiction to grant the prayer on the basis that the *Law of Succession Act*, cap 160, does not have provisions for exhumation of a deceased body for any reasons. She stated that in Kenya's jurisprudence only two Acts of Parliament allow exhumation and those are the *Criminal Procedure Code* and the *Public Health Act*. She further argued that only the Minister is empowered to authorize exhumation in issues related to criminal inquiries. That since the matter in hand is civil, this court has no jurisdiction to grant orders for exhumation.

20. I have considered the argument. I am however, of the view that this court is not limited in its civil jurisdiction and has power to make reasonable orders in the interest of substantial justice. The High Court is under section 60 of the Constitution given ".. Unlimited original jurisdiction in civil .... matters " In my understanding the above provision of the Constitution demonstrates very wide and unlimited powers and discretion given to this court. It has never, been found necessary or even desirable to define the limits of the exercise of such discretion. Every exercise therefore has depended on the facts and circumstances of each case. It has properly never been left to the whims or idiosyncrancies of the Judge since the wide discretion might lead to wrong exercise or misjustice.

21. While the *Law of Succession Act* may therefore have not specifically authorized this court to make an order for exhumation the court, nevertheless hath, power in a proper case, to make an order for exhumation, in the interest of justice.

22. The next issue is whether an order of exhumation should be made in this case. That in my view, will depend on the facts before the court. That is to say that the applicant's case depends on whether or not she has proved on the balance of probability that there was relevant cohabitation or there was marriage between her and the deceased, and whether or not the child in dispute was possibly born out of such cohabitation or marriage. The applicant swore that she cohabited with the deceased in various places in Kenya, an averment that was vehemently denied by the respondents. She produced a photograph showing images of two women, one man and three children. The photograph clearly required to be properly explained. Images therein were not however identified except the image of a man in the photograph which was claimed to be that of the deceased, a fact not denied. In my view and

finding however, the photograph at the end of the day proved very little. Even if it were to be assumed that the image of a man in it was that of the deceased little was done to prove who among the images of children in the photograph would be AKC.

23. The second piece of evidence originally introduced by the applicant to prove that there was cohabitation or marriage between her and the deceased, which evidence would also support her claim that the child was sired by the deceased during the cohabitation, was the evidence of the birth certificate. This evidence would have probably proved the closeness of the deceased to the applicant and the child. It might also probably have shown that the deceased paid the hospital cost of birth of the child. This evidence might be the basic reason to register the child's birth in the deceased's name; a fact that might raise the presumption of his paternity. Unfortunately however, it is the same evidence that threw her claim into a serious doubt. It is clear from the record that the applicant eventually attempted to distance herself from the said evidence of the birth certificate. She purported to feign ignorance concerning the illegality of the obtaining of and the actual certificate, while loudly at the same time wondering how the respondents had discovered the forgery of the certificate. The forged documents also created doubt as to whether the child had been born at Nairobi West Hospital or at Huruma Estate.

24. Be that as it may, the impression left in the mind of the court was that the applicant did and would do anything, even commit an illegality, to link her child's paternity to tire late Charles Chemimoi Kimurgor. That said however, that evidence of the birth certificate does little to prove the paternity of AKC nor does it link the child's birth to the deceased. Put differently, the birth certificate evidence, totally fails to persuade this court that the applicant has made a persuasive case for ordering an exhumation of the deceased's remains for the purpose only of assisting her to ascertain the paternity of her child. If anything, that evidence seriously diminishes her credibility as it shows the extent she will got to lie for the child's sake.

25. It is observed drat the applicant has four other young children. If she had lived and cohabited with the deceased since 1999,1 would have expected the applicant to link those other children's paternity with the deceased. It was asserted by the respondents that the applicant's other four children were sired by different men and the applicant was not heard to deny the allegation, giving die court die impression that it was true. Once again the assertion by the applicant that she was continually living and cohabiting with the deceased from 1999 until October 2006 when he died, is greatiy undermined by the above undenied fact that she, during the same period cohabited and collected four other childrenfrom other different men. On the other hand, the respondents swore that during the same period they, or one or the odier of them lived with the deceased and that they could accordingly have witnessed her alleged cohabitation with the deceased.

