



REPUBLIC OF KENYA



In re Estate of Mwatela Charo Rumba (Deceased) (Succession Cause 18 of 2017) [2024] KEHC 17009 (KLR) (1 March 2024) (Ruling)

Neutral citation: [2024] KEHC 17009 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 18 OF 2017**

G MUTAI, J

MARCH 1, 2024

IN THE MATTER OF THE ESTATE OF MWATELA CHARO RUMBA (DECEASED)

BETWEEN

KAINGU USHURU MCHARO OBJECTOR

AND

STEPHEN NYAMAWI RUMBAH 1ST PETITIONER

BAAKA MWATELA 2ND PETITIONER

RULING

1. By Summons dated 9th October 2023 the Objector/ Applicant herein Kaingu Uhuru Mcharo sought three orders, to wit:-
 1. That the Respondent namely Baraka Mwatela be ordered to undergo age assessment;
 2. That the remains of the deceased be exhumed for purposes of carrying out DNA analysis to determine the paternity of Baraka Mwatela; and
 3. That the costs of this application be in the cause.
2. The basis of the applications as disclosed by the supporting affidavit of Kaingu Ushuru Mcharo sworn on 9th October 2023 is that Baraka Mwatela was not the biological child of the deceased and that the deceased did not maintain him. It was urged that there were conflicting certificates of death in respect of the deceased.
3. The applicant averred that there was no way of conducting a DNA examination to determine the paternity of Mr Baraka Mwatela without exhuming the body. Therefore, it was submitted that the body of the deceased be exhumed for the said purpose.



4. The said Summons was opposed by the Petitioners/Respondents. The 2nd Petitioner/Respondent Stephen Nyamawi Rumbah filed a Replying Affidavit he swore on 24th October 2023 in which he stated that while in principle they were not opposed to a DNA test it had to be first confirmed that the grave allegedly containing the human remains of the deceased indeed belonged to him.
5. Their scepticism was based on the fact that the Objector/Applicant and his father, Ushuru Mcharo, chased away the 1st Petitioner/Respondent and his mother from their home and had remained therein to date. The said deponent stated that it wasn't beyond the Objectors/Applicants to tamper with the remains of the deceased to procure an outcome favourable to them.
6. The deponent stated that in a bid to hoodwink the Court, the Objector forged and death certificate of the deceased, to show that the deceased couldn't be the biological father of Baraka Mwatela, which attempt failed after the Registrar of Deaths and Births Kilifi confirmed that the death certificate produced by the Petitioners/Respondents was genuine, and that a second attempt to mislead the court couldn't be ruled out.
7. He averred that it couldn't be beyond the Objector/Respondent to tamper with the human remains of the deceased, considering that he and his father were in actual possession of the property where the deceased was buried.
8. This court directed that the application be canvassed through written submissions. The parties' advocates filed written submissions in compliance with the said directions. I shall refer to the said submissions below.
9. The written submission of the Objector/Applicant is dated 8th November 2023. Counsel for the Objector/Applicant, Mr Odhiambo, submitted that the 1st Petitioner/Respondent did not oppose the application, although there was a replying affidavit sworn by the 2nd Respondent, Stephen Nyamawi Rumba.
10. Counsel for the Objector/Applicant urged that carrying out a DNA test would enable the Court to determine whether or not the deceased is the father of my 1st Respondent and would thus enable the Court to make a fair and just determination.
11. Counsel for the Objector/Applicant urged the Court to allow the application as, in his view, the same was not opposed.
12. The submissions of the Petitioners/Respondents are dated 29th November 2023. In the said submissions, it was urged that the Objector and his father were trying to disprove the paternity of Baraka Mwatela. To do this, a death certificate was forged showing that the deceased died on 27th July 1987 and that he could not therefore be the father of the 1st Petitioner/Respondent, who was born on 18th May 1988.
13. Mr. Omollo submitted that the Registrar of Births & Deaths, Kilifi, testified and confirmed that the certificate of death produced by the Petitioners/Respondents was genuine. In contrast, that produced by the Objector/Applicant did not emanate from the Registrar's office, and was, in Mr. Omollo's view, a forgery.
14. Counsel urged that Baraka Mwatela is the son of Kadzo Chai Chembe, who had testified that she was married to the deceased at the time he died. Mr. Omollo submitted that as the 1st Petitioner/Respondent was born during lawful coverture between his mother and the deceased, there was a presumption of legitimacy in his favour which could be rebutted only with very cogent evidence.



