



**In re Estate of Hezron Manduku (Deceased) (Succession Cause 8 (E004) of 2020) [2024] KEHC 1966 (KLR) (20 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1966 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
SUCCESSION CAUSE 8 (E004) OF 2020  
TA ODERA, J  
FEBRUARY 20, 2024**

**BETWEEN**

**BASILIO NTHIGA ..... 1<sup>ST</sup> APPLICANT  
HUBERT NYANGWARA MANDUKU ..... 2<sup>ND</sup> APPLICANT  
ONESTAR MWENDA ..... 3<sup>RD</sup> APPLICANT**

**AND**

**FLORENCE MORAA MANDUKU ..... 1<sup>ST</sup> RESPONDENT  
VERONICA KEMUNTO MANDUKU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before me are 3 Applications: one is dated 28.9.2022, filed by Basilio Nthiga and Hubert Nyangwara Manduku and Onester Mwenda, one dated 18.8.22 filed by Balisilio Ndhiga and the other is dated 2.12.2022, filed by Onestar Mwenda.
2. In the Application dated 28.9.2022, the orders sought were:
  - a. That this Honourable Court be pleased to hear this summons (sic) on priority basis.
  - b. That this Honourable Court be pleased to Order the Respondent, Florence Moraa Manduku to deposit in court the rent in respect of the deceased's rented properties.
  - c. That this Honourable Court be pleased to Order the Respondent, Florence Moraa Manduku to file in court a full and accurate inventory of the deceased's assets, estate income, land title documents of 30 acres at Acacia, Kitengela, debtors, creditors, reasonable expenses and any other property belonging to the deceased.
  - d. That this Honourable Court be pleased to Order that the payment of Gesonso Land by Kenya Highways Authority and the proceeds thereof be deposited in this court.



- e. That the costs shall be borne by the estate hereof.
3. The grounds on the face of this Application were that the deceased died intestate. The Respondent failed to disclose material facts and unlawfully left out many assets and beneficiaries of the deceased. The 1<sup>st</sup> Applicant, Basilio Nthiga, is the genetic/biological son of the deceased therefore entitled to inherit part of the deceased's assets with his other children. Basilio attended the burial and took several photographs with the deceased's family and the photographs showed similarities between him and the deceased's children. The Respondent had refused to include Basilio and therefore he prayed for his inclusion. Basilio was ready and willing to take a paternity DNA examination to confirm that he is a child of the deceased.
4. Basilio swore a Supporting Affidavit on 28.9.2022. He deponed that the Applicants were heirs of the deceased's estate being the deceased's biological sons. He deponed that the Respondent unlawfully left out many assets and beneficiaries from the deceased's estate. He deponed that he had taken several photos with the deceased's family during the funeral. However, the Respondent declined to include him in the list of the deceased's beneficiaries. He deponed that he was willing and ready to take a paternity DNA examination to confirm that he was a child of the deceased.
5. I have perused the Court record and there appears to be no response to the said Application.

#### **Application dated 2.12.22**

6. In the Application dated 2.12.2022, the orders sought were:
  - a. That the Honourable Court be pleased to hear and this summons (sic) on priority basis.
  - b. That this Honourable Court be pleased to Order inclusion of Onestar Mwenda as daughter of DR. Hezron Manduku (Deceased).
  - c. That this Honourable Court be pleased to Order inclusion of Onestar Mwenda as one of the beneficiary(sic) of the estate of DR. Hezron Manduku (Deceased).
  - d. That the costs shall be borne by the estate hereof.
7. The grounds on the face of this Application were that the deceased died intestate. The Respondent failed to disclose all relevant facts and left out many assets and beneficiaries. The Applicant was the genetic/biological child of the deceased and was therefore entitled to inherit from the deceased's estate. She attended the deceased's burial and took several photographs with the deceased's family which showed a similarity between the deceased's children and her. The Respondent declined to add Onestar as the deceased's child and beneficiary. She requested to be included in the list of the deceased's children and beneficiaries.
8. Onestar swore a Supporting Affidavit on 2.12.2022. She reiterated the grounds on the face of the Application. She deponed that she was the biological child of the deceased and therefore entitled to inherit from the estate of the deceased. The Respondent had declined to include her as a beneficiary. She deponed that she was willing and ready to take a paternity DNA examination to confirm that she was a child of the deceased. She deponed that the deceased supported her during his lifetime, he substantially financed her education and they would meet often. She also visited him in hospital several times.
9. Veronica Kemunto Manduku *vide* an Authority to Act dated 26.11.2021 authorized the 1<sup>st</sup> Petitioner/ Respondent to appear and swear affidavits on her behalf.