26. As earlier stated, it is unfortunate and even unwise for the applicant to have decided to canvass the issue of paternity of AKC separately and independently outside the objection proceedings which are still pending. The possible effect of such a course is that this ruling might one way or other affect the final findings in the objection. I believe however that taking this course or approach by the applicant was a deliberate, calculated move. She should and must have weighed the risk of canvassing the issue of proof of paternity independent of the objection proceedings. If she did so she must have realized that no justice would be made to this application without going into die proof of cohabitation between her and the deceased in order to justify an order for exhumation.

27. The court's attention was also drawn to the fact that the child AKC was bom in 2003. By the time die deceased died on 9.10.2005, apparently the applicant had not thought of registering child's birth. She started the process only after deceased's death. The applicant lias throughout these proceeding asserted that the deceased knew and accepted that he was the putative father of die child. She claimed that he cared about the child and provided financially and otherwise for the child. On what basis then did she

in those circumstances, and soon after the birth of the said child, fail to seek the direct involvement of the deceased to register the birth of the child? As demonstrated in respect to his other children, the deceased was portrayed as straight forward, categorical and methodical in the process of the registration of his children's births. Why would the applicant wait for over three years before attempting to register the birth? Did she decide to forge the registration documents to produce a birth certificate to support her claims in these legal proceedings? These are the relevant questions which arise but whose answers this court can only deduce from the facts herein. The only logical answer coming into my mind from these facts is that the applicant appears to entertain a belief that she would easily link the paternity of her child to the deceased because the deceased was not there to deny. My humble view and finding however is that notwithstanding the absence of the deceased, the applicant came a little too late and against a strong current of evidence which appears to stand in her way.

28. Having *prima facie* reached the above conclusions on various relevant facts, I now turn to the law.

29. From time immemorial it has been the natural desire of most men that after their death, their bodies should not only be decently and reverently interred, but should also remain in the grave undisturbed. This view should and is indeed respected by societal institutions including the courts of law. Occasions, however arise when unforeseeable circumstances make it desirable or imperative that a body should be disinterred for good reasons. While the court would usually be slow to make orders for disinterment, it nevertheless will not hesitate to do so in suitable cases. The court will, on the other hand, avoid placing any fetters on its discretionary power to do so. That is to say, the court will without fear make orders for disinterment whenever the circumstances of the case make it desirable or imperative to do so. This, in my view, is the tenor of the case of *Re Matheson (deceased)* [1958] 1 All ER, 202.

30. The cited case emphasizes the basis of burial or interment of the bodies of the dead. It states that it has always been accepted that after death there should be a decent and reverend burial of the body of the dead. Thereafter the dead should remain undisturbed for all purposes except when otherwise directed by a court of law. This was best expressed in the *Re Matheson* case at page 204 thus:

> "As I have said, the primary function of the court is to keep faith with the dead. When a man nears his end and contemplates christian burial, he may reasonably hope that his remains will be undisturbed, and the court should ensure that, if reasonably possible, this assumed wish will be respected. In all these cases the court must and will have regard to the supposed wishes of the deceased. I say supposed wishes, because it can rarely, if ever, happen that the circumstances giving rise to the application can have been contemplated, still less, discussed, in the lifetime of the deceased."

31. In my opinion and finding, although the views expressed above were those of an English court relating to an English bearing, nevertheless the same views could have a strong bearing to both Christian and customary society in Kenya. This court will revert to this point in a moment.

32. As earlier pointed out, the respondent opposed an order of exhumation *inter alia*, on the grounds that this court hath no powers to make such order. I have already demonstrated that the court has such powers and that it will exercise the same as the circumstances of the case may dictate. The respondents also argued that such an order would be too drastic and would not only operate against the deceased Christian background under which he lived and was buried, but would also stand out against Iris customary leaning and background.

33. I have also considered the above arguments and principles in relation to this case. There is no direct evidence on the record that the deceased. Charles Chemimoi Kimurgor, anticipated Iris death before it suddenly came on 9.10.2005. We are not either properly informed of Iris Christianity status before

Iris death. It is however common belief, whether in Christianity, Islam or other religious backgrounds, including customary background, that every human being who after death is buried, deserves and indeed requires that Iris remains should not be disturbed, except for good reason. There is no evidence or good reason indicating that deceased in this case expected to be treated differently. In my view, the social status of a person before death would not change the above beliefs, especially if the burial was a decent and respectable one done with the knowledge, participation and deliberations of the deceased's family and friends, which I believe this one was.