- Counsel relied on the decision of the Court of Appeal in *Njenga vs Njenga* [1985]eKLR, and stated that no evidence sufficient to displace the presumption had been adduced.
15. It was urged, relying on *RNC & 2 others vs SMG* [2017]eKLR that exhumation of a body was a drastic remedy that should be granted sparingly and in exceptional circumstances bearing in mind the length of time that had elapsed and the need to leave the body of the deceased undisturbed in the grave.
 16. Counsel stated that the deceased died in 1988. The objectors were in occupation of the suit premises. There was therefore no assurance that the body that would be availed from the grave would be that of the deceased.
 17. Given the possibility of intrigue, it was urged that before the order of exhumation could be granted, it be first established if the proposed remains were indeed those of the deceased or not.
 18. Counsel doubted that, given the length of time that had lapsed and the circumstances surrounding the place of interment, the integrity of the DNA results could not be assured. In his view, the results of such a test were likely to be questionable. He thus urged that the application by the objector should be dismissed.
 19. Counsel relied on the decision of the Court in the case of the *Estate of IMK (deceased)* [2021] eKLR, and urged that, consistent with the authorities he had produced, the Court be pleased to dismiss the application now before the Court.
 20. Does the application have merit? What orders should be issued, if at all? I have considered the application and the responses thereto.
 21. This court can't help but notice that the application was filed soon after the testimony of the Registrar of Births and Deaths, Kilifi. It would appear to me that the summons dated 9th October 2023 was filed to seal the gaps and resolve the deficiencies identified during the hearing.
 22. The Applicant had the duty of laying the basis for subjecting the 1st Petitioner/Respondent to a DNA test. Regrettably, I saw no such basis. To subject Mr Baraka Mwatela to age assessment without sufficient justification would violate his right to be treated with dignity and might amount to shifting the burden of proof.
 23. The deceased died around 37 years ago. This Court is not convinced that the DNA results from the exhumation of his body will be helpful. I say so for several reasons. Firstly, and as apprehended by the counsel for the Petitioners/Respondents, there is no assurance that the body exhumed will be that of the deceased. Secondly, no solid justification has been given to justify such a drastic action. The deceased deserves to rest in dignity and not have his remains disturbed.
 24. I am guided by the decision of Ougo, J, in *RNC & 2 others v SMG* [2017] KEHC 9769 (KLR) where the learned Judge expressed herself thus:-

“9. The next issue is the alternative prayer whether the court should grant an order for exhumation of the deceased’s body. The deceased died about 10 years ago. In the case of *Hellen Cherono Kimurgor vs Esther Jelagat Kosgei* (2008) eKLR Justice Onyancha held as follows;

“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 AII E.R, 202.”

25. The learned Judge went on to hold that:-

“This court too is in agreement that an order of exhumation of a deceased person in order to have a DNA testing to carry out a paternity or maternity test of a child is a drastic order which must only be made in exceptional and compelling circumstances. The deceased was buried some 10 years ago but make an order now after the said years in my view would be a drastic order. His body should be left in the grave undisturbed.”

26. The upshot of the foregoing is that I find and hold that the application dated 9th October 2023 is without merit. The same is dismissed forthwith.

27. Due to the nature of the matter, I make no orders as to costs.

28. As this matter is pending directions on the delivery of the judgment, I direct that the same be mentioned for directions before me on 20th March 2024.

29. It is so ordered.

DATED AND SIGNED IN MOMBASA THIS 1ST DAY OF MARCH 2024. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Mr Mutubia, holding brief for Mr Omollo, for the Petitioners/Respondents;

No appearance for the Objector/Applicant; and

Arthur – Court Assistant.

