



In re Estate of Jama Mohamed (Deceased) (Succession Cause 34 of 1986) [2024] KEHC 8844 (KLR) (19 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8844 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 34 OF 1986**

JRA WANANDA, J

JULY 19, 2024

IN THE MATTER OF THE ESTATE OF JAMA MOHAMED (DECEASED)

BETWEEN

HALIMA JAMA (SUING THROUGH HER ADMINISTRATOR HASSAN ISSA FARAH) APPLICANT

AND

HASSAN JAMA MOHAMMED RESPONDENT

RULING

1. The background of this matter is that the deceased, Jama Mohamed Ile, died intestate on 19/06/1986. On 29/09/2022, through Messrs Onyinkwa & Co. Advocates, one Fatuma Jama Mohamed, describing herself as the eldest daughter of the deceased, petitioned for Grant of Letters of Administration over the estate of the deceased. The Petitioner stated that apart from herself, the only other survivors of the deceased the Petitioner’s 2 sisters, Asha Jama Mohammed and Halimu Jama Mohamed, both who signed consents to the Petition. The Grant was then given to the Petitioner on 29/06/1987 and was thereafter confirmed on 2/03/2001. According to the Grant, the properties left behind by the deceased, including Bungoma Town, Grant No. I.B.N. 1306 and Eldoret Municipality Block 8/123 were distributed equally to the 3 sisters as Beneficiaries.
2. On 19/07/2011, Fatuma Jama Mohamed and Asha Jama Mohamed applied for issuance of a Rectified Grant to the 2 of them jointly on the ground that their sister, co-Administrator, Halima Jama Mohamed, had died on 15/04/2011 in the Republic of Somalia and did not have any children or dependents. The Application was allowed and a Rectified Grant was given on 25/07/2011. The properties, including the said Eldoret Municipality Block 8/123 were therefore re-distributed to the two new Administrators, Fatuma Jama Mohamed and Asha Jama Mohamed, in equal shares as the beneficiaries. Indeed, I have seen a copy of the Certificate of Lease exhibited to one of the Applications



herein (dated 8/03/2022) which shows that the Certificate of Lease was issued in the joint names of the 2 Administrators as registered owners.

3. However, on 16/03/2021, the Respondent herein - Hassan Jama Mohamed - filed Summons seeking Revocation of the Grant on the ground that the same was obtained fraudulently by making false statements. In particular, the Respondent's grievance was that the Petitioner did not disclose the existence of the Respondent as a legitimate biological son of the deceased. On 27/01/2022, the Respondent and one Ahmed Jama (said to be the Respondent's brother and also another son of the deceased), made a fresh Application seeking that they be appointed the new joint Administrators because the Petitioner, Fatuma Jama Mohamed had died on 9/12/2021. It appears that in the intervening period, the only other surviving co-Administrator, Asha Jama Mohamed, had also died.
4. The record is not clear on whether the Application was heard and/or determined and whether, since all initial the co-Administrators are now dead, fresh Administrators have since been appointed. However, since the estate was long distributed among the beneficiaries, the purpose for which an Administrator was to be appointed may be deemed to be now spent and no longer necessary.
5. Be that as it may, now before Court for determination is the Amended Chamber Summons dated 23/06/2023 wherein the Applicant seeks orders as follows:
 - i. [.....] Spent
 - ii. That Hassan Jama Mohammed, the Respondent herein by himself; his employees, servants or agents and/or any person acting under him be ordered to stop collecting monthly rental income over property known as Eldoret Municipality Block 6/123 and from trespassing or interfering with the said property, the houses and tenants therein.
 - iii. That Hassan Issa Farah, the Applicant, be ordered and granted permission by this Court to collect rent over property known as Eldoret Municipality Block 6/123 and deposit it in Court by himself or through his servants or agents.
 - iv. That an order do issue compelling the Respondent to present himself at Kenya Medical Research Institute for extraction of DNA samples for testing to ascertain whether he is a child of the late Jama Mohamed, the deceased herein.
 - v. That the samples of the late Fatuma Jama Mohamed at Kenya Medical Research Institute be utilized for purposes of Deoxyribonucleic Acid (DNA) tests in (5) above instead of exhuming the body of Jama Mohamed, the deceased herein.
 - vi. That in the alternative to the above the samples of Abdi Yusuf, the son of the late Fatuma Jama Mohammed or the Applicant herein be utilized for purposes of Deoxyribonucleic Acid (DNA) tests above instead of exhuming the body of Jama Mohammed, the deceased herein.
 - vii. That this Honourable Court be pleased to order that the monthly rental income collected over property known as Eldoret Municipality Block 6/123 be deposited in a joint account to be opened in the names of the advocates for the parties herein.
 - viii. That this Honourable Court be pleased to order the OCS Turbo Police Station and/or designated officer where the subject property is situate to execute, assist in ensuring compliance of the orders above.
 - ix. Any other further orders that this Court will deem fit to grant.
 - x. The costs of this Application to be paid to the Applicant.



