



**In re Estate of KC (Deceased) (Probate & Administration E053 of 2020)
[2024] KEHC 11205 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11205 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
PROBATE & ADMINISTRATION E053 OF 2020
RN NYAKUNDI, J
SEPTEMBER 20, 2024
IN THE MATTER OF THE ESTATE OF KC (DECEASED)**

BETWEEN

EJK ALIAS S APPLICANT

AND

**GK & 3 OTHERS & 3 OTHERS & 3 OTHERS & 3 OTHERS & 3
OTHERS RESPONDENT**

RULING

1. Summons for revocation dated 25th January, 2023 were before me for determination and this court delivered a ruling on 15th May, 2023, in which I issued directions as follows:
 - a. That a DNA examination shall be done on both the Petitioners (namely GK, BK, SK and DK) and the Objector (namely E Jepkemei Keter alias S) in order to determine the issue of the identity of the Objector herein.
 - b. That the DNA to be done by Kenya Medical Research Institute (KEMRI)
 - c. That matching samples shall be taken from the bodies of the Petitioners and Objector named in (a) above within (45) days from the date of this ruling
 - d. That the costs of conducting the DNA test be shared equally between the Objector and the Petitioners.
 - e. That the Kenya Medical Research Institute to submit their report within (30) days from the date of submission of samples.
 - f. That this case will be mentioned on 26/6/2023 for status conference
 - g. Interim orders on preservation of the estate extended.



- h. Thereafter, the totality on distribution of the estate be fast-tracked to bring it to a closure
 - i. Costs of the Application to abide the outcome of the DNA results.
2. Learned counsel for the Objector wrote to the court vide a letter dated 20th September, 2023 stating that they have experienced challenges in complying with the court orders for reasons that the objector declined to be subjected to the test stating that her conscience and the relationship she had with the deceased would not allow her do such a thing.
3. The Objector then resorted to affidavit evidence as directed by the court wherein she filed two affidavits, one sworn by the area assistant chief and another by her eldest son.
4. According to the area assistant chief, he deposed that he knows well the family of KC having been members of his area of jurisdiction. He stated that he knows the objector herein as the daughter to the deceased herein. He further stated that he came to learn from the community members that the late KC was married to the mother of the objector herein but later separated after the objector was born.
5. The witness deposed that it was within his knowledge that the late DK the Objector's mother had two daughters, the objector herein and one JK who has since passed on. That the late KC had 3 other wives with several children.
6. The witness narrated an incident in the year 1998 immediately after the demise of the Objector's mother DK. That he was sent together with some village elders by the family of the Objector to visit the family of KC (who then had since passed on) to inquire from them whether they would bury the remains of D (who had just passed on) to inquire from them whether they would bury the remains of D who had just passed on. He deposed that on arrival at the family of the deceased herein, he found out that the family had called a meeting where all their members were in attendance except GK Kitur, one of the Petitioners herein. The witness states that one SK Kitur who is also one of the petitioners informed him that the decision they had arrived at as a family would be communicated to him by one SK (C) who immediately told him that the remains of the Objector's mother would be interred by the Objector being her daughter and they would not participate in the process.
7. The witness further relayed another instance in 2012 when one EK went to his office and requested him (the Ass. Chief) to arrange for a meeting between his father (E's father) SK and the Objector herein for reconciliation for what E said was to avoid a bad spell befalling them in future since the two (Objector and SK) were brother and sister and yet they were not in good terms. He further says that later one morning, EK brought the two to meet in the deponent's home and they had a talk around one hour and left thereafter each of them appearing happy. The deponent confirmed that the Objector herein is a daughter to the deceased.
8. SKK equally filed an affidavit in which he deposed that he was the eldest son of the objector who was born in 1929 in Sугоi. He stated that his mother is now old. That he came to know of his grandfather the deceased herein in the year 1958 when he was in class 2. He stated that he used to stay with his grandfather from 1961 to 1964 while schooling at [Particulars Withheld] Primary School. He further averred that he used to stay with his grandfather since his school was far from his home but near the grandfather's place. The witness contends that the deceased recognized him as his grandson and that he knows no other grandfather who sired his mother apart from the deceased herein.
9. The witness deposed that in October 1979 at Cheptil-Kilagam Market, the deceased herein informed him that he was married to his grandmother DJ. That he confirmed the same since his grandmother used to visit the deceased herein at his home. The deponent further says that in 1998 when his grandmother passed on, TK and GK came to their home to visit his mother the objector herein and



informed them that they would be burying the remains of DK in their (GB's) home, her husband's land. The witness narrated that they thereafter totally refused to keep their word and declined to bury her remains there. That information was communicated to them by the area Assistant Chief, Sammy Kerich. That the late DK was later buried in their land Nandi/Cheptil/4XX

10. The witness confirmed that his mother is the daughter to the deceased herein a fact known to everyone in their village and beyond.