34. In the above circumstances, would the deceased have wished that Iris remains be exhumed for the purpose sought herein? The answer would obviously be in the negative. However, as already indicated earlier, this court will not hesitate to order for such exhumation if it is desirable or imperative, taking into account the reasons for doing so. Unlike in the case of *Apeli v Bukulu* [1985] KLR. 777 in which the court was being asked to effect a clear intention of the deceased at the request of the deceased's widow to have his remains disinterred and taken elsewhere for reburial, in this case the prayer for disinterment is raised by a third party whose intere would appear to stand contrary to the probable wishes of the deceased, his widow and his family. It is the view of the court accordingly that the probable burden to convince the court to order exhumation lies with the applicant.

35. The applicants reason for exhumation as the court understands, is twofold:- First she argues that the deceased was her husband since 1999. Second, that he sired her son AKC. The thrust of the applicant's wish for disinterment is therefore, that the exhumation would assist her to prove that she and her son are dependants entitled in the administration and distribution of the estate.

36. Be the above what it may, the applicant placed before the court little or no evidence to persuade it that there was any cohabitation between the applicant and deceased from 1999 to the date of deceased's death in October, 2005. Such evidence would be said to be relevant only to prevent the respondent/ petitioner from being issued with a Grant of Letters of Administration, or if already issued, for revoking the same. However the applicant presented and relied on such evidence to canvass this application. There is therefore no way the court could avoid considering it, although the main suit to issuing of the grant is yet to be heard.

37. Secondly, the applicant and respondent, heavily canvassed the evidence concerning the birth certificate and the registration thereof of the said AKC. This, as earlier observed fell flat before the court as against the applicant while working in favour of the respondent. The evidence was intended to prove that the child was sired by the deceased. It however not only totally failed to prove such a fact but, on the contrary, it proved that the birth certificate was a complete forgery. The documents used to obtain it were also shown to be forged documents, intended to mislead the court and other public institutions. It is not surprising, therefore, that even the applicant who was responsible in introducing the documents in evidence disowned the same and disassociated herself from the whole unlawful process of obtaining them. The court however did not fail to notice that the disowning of the same came a little too late in the day. The result is that there is no evidence and no grounds before the court upon which the court can make the draconian and unpleasant orders for exhumation of the deceased's remains. The applicant has failed to produce probable evidence to show that there was a close relationship between her and the deceased which could have led to the biological origin of the child AKC. She produced no concrete evidence of cohabitation between her and the deceased. Production of a photograph of the deceased with images of applicant and some children was not adequate to prove cohabitation especially in the circumstances where her claims were strongly denied by the respondent and her family members.

38. Furthermore, the applicant did not deny the fact that during the same period of the alleged cohabitation with the deceased, she bore four other children some of who were reflected in the photograph she exhibited. It was averred by the respondent that the said children were either born in

a marriage by the applicant with another man or that she was collecting them from various men at random because she was neither married nor attached to the deceased. The applicant denied neither of the two averments. That, in my finding discredits her position that the deceased and her, cohabited continuously from 1999 until his death in October 2005. It also discredits her main evidence that the deceased, during the same period of alleged cohabition sired the child in issue.

39. In addition it would be expected that the applicant would immediately after the birth of the child, seek help of the deceased to register the birth in view of her claim that the deceased loved and cared for the child. She would accordingly, have no difficulty in rallying for his co-operation and help to do the registration. However, there is no evidence on her part that she attempted to seek such help. Indeed there is no evidence that the deceased knew of or accepted the paternity of the child before his death. That may as well explain the applicant's spirited but probably discredited attempt to produce the forged birth registration documents which she later had to abandon and disassociate herself from.

40. This case, in my view, highlights two competing individual interests. The first interest is that of a child against a possible putative father. The child has a legal or constitutional right to know his father with a view to enforce his rights against him. One such right would be the identification of a father through a DNA test. The second interest is the forcing of an otherwise possibly innocent person who in this case would be the deceased to subjection to such DNA test without being certain that he was the putative father or without or against his free will to do so.

