In re Estate of Arthur Ikua Gioche alias Arthur Mwangi (Deceased) (Succession Cause 736 of 2013) [2025] KEHC 1631 (KLR) (18 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1631 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

SUCCESSION CAUSE 736 OF 2013

J WAKIAGA, J

FEBRUARY 18, 2025

IN THE MATTER OF THE ESTATE OF ARTHUR IKUA GIOCHE ALIAS ARTHUR MWANGI – DECEASED

BETWEEN

ESTHER MUTHONI MWANGI ..... PLAINTIFF

AND

JOHN GATHAIYA MACHARIA ..... DEFENDANT

AND

JOHNSON GIOCHE ..... INTERESTED PARTY

GIBSON KURIA GIOCHE ..... INTERESTED PARTY

RULING

Introduction

1. By an application filed on 25th July 2006 at the high Court of Kenya at Nairobi, the respondent herein petitioned the court for grant of letters of Administration together with the defendant applicant in their capacity as the widow and brother of the deceased.

2. On the 17th June 2012, the respondent took out a chamber summons in at the High Court of Kenya at Nyeri registry being Civil Suit No 172 of 2011 (OS) for a declaration of trust and on 237th February 2013 the court by consent ordered that 3.7045 hectares of land known as LR No Loc.19/ Gacharageini / 2994 be held by John R Gathaiya Macharia alias John Gathaiyia Gioche in trust for the benefit of Arthur Mwangi Gioche,(deceased) and that the succession thereon to proceed as filed in the family Division Nairobi. The said succession file was transferred to this registry and the subject matter of this ruling.

3. By an application filed on 6th august 2014, the respondent applied for confirmation of grant to the estate of the deceased and proposed that the suit land be registered in her name to be held in trust for herself and her children.

4. On 14th November 2014, the applicant John Gathaiya Gioche filed an affidavit of protest in which he stated that the respondent who was his co administrator stayed on the property of the deceased as a helper from 1999 to the time of his death in the year 2001 and therefore the deceased could not have e fathered the children named by the respondent as the beneficiaries of the estate.

5. He contended that the Respondent had been passing off a minor known as JG M as a child of the deceased and that he shall require DNA samplings to be done to ascertain the parentage of the same as at no point was the respondent a wife of the deceased but only took advantage of the deceased and purportedly got pregnant , yet she was not the first person to had been hired to take care of him.

6. That in reply to the said protest the respondent on 28th august 2018 filed a replying affidavit in which she deposed that sometimes in the year 2012 the applicant started interfering with the suit property having allocated to himself 9.827 hectares and to the deceased 2.423 hectares instead of each getting 6.13 and 6.12 respectively .

7. Directions were issued that the protest be heard by way of oral evidence and the trial thereof commenced before Kimondo J.

8. By an application dated 11th March 2019 the applicant herein applied that a DNA test be conducted upon JG to establish the relationship between the same and the deceased which application was allowed and a DNA test carried whose result established that the minor and the applicant shared common paternal linage .

9. In the course of the trial evidence was led to the extent that the said minor was sired by a cousin of the deceased and the applicant the subject matter of this ruling. The court on 15th March 2023 granted the 3rd interested party, the alleged father of the minor time to consider whether he would be willing to undergo the test which he declined.

10. By an application dated 23rd November 2023 under certificate of urgency the applicant sought for an order of DNA to be carried out between the 1st interested party and the 2nd interested party to determine if the 2nd Interested Party was the biological father of the 1st Interested Party.

11. It was stated that the applicant and the deceased were brothers. In the year 1999 the health condition of the deceased deteriorated prompting the family to hire a helper for him and the plaintiff / respondent was employed as such and not as a wife.

12. It was contended that it was in the course of the said employment that the respondent alleged that she had sired a child with the deceased , yet because of his conditions , it was not possible for the deceased to sire a child and that the respondent had confided to one of the applicants witness that the 2nd interested party was the biological father of the 1st interested party .

13. He deposed that on 16th July 202, the court issued an order for DNA test to be carried out between the applicant and the 1st interested party, which confirmed that the applicant and the 1st interested party were of the same parentage , which meant that all male relatives of the two parties share the same Y chromosome thus belonging to the paternal lineage .