10. Florence Moraa Manduku swore a Replying Affidavit on 20.4.2023 in opposition to the Application. She deponed that she was the wife to the deceased. She denied Onestar's allegations and described her as a liar, busy body and an opportunist seeking to eke out a living out of the deceased's estate. She deponed that Onestar had the burden to provide evidence of being the deceased's child as opposed to throwing the claim around recklessly. Onestar had failed to provide such evidence and had therefore failed to prove her claim. She admitted to not informing the Applicant of the proceedings as she did not fall within the cluster of persons who ought to have been informed under the Law of Succession Act. She deponed that the Summons were filed in bad faith and meant to agonize and cause pain to the beneficiaries of the deceased's estate.

### **Application dated 18.8.22**

11. The application dated 18.8.20 is based on the grounds that;
- a. The applicant is a child to deceased but the respondent has failed to involve him in the administration of the estate of deceased.
  - b. The deceased has many prime properties in Nairobi county.
  - c. Under Article 24(4) and v27 of the constitution the applicant is entitled to be treated equally with the other children of Dr. Hezron Manduku.
  - d. The applicant attended the funeral of deceased on 30.8.19.
  - e. The applicants mother is one Celina Nyai Magiri and he was born on 18.8.75 and that deceased loved him and never denied him parentage.
  - f. That before his demise, the deceased informed the applicant of land parcel no. L-Abothuguchi/Makandune/599.
  - g. That the applicant is reliably informed that some persons and the respondent intend to interfere with the land to his detriment unless the inhibition orders are issued.
  - h. Basilio repeated the said grounds in his supporting affidavit and added that he took photographs with his step siblings during the funeral of deceased. Further that deceased verbally bequeathed the sad land parcel no. L-Abothuguchi/Makandune/599 to him before his demise. He deponed that he was born out of wedlock when deceased was working as a medical doctor in Meru. He annexed a bundle of the following documents marked BN -1 in support of his case;
    - i. Copy of land certificate dated 15.5.78 for land no. L-Abothuguchi/Makandune/599.
    - ii. certificate of official search dated 14.11.19.
    - iii. Applicants copy of national identity card.
    - iv. Applicants copy of pin number.
    - v. Eulogy

Florence Moraa filed a replying affidavit dated 30.4.21 in response to the said application. They described the applicant as stranger and a liar. She admitted that she is the widow to the deceased as per their marriage certificate (annexture-1). She said the children of deceased were identified in the chief's letter (Annexture 2). The said that



the funeral program was edited to include the name of the applicant and she annexed a copy of what she calls the "original" programme.