6. The Application is filed through Messrs SKY Advocates LLP and is expressed to be brought under Section 76 of the [Law of Succession Act](#). It is premised on the grounds on the face thereof and supported by the Affidavit sworn by the Applicant, Hassan Issa Farah.
7. In the Affidavit, the Applicant deponed that he is the Administrator of the estate of the late Halima Jama who is a beneficiary of the estate herein by dint of being the daughter of the deceased, that the deceased died a Muslim on 19/6/1986 and was buried as so and that at time of his death, the deceased left the late Fatuma Jama Mohammed, the late Asha Jama Mohammed and the late Halima Jama Mohammed, that on account thereof, the Court confirmed the Grant on 29/03/2001, that the Respondent has now moved this Court seeking to revoke the subject Grant allegedly claiming to be a son of the Applicant's deceased grandfather, that in response to the Application, the Applicant's aunt who was vested as the Administrator of the estate herein, Fatuma Jama Mohamed, filed a Replying Affidavit on 2/07/2021 denying that the Respondent was a child of the deceased.
8. The Applicant deponed further that although there was an existing Certificate of Birth No. [particulars withheld] for the Respondent, there is no genetic or cogent evidence that the deceased was the Respondent's biological father, that before the Administrator - Fatuma Jama Mohamed - passed on the 9/12/2021, she had left samples for DNA testing so as to settle the issue of paternity for purposes of inheritance of the estate of the deceased instead of having the remains of the deceased exhumed, which is contrary to Islamic Shariah. According to him, it is an uncontroverted fact that the late Fatuma Jama Mohamed was the biological daughter of the deceased, that Abdi Awil Mohamed, Abdi Yusuf and himself are the surviving children of the beneficiaries and Administrators to the estate herein, that upon the demise of the Administrator, Fatuma Jama Mohammed, the Respondent has been illegally and unlawfully taking rent in respect of the subject property, Eldoret Municipality Block 8/123, in contravention of the orders of this Court, and that the Applicant is ready and willing to collect the rent remit it to Court without fail.
9. The Applicant deponed further that it is in the best interest of the estate that he be allowed to collect the rent and remit it to Court and also that the Respondent and Ahmed Jama Mohammed be stopped from trespassing on the property. He reiterated that the Respondent is not a son of his late grandfather, the deceased herein, that the estate is wasting on account of the dispute herein and that no prejudice will be suffered by any party to this suit if the orders sought are granted.
10. I have also come across an Affidavit sworn jointly by one Mohamed Adan Mohamed and one Abdi Yusuf and filed on 23/08/2023 through Messrs Tom Mutei & Co. Advocates. The same does not however indicate which Application it has been filed in respect to. It however appears to have been filed in support of the instant Application. In the Affidavit, the two have deponed that they are grandsons of the deceased being the respective sons of the respective Administrators/beneficiaries, the late Fatuma Jama Mohamed and the late Asha Jama, the registered co-owners of the property, Eldoret Municipality Block 8/123. They deponed further that the property comprises of rental units from which rental income is collected monthly, that they are yet to petition the Court on behalf of their said deceased mothers for Letters of Administration, but that as sons of the deceased beneficiaries, they are entitled to collect the rent therefrom.
11. They also deponed that they are aware that pursuant to Court orders issued on 18/07/2023, Hassan Issa Farah (Applicant) was allowed to collect rental income through their Advocates, and that they are not opposed to the said Hassan Issa Farah being allowed to collect rent as ordered by the Court. This



portion of the Affidavit does not however seem to be correct since the record reveals that the interim order issued was in the following terms:

“v) In the meantime, the rent collected by the Respondent from the property Eldoret Municipality Block 8/123 shall be deposited in a Bank Account to be opened at Kenya Commercial Bank (KCB) in the joint names of the two Advocate Law firms on record in this matter, pending further directions from this Court.”