14. It was deposed further that the 2nd interested party is a first cousin to the applicant and the deceased and therefore share the same paternal linage and based on the evidence on record was the biological father of the 1st interested party .

15. It was contended that the paternity of the 1st interested party was highly contentious and therefore necessitating the carrying out of the test so as to effectually and definitively determine the matter herein .

16. In response to the application, the 2nd interested party stated that he was a stranger to the proceedings herein and can therefore not be described as an interested party. It was his contention that the parties to the suit were well known to him as they all hail from the same village and that the plaintiff was married to the deceased, who she lived with until his demise .

17. Any order to subject him to a DNA test, it was contended would contravene his right to dignity having stated that he was not willing to undergo the test and therefore cannot be forcibly subjected to medical examination without his consent and that the dispute before the court was not a paternity or maintenance dispute, there was therefore no legal justification of subjecting him to DNA test as the same had not been sought by the 1st interested party .

18. The 1st respondent in response to the application stated that there was no evidence tendered linking him with the 2nd interested party and that since birth he had known that the deceased was his biological father as per his birth certificate and was considered as such by the deceased who had voluntarily assumed responsibility as per section 3(2) of the *Law of Succession Act*.

19. He contended that the applicant had not brought the application in his best interest but with the intention of humiliating him before the court and members of the public from his home area as the dispute was for distribution of the estate of the deceased where the applicant and his mother were the Co-administrators.

20. He contended that he had previously been subjected to a DNA test between himself and the applicant whose results were positive and there was no reasonable evidence to warrant being subjected to a second test having stayed in the home of the deceased since the year 2000 to date.

Submissions

21. On behalf of the applicant is was submitted that the court in *Wilfred Karenge Gathoni v Joyce Wambui Mutura & another* [2016] eKLR the court held that DNA testing will not cause substantial loss to the applicant except inconvenience that was less important to finding a lasting solution to the issues raised and that paternity was central to the dispute at hand , which was whether the 1st respondent was one of the beneficiaries of the estate of the deceased .

22. It was contended that the 1st interested party was purporting to be a son of the deceased for purposes of succession while as per the evidence the same was a biological child of the 2nd interested party and that the plaintiffs sole claim of right to the estate was on account of the purported son of the deceased and subsequent marriage between her and the deceased and therefore the question of the child's paternity was integral to the suit as was stated in the case of *Benjamin Kibiwot Chesulut v Mary Chelangat & another* [2015] eKLR ,

23. It was contended that the court had a duty to ascertain the truth and determine the paternity of the 1st interested party to aid in establishing the true beneficiaries of the estate as was stated in *DNM v JK* [2016] eKLR where it was held that the court would opt for a scientific method for conclusive results on the paternity of the 1st interested party which was a key issue in the succession dispute.

24. It was submitted that there was sufficient nexus between the 1st interested party and the 2nd interested party to pursued the court to grant the orders sought a d that the rights to human dignity was subjected to limitation under article 24 of the *Constitution* .

25. On behalf of the plaintiff /respondent, it was submitted that the cause was a succession cause and not a maintenance suit. That she was a wife of the deceased, which the applicant has disputed by filing the affidavit of protest which is the subject matter of the dispute. It was contended that the deceased had in his life time assumed full parental responsibility of the 1st interested party who was born on3rd December 2000 thereby falling within sections 3(2) and 29(a) of the *Law of Succession Act* .

26. It was contended that the applicant had not approached the court with clean hands and that the same had not established a link between the 1st interested party and the 2nd interested party to warrant them to be compelled to conduct a DNA test ,in support of which the case of *Benjamin Kibiwot Chesult v Mary Chelangat & another* [2015] eKLR was cited where the court stated that DNA ought only to be permitted where it is necessary for the determination of the issue before court ass the same is seen as an intrusive procedure that has the effect of invading ones right to privacy.

27. It was contended further that a DNA test had already been conducted between the applicant and the 1st interested party allegedly on the basis of the evidence of his sister that the deceased could not sire a child without any medical evidence in support thereof, yet the applicant had acknowledged that the deceased and the respondent had a child way back in the year 2000, whom the deceased had requested him to take care of .

