



In re Estate of AKJR also known as AJKR also known as AJKR also known as AJKR also known as RAK (Deceased) (Succession Cause 2917 of 2022) [2024] KEHC 8109 (KLR) (Family) (7 June 2024) (Ruling)

Neutral citation: [2024] KEHC 8109 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

SUCCESSION CAUSE 2917 OF 2022

PM NYAUNDI, J

JUNE 7, 2024

IN THE MATTER OF ESTATE OF ALBERT KINYUA JOSIAH RUTURI ALSO KNOWN AS ALBERT JOSIAH KINYUA RUTURI ALSO KNOWN AS ALBERT J KINYUA RUTURI ALSO KNOWN AS ALBERT JK RUTURI ALSO KNOWN AS RUTURI ALBERT KINYUA (DECEASED)

BETWEEN

BMM 1ST APPLICANT

SRG 2ND APPLICANT

AND

JMR 1ST RESPONDENT

JAMR 2ND RESPONDENT

AKR 3RD RESPONDENT

RULING

1. The ruling herein relates to summons dated 11th September 2023 presented under Section 47 of the *Law of Succession Act* and rules 63 and 73 of the *Probate and Administration Rules*, Article 159 (2) of *the Constitution* and Sections 1A and 3A of the *Civil Procedure Act*.
2. The application is premised on the averment that the applicants are the biological sons of the deceased and therefore beneficiaries of his estate. They are apprehensive that the respondents have excluded them from the affairs of the Estate and for them to secure their rights they need to establish paternity and therefore it is necessary to conduct a Deoxyribonucleic Acid (DNA) Test with samples taken either from the deceased upon exhumation or known children of the deceased (the 2nd respondent).



3. The application is supported by the affidavit of the 1st applicant sworn on 9th August 2023. It is contended that the paternity of the applicants is a fact acknowledged by family and neighbours and the affidavits of John Muthanji Peter and Pamela Njoki Njue both sworn on 20th April 2023 attest to the paternity of the 1st applicant. The 2nd applicant has also sworn an affidavit in support of the application and has availed his birth certificate as evidence. The 1st applicant avers that he was born on 26th November 1974 following a romantic relationship between the deceased and his mother Faith Mutitu. The 2nd Applicant was born on 10th December 1975 and he avers that his mother Faith Kaguthi Kubai had an intimate relationship with the deceased.
4. The application is opposed and the 2nd respondent has sworn an affidavit on 28th September 2023 in which he avers that the Applicants are unknown to him.
5. In compliance with the Court's directions that the application be canvassed via written submissions both parties have filed their written submissions.

Summary Of Applicants' Submissions

6. The Applicants' proffer that the issue for determination is; Whether the prayer for a DNA order to ascertain the issue of parentage should be granted? It is the Applicant's submission that establishing paternity is key to them accessing their rights as dependants. To support the plea for exhumation of the deceased's body reliance is placed on the decision in the cases of *Hellen Cherono Kimugor vs Esther Chelagat Kossel [2008]* eKLR and *Re Estate of Julius Kiragu Kiara (Deceased) [2018]* eKLR, in which the Courts asserted that they would not hesitate to disinter a body in suitable case.
7. Acknowledging that the exhumation of the body is a drastic order and also the likelihood of the samples being compromised on account of degeneration, the applicants urge that in the alternative the Court do order paternity to be established through sibling testing and rely on the decision in *Re Estate of NKM (Deceased)* for this proposition.
8. It is urged that the 1st respondent's right to privacy provided for under Article 37 of *the Constitution* is not an absolute right and must be balanced against the Applicants' rights under Articles 27, 40 and 50 of *the Constitution*. It is submitted that the applicants have demonstrated nexus between them and the deceased via the affidavits of Pamela Njoki Njue and Jones Muthanji Peter. It is submitted that the paternity of the applicants was well known by relatives and neighbours.
9. In conclusion it is submitted that unravelling the truth overrides the other considerations as an otherwise entitled child will be forever disinherited.

Summary Of Respondents' Submissions

10. The respondents identify 2 issues for determination; Should exhumation of the deceased be ordered?; Should the 2nd petitioner/ respondent be ordered to submit to a DNA test?
11. The respondents submit that exhumation is a drastic order and should only be made in exceptional and compelling circumstances as was stated in *Re Estate of NKM (Deceased) [2021]* eKLR and *Re Estate of Julius Kiragu Kiara (Deceased) [2018]*eKLR. It is submitted that the applicants have not provided exceptional and compelling circumstances to warrant the exhumation of the body of the deceased.
12. It is submitted that the affidavits of Pamela Njoki Njue and Jones Muthanji Peter are defective to the extent that they are sworn in support of an Application that was withdrawn and further their averments are not substantiated at all.