12. It is therefore evident that it is the Respondent, not the Applicant, whom the Court allowed to continue collecting rent and directed him to deposit the same in a bank Account to be opened in the joint names of their Advocates. The deponents' statement is not therefore correct.

Respondent's Replying Affidavits

13. The Application is opposed by the Respondent vide his Replying Affidavit filed on 26/7/2023 through Messrs Kogo Kimutai & Co. Advocates. He deponed that the Applicant is a stranger to the estate herein as no proof has been tendered to prove his relationship with Halima Jama Mohamed, that during confirmation of the Grant issued to Fatuma Jama and Asha Jama Mohammed, the two swore before this Court that the said Halima Jama Mohamed died in Mogadishu, Somalia with no children, that he (Respondent) is the son to the deceased having been born of his 3rd widow, Saida Salim, that at the time of issuance of his Certificate of Birth, it is clearly indicated that the information was provided by his father (the deceased herein) and the issue of DNA does not therefore arise. He deponed further that his sisters, Asha Jama Mohammed, Fatuma Jama Mohammed and Halima Jama Mohammed with the consent of the Respondent's mother and father, removed him (Respondent) from their custody when he was 1 and ½ years old, that this was some time in 1981 and they brought him to Eldoret where they raised him as their brother and took him through school.
14. He added that initially, they lived in a rental house but after sometime their late father (deceased) bought the said Eldoret Municipality Block 6/123 where they all moved in, that he resides in the property together with other family members and that they have been living there since the 1980's together with their sisters, Fatuma Jama Mohammed, Asha Jama Mohammed and Halima Jama Mohammed, that his said sisters took him through school and paid his fees using rent proceeds from the said Eldoret Municipality Block 6/123 and that upon the demise of their father (deceased) in Malindi, he was buried at the mosque cemetery by Fatuma Jama Mohammed, Asha Jama Mohammed, Halima Jama Mohammed and the Respondent's mother in accordance with the Islamic rites.
15. He contended further that during the lifetime of his sisters, no issues arose as to his paternity and it only arose when all his sisters passed away when some of their children wanted them to vacate their only home, that the issue of DNA does not therefore arise, that his mother was legally married to his father (deceased) at the time of his birth, that Islamic law which is applicable to this cause is categorical as regards ascertainment of the heirs of an estate as well as the distribution of a deceased's estate. He deponed further that no order of the Court has been annexed to the Application giving authority to Kenya Medical Research Institute to extract any DNA samples from the said Fatuma Jama Mohammed and that the orders sought by the Applicant are not tenable in law as the applicable law in this Cause is Islamic law and that the Applicant has not cited the provisions of law that he relies on.
16. Also filed in support of the Respondent through Messrs Kogo Kimutai & Co. Advocates is the 2nd Replying Affidavit filed on the same 26/7/2023 and sworn by the said Saida Salim Ahmed. She deponed that she is the mother to the Respondent and that she got married to the deceased herein as his 3rd wife in February 1977 and that on 29/08/1977, the Respondent was born, that the Respondent was



taken into the custody of his sisters in the 1980s and that they have since lived together. In conclusion, she reiterated that the Respondent is the biological son of the deceased and that the Applicant is only hellbent on frustrating the Respondent.

17. Further, filed in support of the Respondent through the same Messrs Kogo Kimutai & Co. Advocates is the 3rd Replied Affidavit filed on the same 26/7/2023 and sworn by one Roseline Jerop Kitur. She deponed that she is the 2nd wife to the deceased with whom they got married in 1967, that they established a home in Soy-Vihiga farm but that the deceased moved to Malindi in early 1977, that in 1977 she was invited to a “Nikah” where she witnessed the deceased marry Saida Salim Ahmed as his 3rd wife, that as a result of the marriage, the Respondent herein was born, that the Respondent was later taken into the custody of his sisters in the 1980s where also the deponent’s children were living and that they have lived together to date with no disputes. She therefore reiterated that the Respondent is the biological son of the deceased and that the Applicant is only hellbent on frustrating the Respondent.