Determination

11. Let me start by looking beyond our jurisdiction. In a South African case *Bother vs Dreyer* (now *Moller*) High Court of South Africa (Trans Vaal Province) Case No.4421/08(unreported) Judge J.R. Murphy stated as follows on the question of paternity;

“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”

12. In Kenyan context it is important to note that this republic is a signatory to the International Covenant on Civil and Political Rights given the constitutional imperatives in Art. 2(5) & (6) of the Constitution. In this convention the right to privacy is derived from Art. 21, whereas Art 31 of our Constitution states as follows:

“That every person has the right to privacy which includes the right not to have their person, home or property searched.”

13. By dint of this Article, no one shall be subject to arbitrary or unlawful interference with his privacy. My understanding and construction of this provision, the right to privacy is actually not a right which cannot be derogated from under our constitution in the same line with Art. 25 and 50 of the Constitution. The attempt in this case by a court order to ascertain paternity of an individual by providing DNA samples under the guidance of supervision of a medical doctor, will be a manner in which merely that privacy is invaded but cannot be holistically stated that it is an infringement under Art 31 of the Constitution. In this case there is a compelling basis why this right to privacy itself has got to be invaded and the import of the justification is on the strained evidence to establish paternity in the ordinary sense of the process.
14. In my judgment the process of collecting samples and subjecting them to a test would not cause any substantial loss to the objector, except inconvenience that is less important to finding a lasting solution to the issue raised in the first place. The DNA result would have been crucial in determining whether the objector is beneficiary and/or dependent of the deceased's estate. The paternity question is central to the dispute in question, whether the objector is one of the beneficiaries of the deceased's estate. In my opinion, it could have been the convenient way to resolve the paternity issue and have the matter pursued to its logical conclusion.
15. Why the necessity of DNA? DNA is made up of one half of one's biological mother's DNA and one half of his/her biological father's DNA. In the human anatomy, 50% of the DNA of both parents is passed down to their biological children. It is this kind of scientific evidence that places a DNA test in a unique, classified and accurate testing which establishes parentage and direct descendants of a deceased



person in the case of contestation in succession matters or in the case of a dispute between a child as it relates to his/her paternity. The issue being canvassed by E that due to an advanced age she cannot offer her DNA samples as ordered by this court is not matched with scientific evidence as there is no age limit in determining the genetic blue print of a human being. Again, it is scientifically proven that DNA can be extracted from a wide range of sources including samples of hair, blood, saliva, semen or nail clippings. In this context therefore, E's objection or disobedience to offer her samples as ordered by this court on this contentious paternity dispute leaves her on a weaker ground to lay claim to the estate of the deceased. It is important to note that the learned counsel Mr. Cheruiyot has invited this court to have the dependents of the affidavits to have their dispositions tested as to their veracity in a cross examination forum. Without being pessimistic on the likely outcome, one has to take judicial notice that the primary evidence of any witness remains the one stated in his/her affidavit or in the witness statement. All what cross examination does is to firm up the truthfulness and probative value of admissible evidence in establishing existence or non-existence of a fact in issue as defined in Section 107(1) of the *Evidence Act* so as to secure judgment in his/her favour.

16. I think from the outset, that seems to have been the wisdom of the court. Calling for scientific evidence of a DNA to establish paternity and kinship relationship and indeed it has been proven over time the accuracy of DNA profiling and its authenticity and reliability is beyond question. It is a matter of judicial notice that legal disputes tailored to vindicate certain fundamental rights and freedoms remain to be a contest between two warring parties and more often than not the truth is never told and the court is left to toss the coin as to who between the parties is closer to the truth of the facts in issue with regard to the dispute.
17. I am of the considered view, given the nature of the right to privacy entrenched in our Constitution, there may be grey areas where an order so made by the court is likely to violate or infringe that protected right. It is much safer for courts being confronted with an application for a DNA profile to establish paternity in the first instance to strictly adhere to the conventional, unscientific, effective and other evidential material as promoted in our system of justice.
18. The court in the case of Wilfred Karengi Gathiomi vs Joyce Wambui Mutura & Another (2016) eKLR, the court stated

“Therefore, since under our law Sections 107 108 & 109 of the *Evidence Act* Cap 80 mandates that he who alleges must prove; the Applicant is the one who raised the issue of paternity against the 1st Respondent. He did not prove. The 1st Respondent claimed in spite of the date contained in her ID card she was born in 1950. She did not prove the same. Therefore, the only option is to result to scientific method for conclusive results. Both parties should undergo a sibling DNA testing to confirm if they are of the same father or not.