12. Hearing
13. Hearing proceeded on 11.12.2023 and 20.12.2023.
14. PW1 was Basilio Nthiga. He testified that was a business man from Isiolo. He adopted the Application dated 28.9.2022 together with the affidavit in support. The deceased was his father and Florence Moraa his step-mother. He knew the first family. Upon the demise of the deceased, they differed with the 1<sup>st</sup> respondent over their claim to be children of deceased and she assured them that the issue would be sorted out after the funeral. He attended the funeral after he was assured that the issue would be sorted out after the funeral and he even took photographs with his step-brothers. Hubert Manduku, his step-brother, was in good terms with him. The deceased took care of his education expenses and gave him land in Abothogochi in Meru County. His mother was deceased; she used to work with the deceased in his clinic in Meru County. Onestar Kawira was his sister and also a daughter of the deceased. On cross-examination, he testified that he had not filed any evidence of his being the deceased's son but his blood would show as much. He denied that the eulogy filed in court was different from the one shared with mourners. The deceased left him a copy of the property in Meru in August 2016 of which his sister witnessed the same. He was given a copy of the title at Serena Hotel in Nairobi. At the time, the deceased was ailing and had been moved to the USA for treatment. He first met the deceased when he was young and after he sat for form 4 examinations. He said he met the deceased in 1993 at his Hema Hospital in Kisii. He later saw him in Parliament in 1997/1998. His mother passed away in 2008. On cross-examination he said his step-brother Hubert wedded in the year 2002 and he was recognized as the deceased's son but he had not filed the photographs from the wedding. On re-examination, he testified that his mother worked for the deceased and it was his mother who informed him that the deceased was his father.
15. PW2 was Onestar Kawira Mwenda. She testified that she was a realtor. She adopted her application dated 2.12.20 and the affidavit in support of the same. The deceased was her father. Her mother told her as much. Her mother was a nurse at the deceased's clinic. She told this court that her mother did not go public about her relationship with deceased as she did not want to cause complications between the two families. She said she met the deceased many times and he is the one who organized for her travel to the USA in 2001. Further that the deceased introduced Hubert to her and the said step-brother visited them in Isiolo. He (Hubert) informed her that the deceased had been hospitalized and she went to see him in Nairobi Hospital where he passed on. Hubert advised her not to stop the burial but promised to work things out after the burial. On cross-examination, she testified that her mother used to work with the deceased at his clinic. The deceased supported her before she travelled to the USA in 2001 and he paid for all her expenses in Florida. He paid for his school fees in both primary and secondary education but he was not indicated as her father. She came to learn that Hubert was her sibling in 2008. She told this court that when the deceased fell ill, she visited him only once in hospital and it was Hubert who informed her as much. She had no evidence of her relationship with the deceased. She got married in the USA in 2005 but the deceased was not a party to it and she never took her husband to see him. She testified that she had filed an application seeking for a DNA test. On re-examination, she testified that she attended the deceased's burial and was treated as a child of the deceased.
16. DW1 was Florence Manduku. She testified that she was a nurse and was married to the deceased for 50 years. She adopted her affidavit sworn on 20.4.2023. She said she had 9 children with the deceased and they had also adopted other children. Dw1 told this court that she and deceased they set up a hospital business in Meru in the year 1974 and also ran mobile clinics in Imenti and Meru Town. They had one clinical officer but she was not aware of anyone by the name Selina. She said Basilio and Onestar became



known to her during this succession cause. She testified that deceased was not in parliament in 1998 and that Basilio and Onestar were not among the children they used to support as she never wrote cheques for them as she would the others. She was not aware that the deceased used to pay their school fees and was not aware that he would talk to Basilio and Onestar through Hubert. He was emphatic that there was no evidence to prove that Basilio and Onestar were children of the deceased or subsistence. Beldina Nyakero and Mbilia Nyanchama listed in the obituary were their adopted children. On cross-examination, she testified that she used to work with the deceased on part-time basis. She was the only nurse working in the Meru clinic. She testified that she did not see Basilio during the funeral. She had not sold any of the deceased's properties. On re-examination, she testified that she was not aware that deceased gifted Basilio Land and that she was in possession of the title document for the property in Meru. She did not recall Hubert confirming that Basilio and Onestar existed.

17. On 20.12.23, Mr. Onyango who was holding brief for Mr. Hubert Manduku informed court that they had filed further affidavit dated 2.12.23 and submissions dated 14.12.23 the same were struck out as they were filed outside the timelines issued on 8.11.23.

## Submissions

### The 1<sup>st</sup> and 3<sup>rd</sup> Beneficiaries'/Applicants' Submissions

18. The Applicants' filed their Submissions dated 15.1.2024. They cited the case of *Re Estate of J.C.G. (Deceased)* 2018 eKLR where the Court stated that the siblings were at liberty to undergo a sibling DNA test to prove beyond peradventure of the Objector's paternity.
19. They also cited the case of *Re Carey Kibagi Muriuki* (2000) eKLR where the Court held that children born out of an invalid marriage would not qualify as dependants unless the father had recognized or accepted them as children of his own or he had voluntarily assumed permanent responsibility over them.
20. They cited the case of *Estate of J.M.K. (Deceased)* (Succession Cause 102 of 2019) where the Court in that case ordered for a DNA test to ascertain the children's paternity.
21. They cited the case of *Estate of Julius Kiragu Kiara (Deceased)* (2018) eKLR, where the Court held that the Court retains discretion to order DNA profiling in suitable cases.
22. The case of *Estate of N.K.M. (Deceased)* (Succession Cause 2 of 2019) was cited in support of the prayer for a DNA test.
23. Lastly, they cited the case of *Estate of Martin Luther Owuor (Deceased)* (2018) eKLR, where the Court held that the applicant had met the threshold for an application for a DNA test.