Applicant’s Further Affidavit

18. In a re-joinder, the Applicant filed a Further Affidavit on 2/10/2023 wherein he reiterated that he is one of the deceased's grandsons and the Administrator of the estate of the late Halima Jama Mohamed as evidenced by the copy of the Grant ad Litem and Birth Certificate that he produced. He deponed that the threshold of a marriage as per Shariah law has not been met, that it is trite law that he who alleges must prove but the Respondent has not submitted any Marriage Certificate or witnesses to prove the existence of a marriage between his mother and the deceased, that in accordance with Shariah law, paternity is determined by the existence of a valid Marriage Certificate, that in the alternative, Islamic law dictates that the person alleging existence of a marriage must, in the least as a threshold to prove marriage, call as a witness the one who conducted the marriage and the guardian who represented the bride which the Respondent has not done.
19. He contended further that for the truth to be established and just conclusion reached, the DNA test will put to rest the Application for Revocation by the Respondent and dispense of all other Applications, that the Court should order the Respondent to present himself for DNA test to confirm that he is a child to the deceased and that the Applicant is ready to cater for the costs thereof. He deponed further that Muslim women are not allowed in cemeteries. The rest of the matters deponed are mere repetitions.

Hearing of the Application

20. The Application was canvassed by way of written Submissions. The Applicant filed his Submissions on 3/10/2023 while the Respondent filed on 7/11/2023.

Applicant’s Submissions

21. The Applicant’s Counsel submitted that the Application seeks to preserve the estate for the benefit of all heirs but he then basically repeated matters already stated in his Affidavits. He then submitted that he who alleges must prove and that the Respondent has not proved that he is a legitimate son to the deceased. He cited the case of Succession Cause No. 200 of 2015; In the Matter of Estate of Salim Juma Hakcem Kitendo (Deceased). He submitted further that in Islam, only a legally existing marriage confers the right to inheritance to the estate of a deceased and that the Respondent should not therefore inherit from the estate until issues regarding his paternity are determined. He contended further that the deceased was born, lived and died a Muslim and that his body buried as per Muslim rights and that his estate should thus be distributed to legitimate heirs as per Muslim law. He cited Article 24 (4) of



the Constitution, Section 2(3) of the Law of Succession Act and also the case of Ali Mohamed Kismala Vs. Mohamed Ahmed Mohamed.

22. Regarding the Respondent's contention that he was brought up by the daughters of the deceased, whom he alleges to be his sisters, in Eldoret from when he was 1 ½ years old, Counsel argued submitted that the Respondent is not the deceased's biological child but a child who was taken in by the deceased's family to support him and see him through school, but who is now forcefully claiming for what is not rightfully his, and that the Respondent is an adopted child to the deceased who has no right to inherit from the estate of his adoptive parents. He cited the case of Civil Appeal No. 17 of 2019, MO vs. HAK. He argued further that the fact that the name of the deceased appears in the Respondent's Birth Certificate is not enough proof of his being the deceased's biological child under Shariah law. According to him, paternity is the hallmark of inheritance in the Muslim religion. He cited the case of In the Matter of the Estate of Ishmael Juma Chelanga-Deceased [2002] eKLR and also the case of In re Estate of CCBH (Deceased) [2017] eKLR. He then reiterated his prayers that the DNA samples of the late Fatuma Jama Mohammed kept at the Kenya Medical Research Institute be utilized for purposes of DNA tests instead of exhuming the body of the deceased and that in the alternative, samples be taken from one Abdi Yusuf, a son of the late Fatuma Jama for purposes of the test instead of exhuming the body of the deceased. He cited the case of Succession Cause No. 123 of 2017, In the matter of the estate of J.K. (Deceased).