41. In Kenya presently, children's rights are protected under the *Children Act* of 2001. The attention of the court was drawn to the Act by one of the parties herein through the case of *MW v KC* [2005] 2 KLR, 246, decided by my brother Kariuki, J at Kakamega High Court in September, 2005. The court noted that the purpose of the Act in section 4(3) is to (a) safeguard and promote the rights and welfare of the child. (b) conserve and promote the welfare of the child and. (c) to secure for the child such guidance and correction as is necessary for the welfare of the child in the public interest. Under these provision accordingly, the right of the child to live with and be taken care of by liis parents is secured. So are the rights to education, health, to medical care and to social care. The *Act* includes in section 2 the definition of parent as the mother or father and includes in the definition, any person liable by law to maintain a child or whose custody the child is entitled. Under section 6 of the *Act*. the child's rights include the child's right to live with and be cared for by the child's parents. The provisions of section 22(1), (2) and (3) provides as follows -

> 22(1) Subject to section 22(2) of the Act. if any person alleges that any of the provisions of section 4 to 19 (inclusive) has been, is being or is likely to be contravened in relation to a child. then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress on behalf of the child
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> (2) The High Court shall hear and determine an application made by a person in pursuance to subsection (1) and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of section 4 to 19 (inclusive).
>
> (3) The Chief Justice may make rales with respect to the Practice and Procedure of the High Court in relation to the jurisdiction and powers conferred on it or under this section including rales with respect to the time within which application may be brought and reference shall be made to the High Court."

this section is clearly constructed in terms similar to the provisions of section 84 of the *Constitution of Kenya* relative to the enforcement of the fundamental rights of the individual. To invoke the child's rights under the Act the applicant requires to show that in the circumstances of the child's case there is -

(a) a likelihood that the respondent could be the father of the child

(b) the respondent's refusal to submit to a DNA test is unreasonable and has violated the child's right to know liis father which fact in turn will deprive the child the possible enjoyment of the rights and benefits enshrined under sections 4 to 19 of part II of the Childrens Act.

(c) The court has jurisdiction under the Act to compel the respondent to take the DNA test.

42. It is also important to note that in addition to the *Childrens Act* of 2001, Kenya is a signatory of the *United Nations Universal Declaration of Human Rights* whose article 25 requires that "all children whether born in or out of wedlock shall enjoy the same social protection" Kenya has in addition ratified the *United Nations Covenant on Civil and Political Right* whose article 26 affords all persons, including the child, equal protection of the law. So do article 7 of the *United Nations Universal Declaration of Human Rights*. In these circumstances, there is in my view, sufficient legal scope for the court to possibly make reasonable order for the protection of the rights of the child, notwithstanding the fact that the applicant did not approach the court through the *Children's Act* or its above legal provisions. The court may not therefore in a suitable case totally shut its eyes merely because the party has failed to invoke the relevant legislation especially if, as in this, its attention has been drawn to the same.

43. In this case I would easily conclude that the applicant on behalf of the child is practically attempting to realize and protect the rights of the child although she failed to invoke the above relevant legislations. The court is accordingly at liberty to invoke the above legislations if it thinks that they are presently applicable.

44. The court has now to resolve, whether or not this is a suitable case where despite its earlier conclusions on the other facts the court should find it desirable or imperative to order for an exhumation of the body of the deceased for the purpose of enabling a DNA test to be done to establish specifically, the child's paternity in the realization of the child's rights. In the similar local case earlier cited, in which the issue of a DNA test arose ie MW v KC the court ordered the respondent therein to undergo a DNA test. The facts therein show that the applicant, the mother of the child, had cohabited with the respondent, the putative father, until she became pregnant when the respondent sent the applicant away. Later the applicant bore the child and then filed an application under the *Childrens Act* of 2001, premised on sections 6 and 22 of the Act. She sought *inter alia*, an order "that the respondent be ordered to attend a DNA test". The application was based on the ground, *inter alia*, that the respondent had denied the child's paternity despite the fact that he had cohabited with the applicant before chasing her away after the respondent had pregnanted her. She argued that in these circumstances the child had a right to know that the respondent was his father who had the responsibility to take care of him. In response the respondent had replied that the court had no jurisdiction to order or force him to participate in the DNA test and that the application was incompetent and misconceived. He also argued that the application infringed on his individual rights in attempting to force him to submit to the DNA test when he was not willing to do so.