Respondents cited Article 31 of the *constitution* which guarantees protection of privacy. Article 31 of the *constitution* provides " Privacy

Every person has the right to privacy, which includes the right not to have—

- (a) their person, home or property searched;
- (b) their possessions seized;
- (c) information relating to their family or private affairs unnecessarily required or revealed; or
- (d) the privacy of their communications infringed.

They cited the case of *S.W.M VS G.M.K* (2012) where it was held that " Ordering the respondent to provide DNA for whatever reason is an intrusion of his right to bodily security and integrity and



also the right to privacy which rights are protected under the Bill of Rights. The petitioner bears the burden of demonstrating to the court the right she seeks to assert or vindicate and which the court would consider as overriding the respondent's rights."

Also *RMK vs AKG & AG* petition no. 18 of 2013 where it was held that " Apart from the petitioner's own bland assertions, there is nothing to connect the petitioner and the 1<sup>st</sup> respondent that would discharge the burden of persuading the court to permit an intrusion of the 1<sup>st</sup> respondent's rights. "

They also cited the case of *Hellen Cherono Kimurgor V Esther Jelagat Kosgei* [2008] eKLR

Where it was held " I am on the balance of probability satisfied on the facts and the circumstances of this case, that the applicant failed to establish a sufficient link between herself and the late Charles Chemimoi 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 ".

Finally, the respondents also cited *HCK vs. EJK* [2008] eKLR, where it was held;

" 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. "

Also that section 25 of the Data Protection Act provides that consent of the subject must be obtained before collection of DNA samples and section 26 requires that the subject be informed of the to which the personal data is to be put and his right to object to the entire process.

24. Secondly, that the applicants bear the burden of proving the allegation that they are children of deceased under section 107 of the *Evidence Act* as he who alleged must prove. The supreme court case of *Gatirau Peter Munya Dickson Mwenda Kitinji & 3 others* (2014) eKLR "
25. The respondents also submitted that no documentary evidence either in form of birth certificates, proof of subsistence and or communication was produced by applicants to establish the nexus between them and the deceased.
26. Also that the allegation by the 1<sup>st</sup> applicant that he met deceased in the year 2008 in his parliament officers are farfetched as deceased was not a member of parliament then as per the parliament of Kenya website. Determination
27. When this matter came up for directions on 8.11.23, this court gave directions on hearing of the applications dated 28.9.22 and 2.12.22 only. However, there is also application dated 18.8.20 which seeks orders similar to application dated 2.12.22. I have however noted that the evidence of Basilio (Pw1) is based on the said application dated 18.8.20 I find that it would be in the interest of justice and expediency that I deal with the 3 applications together and no prejudice would be occasioned to any party herein.
28. I have considered the 3 Applications herein; the Replying Affidavit, the various witnesses' testimonies herein and the submissions by both applicants and respondent.
29. The Applications dated 18.8.20 and 2.12.120 are based on the grounds that Basilio and Onestar are children of the deceased and hence entitled to share in the Estate. That was vehemently opposed by the Respondents.
30. It follows therefore that the first issue that this Court has to determine is whether Basilio and Onestar are children of the deceased for the purposes of the *Law of Succession Act*.



31. Basilio and Onestar alleged that they are the biological children of the deceased and hence dependants under the *Law of succession Act*.
32. Section 29[a] of the *Law of Succession Act*, Cap 160 of the Laws of Kenya provides as follows:
29. Meaning of dependant
- For the purpose of this Part, “dependant” 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;
33. The same Act defines child or children under Section 3[2] as follows:
3. Interpretation
- (2) References in this Act to “child” or “children” shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.
34. The onus was therefore on Basilio, Onestar and Hubert to prove that Basilio and Onestar were children of the deceased. Hubert did not participate in the proceedings in terms of testifying or filing documents in relations to the said applications by Basilio and Onestar.
35. Section 107 of the *Evidence Act*, Cap 80 of the Laws of Kenya provides that the burden of proof lies with the party who alleges. Section 109 of the *Evidence Act* provides that “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
36. Therefore, the burden of proving that they were biological children of the deceased and that he provided for them prior to his demise, lay squarely on the Applicants.
37. In the case of *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 3 Others* (2014) eKLR, the Supreme Court of Kenya held thus:
- “The person who makes such allegations must lead evidence to prove the facts. 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.”
38. This burden, to my mind, could have been discharged by production of documentary evidence, photographs, proof of monetary support among other ways. The Applicants did not produce any of these. Save for alleging paternity and having a relationship with the deceased, the Applicants did not provide any other evidence that this Court could rely on. Not even the testimony of other persons who were aware of the alleged familial neighbours relationship, be it other relatives or even local administrators both in Meru and Kisii. Further that PW1 said he was given the title deed for the Meru land by deceased in his office and again contradicted himself by saying that he got the same from the lands office.