The court finds that the DNA testing will not cause substantial loss to the applicant, except inconvenience that is less important to finding a lasting solution to the issue raised in the first place.....

In light of above-cited authorities that DNA is intrusive and interferes with the right to privacy, this court finds basis for the DNA testing. Paternity is central to the dispute at hand, whether the 1st respondent is one of the beneficiaries of the estate of the deceased's estate. It is the only way to resolve the paternity issue, the applicant raised and is now reluctant to pursue the matter to its logical conclusion. The DNA testing will not prejudice the Applicant's case pending appeal, as he has not advanced any proposal on how to resolve issue it was his word against his.”



19. At the heart of the present dispute is the question of paternity and from the start of it, I have been persuaded that justice will only be rendered in the circumstances of this matter if the objector would have taken the approach given by this court of conducting DNA over the idea that she is of age and therefore not capable of undergoing the process. That in my view would have been the best available and most accurate approach for this court to arrive at a fair decision.
20. Nonetheless, I am conscious of the fact that scientific proof must 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. In the case of ANM & RMM (suing in their own behalf and on behalf of AMM (Minor) as parents and next friend) v FPA & Attorney General (Constitutional Petition [10 of 2017](#)) [2019] KEHC 7369 (KLR) stated as follows:
- “Clearly, a direction that a party undergoes a DNA test is a limitation or restriction of the rights to privacy and dignity. It is therefore clear that the right to privacy is one of the fundamental rights enshrined in the [Constitution](#). For the said right to be limited the provisions of article 24 of the [Constitution](#) must be satisfied.”
21. The objector opted to use affidavit evidence wherein two affidavits have been adduced in support of the Objector’s position that she is a beneficiary to the estate of the deceased. Besides the affidavit evidence, there is no nexus biologically connecting the objector and the deceased person.
22. The decision to conduct DNA test through samples submitted by the Objector is the only sure way of determining the paternity of this case and put to rest the only issue of contention. Without it as I have stated elsewhere, it leaves her on a weaker ground. The affidavit evidence as adduced by the Objector and other witnesses is inconclusive. Scientific evidence was the last resort for this court to make a just and fair determination.
23. In *Lawson and Anor v Odhams Press Ltd. and Anor.* (1948) 2 All ER 717, the court held that cross-examination on an affidavit in support of an interlocutory application should be allowed only in special circumstances. Similarly, in *G G R v H-P S* [2012] eKLR, the court stated:
- “The law has allowed evidence to be proved by way of affidavits under Order 19. But under Rule 2 of the said Order, the Court may order a deponent of an Affidavit to attend court to be cross-examined..... This also extends to where there is a conflict of Affidavits on record or where the evidence deponed (sic) to is conflicting in itself. Further, the order for cross-examination is a discretionary order but as is in all discretions, the same must be exercised judiciously and not whimsically. There should be special circumstances before ordering a cross examination of a deponent on an Affidavit. The court must feel that adequate material has been placed before it that show that in the interest of justice and to arrive at the truth, it is just and fair to order cross examination.”
24. It is important to note that the duty of a probate court is to identify the estate of a deceased person, identify the lawful beneficiaries to the estate and distribute the same to the beneficiaries. [In Re Estate of Alice Mumbua Mutua \(Deceased\)](#) [2017] eKLR Musyoka J. elucidated this role as follows:
- “.....The [Law of Succession Act](#), and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and



preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.”

25. The record is clear that the objector has given evidence on this question and there are no special circumstances that would compel this court to put the affidavit evidence on test. The Objector has had a fair chance to set the record straight but she never took advantage of that opportunity. The court cannot stay far too long on this question of paternity and deny the rest of the beneficiaries a chance to get their share from the estate. It will be litigated and re-litigated without any progress and therefore it is only fair and it is time that the parties are allowed at this stage to give a proposal on how they would wish to have the estate distributed. Having said that, the following orders shall issue:
- a. The parties are hereby directed to submit a proposal on the desired model of distribution of the properties forming part of the estate.
 - b. Subsequently, the parties are to file written submissions in support of the various models of distribution.
 - c. The status conference is set to be on 8th October, 2024.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 20TH DAY OF SEPTEMBER, 2024.

In the presence:

Chebiego & Co. Advocates

.....

R. NYAKUNDI

JUDGE