Respondent's Submissions

23. In regard to whether the Respondent is a child of the deceased, Counsel for the Respondent submitted that the deceased had 3 wives namely; Hodan Mohammed, Roselyn Cherop and Saida Salim Ahmed, 1st, 2nd and 3rd wives, respectively, that from the 3 wives, the deceased got 7 children, that the Respondent was born to the 3rd wife, Saida Salim Ahmed, in 1979, that he was issued with a Birth Certificate as exhibited which duly bears the name of the deceased and Saida Salim Ahmed as the parents of the Respondent and which Birth Certificate the Applicants have not disputed the veracity thereof. He cited Section 3(2) of the Law of Succession Act and submitted that since there is documentary evidence in form of the Birth Certificate bearing the name of the deceased, it follows that the deceased voluntarily assumed responsibility of the Respondent as being his biological father.
24. Counsel further submitted that the Respondent's mother, Saida Salim Ahmed, through her Affidavit dated 21/07/2023 averred that she was married to the deceased as his 3rd wife in February 1977 and that the Respondent was born thereafter on 29/08/1979. Like the Applicant, he, too, submitted that the basis of paternity in Islam is a legal marriage which, according to him, has been affirmed herein by the Respondent's mother vide her said Affidavit. He, too, submitted that for a child to be legal, he must have been conceived after consummation of marriage and born at least 6 months after the marriage, and that in this case, the Respondent was born after 6 months of the marriage between the deceased and his mother in 1979. Counsel argued that further, the said Roseline Cherop, the 2nd wife of the deceased, also swore an Affidavit confirming that she attended the "Nikah" ceremony wherein she witnessed the deceased marry the said Saida Salim Ahmed as his 3rd wife and that the Respondent was born to the couple after the marriage. He cited Section 11 and 12 of the Births and Deaths Registration Act and also the case of Joachim Ndaire Macharia Vs Mary Wangare & Another (2008) eKLR and argued that in this instance therefore, the Birth Certificate produced is sufficient proof of the paternity of the Respondent. He submitted further to that the Respondent's National Identity Card also bears the name of the deceased and cited the case of In Re Estate of Mohamed Kismala (2017) eKLR. Counsel contended further that the Applicant has not led any evidence on why he believes that the Respondent is not a child of the deceased despite not contesting the Birth Certificate.



25. As regards whether the late Fatuma Jama Mohamed is a child of the deceased, Counsel submitted that the Applicant is seeking orders for a DNA test to be conducted on the basis of samples taken from the body of the said the late Fatuma Jama Mohamed's but that no evidence has been adduced by the Applicant to show that indeed the late Fatuma Jama Mohamed was herself the child of the deceased, that there is no Birth Certificate or DNA genetic or cogent evidence to prove that she is actually the daughter of the deceased. He contended that they could as well argue that the late Fatuma Jama Mohamed is a stranger to the estate and that she should therefore not have taken out Letters of Administration or even to have inherited from the estate. According to Counsel therefore, since no such cogent evidence has been presented to prove that the late Fatuma Jama Mohamed is a child of the deceased, it would be unfair to use samples from her body to conduct such DNA test.
26. On whether the Applicant is related to the deceased, Counsel submitted that the Applicant applied as an Administrator of the estate of the late Halima Jama claiming to be a grandchild of the deceased but that he has however not provided any cogent evidence of such relationships. Counsel argued that the late Fatuma Jama and Aisha Jama, when they sought applied for amendment of the Certificate of Grant in 2011, swore an Affidavit in which they stated that their sister, the late Halima Jama Mohamed, was not blessed with any children or dependents, that however the Applicant took out Letters of Administration Ad Litem stating that he is the late Halima Jama Mohammed's son. According to Counsel, these are two very contradictory facts both sworn before this Court with no way to ascertain the truth. He argued that since the late Fatuma Jama Mohamed and the late Aisha Jama Mohamed are sisters to Halima Jama Mohamed, they were better placed to ascertain whether their sibling had any children and they swore that she did not. According to the Respondent, the Applicant has committed the offence of perjury under Section 114 of the Penal Code. He further argued that if this Court is to rely on the statement by the Applicant that he is a grandson of the deceased, it would mean that the Affidavit upon which the late Fatuma Jama Mohamed and Asha Jama Mohamed obtained the Certificate of Confirmation of Grant herein consisted of falsehoods and fraud and it would then follow that the Grant is null and void and in turn, it would mean that the Applicant is a stranger to these proceedings. He maintained that the Applicant has not demonstrated that he is related in any way to the deceased as required under Section 107 of the [Evidence Act](#).
27. On whether the Applicant is entitled to the orders for DNA analysis, Counsel reiterated the matters already stated and added that under [the Constitution](#) on the right to privacy, Article 31 protects the unnecessary requisition or revelation of private information. According to him, the Respondent's rights, if compelled to have the DNA samples taken from him, will be violated since his rights under the Bill of Rights need to be protected. He argued further that the extraction of DNA samples from the late Fatuma Jama Mohamed was done before her death and that since it has been several years since then, there is no guarantee that the samples as stored have not degenerated due to passing of time. He added that at the same time, the late Fatuma Jama Mohamed and the Respondent do not share both parents but only the father. He therefore submitted that it would be abhorrent and unfair to utilize the samples from the late Fatuma Jama or the Applicant or Abdi Yusuf to conduct the DNA analysis since none of them is a child of the deceased and they do have very different fathers as compared to the Respondent whose DNA it is sought to be compared with. Counsel maintained that if indeed the Court finds that the DNA analysis is of necessity, then it would be prudent to utilize the DNA of the deceased. He cited the case of *FNT & Another v CM on behalf of CSNT* (2021) eKLR.
28. Regarding his contention that an order to compel the Respondent to have DNA samples extracted from him for testing would infringe on the Respondent's constitutional rights to privacy, Counsel cited the case [UFM V KFM \(Family Appeal 5 of 2020\)](#) [2022] (2022) KEHC 14589 (KLR, and also the case of *SMW VS GMK* (2012) eKLR. He maintained that granting the orders for DNA extraction