39. It was not enough to state that the deceased would pay for their school fees or meet them. The applicants alleged that they attended the funeral and took photographs with the family of deceased and that they resemble the children of the first family herein but the same were not annexed to the applications herein. The applicants alleged that they were recognized in the obituary but the 1<sup>st</sup> respondent denied this saying the said obituary was made to suit this case and she produced a funeral programme, which did not contain the names of the applicants and an extract of obituary posted on the daily nation new paper dated 26.8.19 which does not bear the names of applicants. The applicants did not explain why they were in the programme but not in the obituary. PW2 said that her birth certificate bears the name of her maternal grandfather. There was no reason given as to why the name of deceased was not in the said certificate if indeed he was her known biological father.
40. In the case of *Ngengi Muigai & another v Peter Nyoike Muigai & 4 Others* [2018] eKLR, faced with a similar situation, the Court of Appeal held thus:
- 52.... There was no scientific evidence of paternity and the evidence extracted from both parents was unhelpful as it simply amounted to an affirmation by one and a denial by the other.
- 53..... With respect, we can find no factual or legal basis for such summation. Custom is a matter of fact but there is no proof of it on record. In our finding, there was no cogent evidence to support the claim that Nyoike was the child of the deceased.
- 57.... The bottom line is that there was no evidence that Nyoike was financially or otherwise supported by the deceased immediately before his death to warrant a positive finding on dependency.
41. The Court of Appeal proceeded to reverse the Trial Court’s decision that the said Nyoike had proven that he was a dependent or child of the deceased in the absence of cogent evidence.
42. Basilio and Onestar were also, to my mind, unable to prove that there existed a relationship between their mother and the deceased that resulted in their births.
43. As was stated by the Court of Appeal in the case of *BKN & another v TNW* [2019] eKLR that:
- “...Even if the contrary was the case, then there was evidence that the deceased had voluntarily assumed responsibility over them and indeed held himself out as their father. The deceased had deserted the 1<sup>st</sup> appellant and was staying with the respondent and the children prior to his death. What the respondent had to show and indeed did was that there was on a balance of probability, evidence of a relationship between her and the deceased that brought forth the children as a consequence of their intimate relationship. Further, she demonstrated to the court that the deceased was the putative father or had assumed the role of being their father and or held himself out as such.”
44. On the issue of dependency, it was upon Basilio and Onestar to prove that they were dependants of the deceased immediately prior to his demise. *Re Estate of Patrick Kinyua Mathendu (Deceased)* (Civil Appeal E115 of 2022) [2023] KEHC 24031 (KLR) (24 October 2023) (Judgment) where the Court cited the case of *Re Estate of George Musau Matbeka (Deceased)* [2010] eKLR where it was held that the burden of proof of dependency lies on the claimant.
45. *In Re Estate of Patrick Kinyua Mathendu (Deceased)* (Civil Appeal E115 of 2022) [2023] KEHC 24031 (KLR) (24 October 2023) (Judgment) the Court cited the case of *Re Estate of George Musau Matbeka (Deceased)* [2010] eKLR where it was held that the burden of proof of dependency lies on the claimant.



The averments of the applicants that the deceased would pay their school fees and for ONESTAR that he supported her move to the USA were denied by the 1<sup>st</sup> respondent. The same could have easily been proven by adducing receipts, statements, records from school or other documents. This was not done and so applicants failed to prove dependency.