28. She submitted that the only solution to the dispute was to exhume the body of the deceased so as to subject it to DNA test with the 1st interested party as was stated in the cases of *Hellen Cherono Kimurgor v Esther Jelagat Kosgei* [2008] eKLR and *Re Estate of Jacob Mwalekwa Mwambewa (deceased)* [2018] eKLR where the court held that the pursuit of truth overrides the wishes of the deceased as well as the cultural discomfort and outrage .

29. It was submitted that the applicant h ad the burden of demonstrating to court that the right he seeks would override the rights of the respondents as was stated in *SWM v GMK* [2012] eKLR and *HCK v EJK* [2008] eKLR where the court stated that there must be facts strongly linking the respondent to the child and that since the compulsory DNA testing violates a person's bodily integrity as well as his privacy, the court will always decline to order the same unless an appropriate basis has been laid, as was stated in the case of *RK v HJK & another* [2013] eKLR .

30. On behalf of the first interested party it was contended that the same has not consented to be subjected to a second DNA test as there was no basis laid for the same and that his rights had not been violated for the court to order the same as was stated in RMK v AKG and Another and that the only solution was to exhume the body of the deceased so as to clear any doubt as to whether he was the father.

31. On behalf of the 2nd respondent it was submitted that there was no direct linkage between the same and the 1st interested party and that the application was based on averments and allegations without proof and that the application has not been brought without undue delay since the said allegations were contained in witness statements filed way back in 2018 and that the same has aright to privacy as stipulated under Article 31 of the *Constitution* of Kenya and that for the court to order for the test the conditions set by the court in *MW v KC* [2005] eKLR must be met as follows: that there is likelihood that the respondent could be the father of the child, that the respondent refusal to submit to the DNA test has violated the child's right to know his father that the respondent refusal to take DNA is unreasonable because it deprives the child of the possible enjoyment of the rights and benefits

enshrined in section 4 to 19 of part II of the *Children Act* and that the court has jurisdiction to order the test .

32. It was submitted that the applicant had not demonstrated why the rights of the 2nd interested party should be infringed and violated as was stated in SWM v GMK (*supra*) .

Determination

33. It must be stated for record purposes that this suit has had a chequered history having filed in Nairobi, then in Nyeri where the issue of Trust was determined. That both the applicant and the respondent petitioned for grant of letters of administration to the estate of the deceased and that the chief's letter of introduction indicated that the respondent was the wife and the 1st interested party who was at that time a minor was indicated as a son.

34. That the issue which was pending before this court for determination was a protest filed by the applicant wherein directions had been given that the same be heard by way of oral evidence and as at the time when the application herein was filed, the court had heard and recorded the evidence of two witnesses.

35. It is also not in dispute that the applicant herein had approached the court for an order of DNA to be conducted between him and the 1st interested party. What is not clear to this court is how the 1st and 2nd interested parties were joined to this cause ? I have not seen any application made by the applicant in which he sought for an order joining the interested parties to the cause and no such order exist on the file and would therefore agree with the submission by the 2nd interested party that he is a stranger to this proceeding.

36. Though none of the parties submitted on this issue, it is clear to me that the application herein is resjudicata, the court having made a determination on the issues of DNA which established that the applicant and the 1st interested party shares common paternal linage and that the issues of the linage between the 1st and 2nd interested party should have been a subject matter of the application dated 11th march 2019 which application was heard on merit and the orders granted thereon. If the applicant wanted the DNA test to be conducted between the 1st and 2nd respondent, there was nothing that barred him from approaching the court then thereon.

37. It is clear to my mind that the application herein is an abuse of the court process, with the sole intention of the applicant prosecuting his protest by way of fishing expedition and that the issue in dispute between the applicant and the respondent can still be adequately adjudicated to by the court, without making orders against a party who has not been property joined to the proceedings herein.

38. Whereas the court has the jurisdiction to issue the orders sought, it is the finding that the applicant did not properly join the interested parties to this cause and the court can therefore not make any substantive orders against the 2nd interested party who has no stack in the dispute herein

39. It therefore follows that the application has no merit and is dismissed with no order as to cost. And it is ordered

DATED SIGNED AND DELIVERED VIRTUALLY THIS 18th DAY OF FEBRUARY 2025

J. WAKIAGA

JUDGE

In the presence of

Ms. Mulinge for the applicant

N/A by Ms. Waititu for the respondents.