45. The court, taking the circumstances of the case into account, not only found jurisdiction in tire *Children's Act* of 2001 but also in the Kenya Constitution and in tire United Nations protocols and Declarations earlier referred to in this ruling. It proceeded to make the order subjecting the respondent therein to a DNA test. That decision is of persuasive nature to this court and this court is not under

obligation to follow it. However, this court regards it to be a good decision and would follow it if the facts of this case before me were not a little different. It is my view, however, that that case establishes and confirms the clear jurisdiction of the High Court to make such orders as related to DNA tests.

46. The facts of that case are however a little different as already mentioned above. In that case the respondent, who was the alleged father of the child, was alive while in this case before me, the father is already dead and the issue was not raised against him while he lived. Secondly, there was no issue of disinterment of the alleged father of the child in that case, while here, that appears to be the underlying issue. Thirdly, while in that case the respondent did not deny cohabitation with the applicant and only disputed the jurisdiction of the court to make the relevant orders, in this case cohabitation is a central dispute though raised not by the putative father himself but by the widow of the deceased and her family members. this court has earlier more or less made a finding that the facts of the case rule out relevant cohabitation between the applicant and the deceased.

47. It is important furthermore to observe one more conclusion reached by the court in that case of *AflF v KC*. The court in exercising its jurisdiction to subject the respondent to a DNAtest, particularly underthe *Children's Act*, cautioned that that jurisdiction could easily be abused in appearing to protect the rights of the child. Kariuki, J having first state thus-

> "To my mind this court has jurisdiction under section 22 of the Act to issue orders to compel determination of the child's paternity by DNA. this is a matter that falls within the purview of this court's jurisdiction. To ascribe a contrary interpretation would be to render meaningless both the protection of the child under section 70 of the Constitution and the rights of the child enshrined in the Act and in the articles of the International Covenants to which this country is privy. I refuse to render such rights a dream pipe."

proceeded to caution as follows:-

> "But this interpretation canbe open to abuse. Therefore, in exercising its discretionary power to grant or not to grant this relief, the court will not lose sight of the fact that there is a real likelihood of abuse and must therefore guard against it. but always ensuring that the imperative need to see that die best interest of die child is secured, is not relegated."

I strongly agree with that Judge's, well considered and cautioned approach.

48. I further agree that the interest of the child is paramount in these kind of cases. I however consider diat it is the facts and the circumstances of a case that will guide die court in coming to die rescue or not, of a child. No reasonable court will order for a DNA test against a person in circumstances which do not appear to link the person with the child intended to be protected. There must therefore be facts strongly linking the respondent to the child. Otherwise an applicant will look at the richest person among those she generally associated with and claim him to be the putative father of her child to thereby entide her to seek a DNA test against him.

49. Turning now to the application before me. I am on the balance of probability satisfied on the facts and die circumstances of this case, that die applicant failed to establish a sufficient link between herself and the late Charles Chemimo Kimurgor during his life time to persuade this court to find it desirable or imperative to make the drastic order for exhumation of the deceased's body for the purpose of a DNA test. The result, therefore, is that this application has no merit and must fail. It is hereby ordered dismissed with costs to the respondent/petitioner on die ground diat it was unnecessary as it ought to have been satisfactorily canvassed as part of die main ob jection or cross-petition and not independently as was done herein. The application in its present fonn is a fishing expedition for the purpose of the objection and cross-petition. It in my view, portends *mala fides*.

50. In the above circumstances I do not find it necessary to decide whether or not the orders sought if granted, could have been directed at die otiier parties who were not parties in these proceedings.

51. I further find it unnecessary to make a finding as to whether or not this court could have successfully made a disinterment order witiiout subjecting the order to a permit issuable by the relevant Minister under section 146 of the *Public Health Act*, cap 146.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF NOVEMBER, 2008.

D.A. ONYANCHA

JUDGE