will violate his rights and that the Applicant has failed to demonstrate that his rights should override the Respondent's rights to privacy and bodily integrity. He cited the case DNM V JK (2016) eKLR and argued that the Orders ought not to be granted lightly especially since paternity can be proven by way of the Birth Certificate provided.

Determination

29. There is no doubt that what the instant Application seeks to address is the Respondent's paternity, i.e. "whether the Respondent is the biological child of the deceased". As a consequence, the Applicant prays that the Respondent be compelled to submit himself to a DNA test. The basis of the said prayers seems to be that, according to the Applicant, the Respondent is not a biological child of the deceased, and that therefore, he should not be the one collecting rent from the estate property, Eldoret Municipality Block 6/123. According to the Applicant, it is him (as a grandson of the deceased) who should be the one collecting rent.
30. It is therefore clear that the motivation for the Applicant to file the instant Application is to stop the Respondent from collecting rent proceeds from the property, Eldoret Municipality Block 6/123.
31. As aforesaid, it is not in dispute that when the Grant herein was initially given on 29/06/1987, it is Fatuma Jama Mohamed who was appointed the sole Administrator and when the same was later confirmed on 2/03/2011, the estate was distributed equally among the 3 sisters (daughters of the deceased) as beneficiaries, namely, Fatuma Jama Mohamed, Asha Jama Mohamed and Halima Jama Mohamed.
32. As aforesaid, after Halima Jama Mohamed died, the Grant was subsequently Rectified on 25/07/2011 wherein the estate properties, including the said Eldoret Municipality Block 8/123 were re-distributed to the 2 then surviving Administrators, Fatuma Jama Mohamed and Asha Jama Mohamed, in equal shares as beneficiaries. As further stated, pursuant thereto, that property is now accordingly registered in the joint names of the said 2 Administrators, Fatuma Jama Mohamed and Asha Jama Mohamed as the joint registered owners. It is however not in dispute that both these 2 Administrators/Beneficiaries are now also dead.
33. It is also not in dispute that the Applicant's alleged locus in this Cause is that he is a grandson of the deceased, being allegedly a son of the late Halima Jama Mohamed upon whose estate he holds a Limited Grant of Administration Ad Litem. It is however relevant to note, as aforesaid, that on 19/07/2011 when the said Fatuma Jama Mohamed and Asha Jama Mohamed applied for a Rectified Grant to be given to the 2 of them jointly on the ground that their sister, co-beneficiary, Halima Jama Mohamed, had died on 15/04/2011 in the Republic of Somalia, they deposed that Halima Jama Mohamed did not leave behind any children or dependents. Of course, when the Applicant emerged when he filed the instant Application on 26/01/2023, 12 years after the Grant was rectified on 25/07/2011, he exhibited a copy of a Birth Certificate bearing the name of Halima Jama Mohamed as being his mother and showing that he (Applicant) was born on 1/06/1960.
34. Whether or not the Applicant is the son of the said Halima Jama Mohamed and therefore a grandson of the deceased is therefore an issue yet to be determined. However, the more important fact is that although the Applicant's claim is for the share allegedly inherited by the said Halima Jama Mohamed, in view of the Grant rectified on 25/07/2011, the said Halima Jama Mohamed herself no longer has any share in the estate. Although she was initially among the 3 beneficiaries, upon her death, said to have occurred in Somali on 15/04/2011, the 2 remaining beneficiaries, Fatuma Jama Mohamed and Asha Jama Mohamed, became the 2 sole beneficiaries. What share is the Applicant therefore agitating about in the circumstances? To my knowledge there is none.



