



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of of elijah Cheruiyot Chebelyon (Deceased) (Succession Cause E041 of 2021) [2024] KEHC 2631 (KLR) (5 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2631 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
SUCCESSION CAUSE E041 OF 2021**

JK SERGON, J

MARCH 5, 2024

**IN THE MATTER OF THE ESTATE OF ELIJAH CHERUIYOT
CHEBELYON (DECEASED)**

BETWEEN

**LILY R BOR 1ST PROTESTOR
SALLY CHEPKOECH CHERUIYOT 2ND PROTESTOR
MARY CHEPTONUI 3RD PROTESTOR
JANET CHEPKORIR CHEBELYON 4TH PROTESTOR**

AND

**RAEL CHEPNGETICH CHEBELYON 1ST PETITIONER
NANCY CHEPKORIR CHEBELYON 2ND PETITIONER
RICHARD KIPLANGAT CHERUIYOT 3RD PETITIONER
JANE CHEPKIRUI CHEBELYON 4TH PETITIONER**

RULING

1. The application coming up for determination is a notice of motion dated 13th December, 2023 seeking the following orders;
 - (i) Spent
 - (ii) This Honourable Court do grant leave to the protestor/applicants to conduct a DNA Test to establish the biological parentage of the late Elijah Cheruiyot Chebelyon.



- (iii) This Honourable Court do direct the rival parties in the ongoing succession cause to submit to DNA testing to ascertain the parentage of the late Elijah Cheruiyot Chebelyon. More specifically the 2nd, 3rd and 4th Petitioner/Respondents and the Protestors.
 - (iv) This Honourable Court do appoint the government chemist to conduct the said DNA Test and file their report within 30 days of this order, with the costs thereof to be borne equally by the parties or as the court may deem just and equitable.
 - (v) Such further or other orders as this Honourable Court may deem fit to make in the interest of justice.
 - (vi) Costs be provided for
2. The application is supported by grounds on the face of it and the supporting affidavit of Lily Russell Bor on behalf of her co-applicants.
 3. The applicants aver that they have filed a protest against the confirmation of grant in the instant succession proceedings in order for this Court to determine the beneficiaries to the estate of the deceased as they were apprehensive that they would be disinherited. The applicants reiterated that the DNA Tests are imperative for ascertaining parentage before the matter proceeds and that the tests will provide a conclusive way to settle the matter.
 4. The respondents filed a replying affidavit in response to the instant application, the replying affidavit was sworn by Jane Chepkirui Chebelyon.
 5. The respondents contended that compelling them to do a paternity test against their wish was tantamount to an infringement of the right to privacy under article 31 of the Constitution.
 6. The respondents contended that whereas the right to privacy under the Constitution is not absolute, the Court cannot compel them to undergo such an invasive process and further that Courts have held that compulsory DNA tests especially for non-consenting adults can only be ordered in very exceptional circumstances.
 7. The respondents therefore urged the court to dismiss the unlawful attempt to seek the aid of the court in fishing for evidence for their case and allow the matter to proceed to further hearing on 20th February, 2024.
 8. The application came up for inter partes hearing on 1st February, 2024 and Mr. Kiletyen Learned Advocate for the Protestors/Applicants stated that he will entirely rely on his pleadings and maintained that the DNA test to establish paternity will conclusively settle the suit whereas Mr. Ondiek Learned Advocate for the Petitioners/Respondents made oral submissions. He submitted that compulsory DNA Tests are a violation of article 31 of the Constitution and can only be ordered under very exceptional circumstances and further that the applicants had failed to establish a nexus between them and Elijah Cheruiyot Chebelyon the deceased herein, they are therefore asking the court to order a DNA Test on the sole basis that they have a strong reason to believe that they are biological children of the deceased. The Learned Advocate was adamant that this was a fishing expedition whereby the applicants wanted the court to assist them gather new evidence, he therefore urged the court to dismiss the instant application and allow the matter to proceed to hearing on 20th February, 2024.
 9. The Learned Advocate submitted several authorities for consideration by this Court, I have considered the said authorities and wish to highlight the following cases S.W.M v G.M.K [2012] eKLR the court refused to order for DNA tests as it considered it an intrusion to bodily security and integrity and a violation to the right to privacy which rights are protected under the Bill of Rights and Re Estate



of J.S.M (Deceased) [2019] eKLR where a probate court declined to issue orders for a DNA Test as the applicant had not satisfied the court that there existed special circumstances sufficient to warrant issuance of the order sought.

10. I have considered the notice of motion, replying affidavit and oral submissions made on behalf of the parties and it is clear that the sole issue for determination by this court is whether to issue orders directing the parties to instant succession cause to submit to DNA testing in order to ascertain paternity. I find that the answer is in the negative. This court cannot compel non consenting adults to undergo such an invasive procedure against their wish, furthermore, Courts have held that compulsory DNA tests especially for non consenting adults can only be ordered in very exceptional circumstances. In the instant succession case, I find that there are no exceptional circumstances that warrant this court to issue orders for DNA testing.
11. *D.N.M v J.K* [2016] eKLR the Learned Judge observed as follows; “ In conclusion, I hold the view that where paternity is in dispute then within reasonable limits and in appropriate cases DNA testing of non-consenting adults may be ordered even at an interlocutory stage. The bid to establish the truth through scientific proof must however not be generalized and should never so lightly prevail over the right to bodily integrity and right to privacy until it is clear that such rights ought to be limited. The clarity is only established where an undoubted nexus is shown as well as a specified quest to protect or enforce specific rights.”
12. Consequently, the notice of motion dated 13th December, 2023 is dismissed with no orders as to costs. The protest against confirmation of grant should proceed for hearing and determination.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 5TH DAY OF MARCH, 2024.

J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Rutoh

Ondieki for the Petitioner/Respondent

Kiletyen for the Protestor