13. It is further submitted that the Application ought to fail as the Applicants have not established any nexus between them and the deceased.
14. The Respondents rely on the decision in *DKM vs FIM [2022]* eKLR for the assertion that the Applicants have not laid a firm and persuasive foundation to warrant the 2nd respondent being compelled to undergo a DNA test. It is further submitted that the Applicants have not discharged the burden of ‘establishing by pleadings and evidence sufficient nexus between him and the respondent in order to persuade the court to grant the orders’ as stated by the Court in the case of *RMK vs AKG & Attorney General, Petition No. 18 of 2013* and *DNM vs JK [2016]* eKLR

Analysis And Determination

15. I discern the issue for determination to be; whether the Court should direct that a DNA test be conducted to determine the paternity of both the 1st and 2nd applicants.
16. It is proposed that the Court order that either the body of the deceased be exhumed or that the 2nd respondent be ordered to avail a sample for sibling DNA testing to ascertain the paternity of the 2 applicants.
17. I must thank Counsel for both parties as their submissions and authorities cited have been extremely helpful at assisting me glean the issues and arrive at my decision. Judicial precedent has characterized the orders sought as drastic (as relates to exhumation) and intrusive (as relates Sibling testing). It is settled that before the Court can make an order for DNA the applicants must demonstrate that there are exceptional and compelling circumstances, and also lay a firm and persuasive foundation.
18. It is evident therefore that the order compelling parties cannot be issued on a whim or to support a party on a needle in the haystack search. The evidence that moves the Court to grant the order must be one that goes beyond mere musing and speculation and knocks persistently on the door of persuasion. One that prompts the Court to be persuaded that by failing to obtain medical evidence it may very well be shutting out the truth on what has been shown to be probable.
19. In doing so the Court is obligated to balance the interests of the applicants, as it would be an undesirable outcome that a dependant be denied his rights, against the public policy concern related to exhuming the dead body and constitutional safeguard against violating the respondent’s right to privacy. But ultimately the Court will strive to arrive at an outcome that delivers justice. Justice and truth in cases of this nature are inexorably linked. The responsibility rests with the applicants to persuade the Court that theirs is not a shot in the dark hoping they hit something but a quest for a missing piece in a puzzle to which they have the other pieces.
20. In this regard I am persuaded by the reasoning of Hon. Lady Justice Ali-Aroni (as she then was) in where she cited the decision in the High Court South Africa, *Bother vs Dreyer (now Moller) High Court of South Africa (Trans Vaal Province) Case No.4421/08*(unreported) and Judge J.R. Murphy stated;

“In short, I agree with those judges and commentators who contend that as a general rule the more correct approach is that the discovery of the truth should prevail over the idea that the rights to privacy and bodily integrity should be respected. - see Kemp. Proof of Consent or Compulsion (1986) 49 THRHR 271 at 279-81. I also take the position, and I will return to this more fully, later, that it will most often be in the best interest of a child to have any doubts about the paternity resolved and put beyond doubt by the best evidence”
21. In this matter, the averments of the applicants are supported by two witnesses. I will examine the respective cases of each applicant separately.



22. Benn Mugendi Maina alleges he is the son of the deceased. His mother is Faith Mutitu. Jones Muthanji Peter supports this averment. She avers that her family and the family of the deceased were neighbours and their parents were good friends. She is a sister to Faith Mutitu, she is aware that the deceased and her sister had a close relationship and the 1st Applicant was born out of that relationship.
23. In addition, Pamela Njoki Njue in her affidavit states that she is the younger sister to the deceased. She states that her family and the family of the mother of the 1st Applicant were neighbours. She is aware that the 1st Applicant was born out of a relationship between the deceased and the mother of the 1st Applicant.
24. I find that sufficient evidence has been placed before the Court for the scales to tilt in favour of the applicant to require a DNA test to get to the truth. I agree that with the time lapse and possible degradation of the body of the deceased it would not be judicious to exhume the body of the deceased. For this reason, I order that a sample be extracted from the 2nd respondent who is the known child of the deceased for purposes of determining paternity of the 1st Applicant.
25. With regard to the 2nd Applicant. In her affidavit Pamela Njoki Njue states that the applicant was likely conceived when the deceased and his wife had separated. She does not know of this child firsthand but is relying on information given to her by her brother, Charles Nyaga, who is now deceased. She does not appear to know the 2nd Applicant but is relying on information from some unidentified individuals. This coupled with the fact that the birth certificate does not disclose the identity of the father of the Applicant standstills the 2nd applicant's case. The case seems to answer itself, nexus has not been established. The 2nd Applicants request for DNA testing either by exhumation or sibling testing must be denied.
26. In the end I make the following orders
 - a. That the 2nd Respondent, Josiah Albert Muthee Ruturi will avail an appropriate sample for DNA to determine the paternity of Benn Mugendi Maina to a pathologist jointly agreed upon between the parties within 14 days from the date hereof. The 1st Applicant will meet the costs of this test.
 - b. That in the event that the parties fail to agree Josiah Albert Muthee Ruturi shall present himself before Dr. Perminus Minda Okemwa Pathologist for extraction of DNA samples and/or tissue for testing within 7 days of request being made. The 1st Applicant shall meet the costs of the test.
 - c. In addition to the test in (b) above but not as an alternative, Josiah Albert Muthee at liberty to appoint his own pathologist to conduct the paternity test in the event that the parties are unable to agree on a pathologist as directed under (a) above. In which event Benn Mugendi Maina to present himself for extraction of samples for DNA testing within 7 days of the request being made. The Estate shall meet the costs of the test.
 - d. The results of the DNA test under (b) and (c) above to be presented to the Court within 45 days from today's date.
27. Each party will bear their own costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 7TH DAY OF JUNE, 2024.

P. M NYAUNDI



JUDGE