35. In my view, the Applicant's recourse would be to apply for Revocation of the Grant issued herein (initially confirmed on 2/03/2001 and later rectified on 25/07/2011). Of course, the rectified Grant having been issued 12 years ago on 25/07/2011, the Applicant will have a herculean task to convince the Court to revoke the Grant after such a very long time. Until and unless the Applicant successfully files for and obtains Revocation of the Rectified Grant and a re-distribution of the estate is made to include him, I do not see how he can, at this stage, possess any basis, in law, to seek to collect rent from the property, or to even question the paternity of members of the family. In my further view, only the survivors of the current beneficiaries, Fatuma Jama Mohamed and Asha Jama Mohamed, can agitate on the issue of rent collection.
36. In any event, regarding the issue of the Respondent's paternity, the Respondent has insisted that he is a son of the deceased begotten through the 3rd wife, Saida Salim. The Respondent has tendered a copy of his birth Certificate as proof that he indeed is a son of the deceased. He has also stated that he lived with and grew within the family of the deceased which allegation has not been seriously challenged. The Respondent's mother, Saida Salim Ahmed, has also sworn an Affidavit contending that she was married to the deceased as his 3rd wife in February 1977 and that the Respondent was born thereafter born to them on 29/08/1979. One Roseline Cherop, the 2nd wife of the deceased, also swore an Affidavit stating that she attended a "Nikah" ceremony wherein she witnessed the deceased marry the said Saida Salim Ahmed as his 3rd wife and that the Respondent was born to the couple after the marriage.
37. The Applicant contends that although the Respondent tendered a copy of his Certificate of Birth as proof of his relationship with the deceased, there is in fact no "generic or cogent evidence" that the deceased was the biological father to the Respondent. In my view, where sufficient evidence exists to resolve the issue of paternity without necessarily ordering for a DNA test, an order for a DNA test would be inappropriate and should not be granted.
38. DNA which is the short version of Deoxyribonucleic Acid, is a genetic material which one inherits from a father or mother. It has been proved that science, through DNA, can achieve up to 99.9% accurate results in determining paternity. Should this Court then order the Respondent to submit to a DNA test? I do not think so.
39. First, the deceased died on 19/06/1986, 38 years ago. Whereas the law does not prohibit extraction of samples from a deceased person's body, Courts should exercise extreme caution not to interfere with the peaceful resting of departed ones if there is an alternative way or source or method of achieving the intended results. The Applicant correctly therefore does not insist on exhumation, which in any event, is discouraged in the Islamic faith.
40. Secondly, although the Applicant is seeking orders for a DNA test to be conducted on the Respondent on the basis of samples that were allegedly taken from the body of the said the late Fatuma Jama Mohamed and reportedly stored at the Kenya Medical Research Institute (KEMRI) before she died, it cannot be simply presumed that such samples would be of assistance. This is because the fact that a man "believes" that he has "fathered" a child is not necessarily conclusive proof that he is in fact the scientifically or biological sire. The Court cannot therefore assume that simply because the deceased was accepted "by all" to be the "father" to Fatuma Jama Mohamed, that automatically, samples taken from Fatuma Jama Mohamed would mirror the DNA profile of the deceased. The Court cannot operate upon such inconclusive assumptions.
41. Thirdly, the Respondent has also argued further that the extraction of DNA samples from the late Fatuma Jama Mohamed was done before her death and that since it has been several years since then,



there is no guarantee that the samples as stored have not degenerated due to passing of time. This indeed, too, is a valid concern.