## DNA

46. On the issue of DNA, I note that Basilio and Onestar testified that they were ready and willing to take a DNA test to prove paternity. For clarification, this was not a substantive prayer in their applications. The respondents submitted that the orders for DNA testing cannot be granted unless it is specifically prayed for and that a basis for granting the same must be laid before granting the same.
47. I have considered the authorities cited by the 1<sup>st</sup> and 3<sup>rd</sup> Applicants. They are distinguishable in the following ways:
  1. *Re Estate of JCG (Deceased)* [2018] eKLR is distinguishable because in that case, there was a direct link and relationship between the deceased and the objector. The deceased housed the objector in one of his properties, assisted him change his name and even accompanied him when paying dowry for the objector's 1<sup>st</sup> and 2<sup>nd</sup> wives. The Court held that the evidence adduced was indicative of a man who had made contact with his son and the subsequent activities strongly suggested that the deceased found the objector as his son.
  2. *Re Carey Kibagi Muriuki* [2000] eKLR is distinguishable from the facts in the present case since there was tremendous evidence that the deceased recognized the objector as his own child and assumed permanent responsibility. He produced photographs, and cheques indicative that the deceased paid his school fees, unlike in the present case.
  3. *Re Estate of JMK (Deceased)* [2021] eKLR is distinguishable as there was an express application for a DNA test which was eventually granted. In addition, a birth certificate was introduced and not challenged. The Court also found that there was no indication that Section 12 of the *Births and Deaths Registration Act* requiring consent of the father or proof of marriage between the father and mother before the father's entry were not complied with. In the present case, there was no such prayer or such evidence.
  4. *Re Estate of Julius Kiragu Kiara (Deceased)* [2018] eKLR is distinguishable as the facts therein depicted a case worth referring for DNA profiling. In the present case, the Applicants did not present a suitable case for the grant of such orders. The Court declined to order for a test for DNA.
  5. *Re Estate of N.K.M. (Deceased)* (Succession Cause 2 of 2019) is distinguishable as there was an express application for DNA testing and both parties were also in agreement that the test should be conducted, as opposed to the case herein. In addition, the Court held that some nexus had been established between the alleged marriage of the deceased with the objector and therefore a possibility of children from both houses sharing the DNA from the deceased. The Court also held that some nexus must be established to enable the Court make orders for a DNA test.
  6. *Estate of Martin Luther Owuor (Deceased) (2018)* eKLR is distinguishable as there was an application for DNA testing as opposed to the facts herein. The Court further held that an Applicant must meet a certain threshold to demonstrate a nexus or connection between the applicant and the deceased for the Court to order for a sibling DNA test.



48. I must reiterate that over and above not filing a formal application seeking to conduct a DNA test, the Applicants failed to establish a nexus between them and the deceased, or the deceased and their deceased mother.
49. I would also like to add that taking samples of the children of a deceased to test against those children who would be termed “legitimate”, for lack of a better word, has been frowned upon by the Court of Appeal. It was described as a very unsatisfactory way of determining paternity. See Par. 70 of *Faraj v Mwawasi & 2 others* (Civil Appeal E043 of 2022) [2023] KECA 1322 (KLR) (10 November 2023) (Judgment)
50. However, in as much as the same was indicative of how anxious they were to resolve the matter, I find that the Applicants could not benefit by getting such an order for two reasons- it was not a substantive prayer in any of the applications and parties are bound by their pleadings; and also that, in their testimony they failed to lay any basis for grant of such orders.
51. I am persuaded by the decision in the case of *Re Estate of Patrick Kinyua Mathendu (Deceased)* (Civil Appeal E115 of 2022) [2023] KEHC 24031 (KLR) (24 October 2023) (Judgment) where the Court held thus:

“ 19. From the foregoing, the appellant is required to demonstrate that the minor was a dependant of the deceased thus proving that there is a link between the minor and the deceased. This was stipulated in the case of *H.C.K. vs E.J.K.* [2008] eKLR where the court held as follows:

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 entitle her to seek a DNA test against him.”

52. I am guided by the decision of the Court of Appeal in *Faraj v Mwawasi & 2 others* (Civil Appeal E043 of 2022) [2023] KECA 1322 (KLR) (10 November 2023) (Judgment). In that case, the Court held thus:

“ 68. The matter before the Learned Judge the appellant’s case was in the form of objection proceedings. In such proceedings, the burden is on the objector to prove that the proposed distribution of the estate by the petitioner is not proper or legally correct. The burden, of course, is on a balance of probabilities. Where an objector fails to prove what she set out to persuade the court to do, the court cannot, on own motion, set out to assist, as it were, by making orders geared towards the proof or disproof of the objection. In this case, it is clear that the Learned Judge was not satisfied that the petitioner, who was the objector had proved that the children of the 1<sup>st</sup> respondent and the 3<sup>rd</sup> respondent were not entitled to benefit from the estate of the deceased either as beneficiaries or as dependants of the deceased. It was in that regard that we understand his decision to direct that proof of paternity of the 1<sup>st</sup> and 2<sup>nd</sup> respondent’s children be by way of DNA.