42. Further and as aforesaid, this Court already fully carried out its statutory mandate as a Succession Court and had long wound up this Cause. This is because the Court, by confirming the Grant way back on 19/03/2001, 23 years ago, fully distributed the estate herein. This Court is now therefore basically *functus officio* and the situation shall remain so until and unless the Grant is revoked. The Court should therefore not be dragged into resolving secondary disputes arising between or among 2nd and 3rd generation descendants of the deceased. If the Courts were to allow such, then Succession matters will never be concluded. The drafters of the *Law of Succession Act* could not have contemplated such endless litigation.
43. It is not therefore proper for this Succession Court, 38 years after it had already fully concluded its mandate of distributing the estate of the deceased amongst the beneficiaries, to be dragged back into ordering DNA tests to be taken or determining paternity of 2nd and 3rd generation descendants of the deceased. Any further litigation should now be conducted under the estates of the party's respective parents. As regards the estate of the deceased, this Court will not reopen litigation.
44. On this issue of ordering for a DNA test, I cite Hon. Sergon J in the case of *In re Estate of Elijah Cheruiyot Chebelyon (Deceased) (Succession Cause E041 of 2021) [2024] KEHC 2631 (KLR) (5 March 2024) (Ruling)*, in which he made the following statement:

“..... 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.”
45. Further, in the case of *DNM v JK [2016] eKLR*, the late Hon. JLO Onguto J held as follows:

“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. Untested and controverted affidavit evidence, may not suffice.”
46. Also, in *S.W.M vs. G.M.K [2012] eKLR*, the late Hon. D. S. Majanja J declined to order DNA testing since according to him, such an order would have resulted in the violation of the non-consenting adult's rights to bodily integrity and privacy. He stated as follows:

“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”.
47. I believe that I now have said enough to leave no doubt that I am not persuaded that the Applicant has established any “exceptional circumstances” to warrant this Court to order the Respondent to undergo a DNA test to establish his paternity.



48. Regarding rent proceeds from the property, I understand that it is the Respondent who is currently and has been collecting the same. Like the Applicant, the Respondent's locus in collecting rent is equally questionable considering that he, too, is not a direct beneficiary to the estate of the deceased and his mother, Saida Salim Ahmed, too, was not a beneficiary. As aforesaid, the persons who would have the right to collect rent are the respective legal representatives of the beneficiaries, namely, Fatuma Jama Mohamed and Asha Jama Mohamed.
49. From the record, I note that the respective sons of the said respective beneficiaries (both now dead), one Mohamed Adan Mohamed and one Abdi Yusuf have indeed come forward as children of the respective beneficiaries. Although they have sworn an Affidavit deponing that they are agreeable to the Applicant being allowed to collect rent, in law, they have no capacity to give any authority. What they need to do is to themselves apply to be appointed as Administrators or Legal Representatives of the respective estates of their respective mothers and once they are so appointed, they will be eligible to take over collection of the rent. Since however, there is no evidence that they have done that, I find that it will be too disruptive to replace the Respondent or substitute him with the Applicant as the person to collect rent. In the circumstances, I choose to let the status quo prevailing to remain as it is. I do not therefore see any need to bar the Respondent from collecting rent at least for now.

Final Orders

50. In the end, I order as follows:
- i. The Applicant's Amended Chamber Summons dated 23/06/2023 and filed in Court on 26/06/2023 is disallowed save that I grant prayer (8) of the Application and consequently, confirm as a final order the following order earlier issued as an interim measure:

Pending further directions from the Court and/or agreement amongst the parties, and in respect to which any party is at liberty to move the Court accordingly, the rental income collected by the Respondent from the property Eldoret Municipality Block 8/123 shall be deposited in a Bank Account to be opened at the Kenya Commercial Bank (KCB) in the joint names of the two Advocate Law firms on record in this matter
 - ii. I make no order on costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 19TH DAY OF JULY 2024

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Yusuf for Applicant

Ms Kosgey h/b for Ms Bornes for Respondent

Ms Moraa for 2 beneficiaries

Court Assistant: Brian Kimathi