69. In this case there was evidence that the children sired by the 1<sup>st</sup> respondent and the 3<sup>rd</sup> respondent whose paternity was in dispute and whom the Learned



Judge directed that DNA samples be taken, notwithstanding the Islamic Law, were born during the cohabitation between the deceased and the 1<sup>st</sup> and 3<sup>rd</sup> respondents and that the deceased treated them as his own children during the deceased's lifetime." [Emphasis mine]

53. Evidently, in that case, a link between deceased and the 1<sup>st</sup> and 3<sup>rd</sup> respondents' children and the deceased was established as they were born during the cohabitation between the deceased and the 1<sup>st</sup> and 3<sup>rd</sup> respondents. In the present case, there is no such link that would incline this Court to grant such orders, even assuming that there was such an application.
54. I am further persuaded by the decision *in Re Estate of Patrick Kinyua Mathendu (Deceased)* (Civil Appeal E115 of 2020) [2023] KEHC (KLR) (24 October 2023) (Judgment) where the Court held thus:
22. ....In the absence of a prima facie case to show the link between the deceased and the minor, there would be no legal basis to subject the minor to a DNA test.
55. The evidence adduced by the applicants in applications dated 18.8.22 and 2.12.22 is scanty and does not meet the threshold for granting of the orders sought. I find that Basilio and Onestar have on a balance of probability failed to prove any nexus between them and the deceased or that they were his dependants in his life time. They cannot therefore be included herein in the estate herein as beneficiaries.
56. On the application dated 28.9.22, Basilio Nthiga is the 1<sup>st</sup> applicant, Hurbert Manduku Nyangwara the 2<sup>nd</sup> applicant and Onester Mwenda the 3<sup>rd</sup> applicant. Since applications by the 1<sup>st</sup> and 3<sup>rd</sup> applicants to be enjoined in this succession cause have been dismissed, I find that they therefore have no locus standi to urge the Court to order Florence Moraa Manduku to perform the actions sought in the Application dated 28.9.2022.
57. However, it is not in contention that Hubert is a son of the deceased and thus entitled to inherit the deceased's estate. This application was not opposed.
58. Part of the duties of personal representatives are enumerated in section 83 of the *Law of Succession Act*, Cap 160-
83. Duties of personal representatives
- Personal representatives shall have the following duties-
- (e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
- (h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings.
59. The applicant sought that the payment of Gesonso land by Kenya Highways Authority and the proceeds thereof be deposited in court, deposit of rent in court and that the respondent renders full account of the estate of deceased. Prayers b and d are vague and so cannot be granted in vacuum. I find that it would be in the interests of justice that the Respondents render a full and accurate inventory of the deceased's assets and liabilities in terms of prayer c of the application.
60. In the end, the Applications dated 28.9.2022 2.12.2022 and 18.8.22 are determined as follows:



- a. The Application dated 2.12.2022 and 18.8.22 are dismissed.
- b. For the avoidance of doubt, Basilio Nthiga and Onestar Kawira have not satisfied this Court that they are children and/or dependants of the deceased.
- c. The Application dated 28.9.2022 is allowed in terms of prayers [c].
- d. I further order and direct that the Petitioners render a full and accurate inventory of the assets and liabilities of the deceased, and an accurate account of all dealings therewith up to the date of the account within 30 days of the date of this Ruling.
- e. Summons for Confirmation of Grant dated 18.8.21 is set for hearing on 15.5.24. Hearing notice to issue.
- f. There shall be no order as to costs.

61. It is so ordered.

**DATED, DELIVERED AND SIGNED AT KISII THIS 20<sup>TH</sup> DAY OF FEBRUARY 2024.**

**T.A ODERA**

**JUDGE**

In the presence of:

Mr. Kurauka for the 1<sup>st</sup> and 3<sup>rd</sup> Objectors /Applicants

Mr. Ratemo - For the Petitioners/Respondents

Oigo - Court Assistant

Ratemo: This case has taken long from 2018 to date. We seek leave to amend the inventory to include the Meru property. we seek a date for directions first.

Order: Mention on 19.3.24 for the inventory and accounts and directions. Mention Notice to Issue.

**T.A ODERA**

**JUDGE**

**20.2.24**

Kurauka: We seek a copy of the ruling.

Order: Same be supplied on payment.

**T.A ODERA**

**JUDGE**

**20.2.24**

