



In re Estate of Allan Lawrence Awuoche Otwack (Deceased) (Succession Cause 1913 of 2008) [2024] KEHC 11660 (KLR) (Family) (3 October 2024) (Ruling)

Neutral citation: [2024] KEHC 11660 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1913 OF 2008
HK CHEMITEI, J
OCTOBER 3, 2024
IN THE MATTER OF THE ESTATE OF ALLAN LAWRENCE
AWUOCHE OTWACK (DECEASED)**

BETWEEN

AGNES AYOO ODINDO AWUOCHE APPLICANT

AND

BARACK OBAMA AWUOCHE 1ST RESPONDENT

JECINTA ANYANGO 2ND RESPONDENT

EDNA AWINO AWUOCHE 3RD RESPONDENT

RULING

1. This ruling relates to the application dated 18th April, 2024 filed by the Applicant, Agnes Ayoo Odindo Awuoche, seeking for the application dated 6th October, 2021 to be heard on priority basis.
2. The application dated 18th April, 2024 is opposed vide replying affidavit sworn by Barack Obama Awuoche on 24th June, 2024. He avers inter alia that the Applicant herein does not have authority to decide who is to benefit from the deceased's estate based on the impugned DNA report. The application is full of misrepresentations and falsehoods resulting in perjury.
3. That this court's order was that the DNA test be conducted at the Government Chemist and not KEMRI where the Applicant conducted the DNA test. The KEMRI DNA report has been challenged before this court. The issues of access to funds, rental income and distribution of the deceased's property can only be determined at the conclusion of this matter.



4. Further that the annexures to the application dated 18th April, 2024 have not been certified or accompanied by a certificate of production of electronic evidence thus cannot be relied upon.
5. He deponed that there was no accountability on how the Kshs.3 million was to be spent.
6. The application dated 6th October, 2021 seeks for Orders That:
 - (a) Spent.
 - (b) Pending the hearing and determination of this summons and prayer 3 below, this honourable court in protection of the interests of the school going beneficiaries of the deceased as specified in the affidavit of the Applicant be pleased to order and direct ELIPA ENTERPRISES which is holding Kshs. 400,000/= of rent due to the Estate of the deceased herein Allan Lawrence Awuoche Otwick (Deceased) to forthwith release the said sums to the Applicant Agnes Ayoo Odindo Awuoche limited to and for purposes specified in the summons herein.
 - (c) The order herein made on 27th May, 2020 reviewed, and varied to permit and allow Agnes Ayoo Odindo Awuoche the joint administratrix of the Estate of Allan Lawrence Otwick (deceased) access the funds held in the deceased's:
 - i. Bank Account No. 01*****00 with National Bank of Kenya, Kenyatta Avenue Branch;
 - ii. Bank Account No. 01*****00 with National Bank, Kenyatta Avenue Branch;
 - iii. Bank Account No. 01*****00 with Standard Chartered Bank, Westlands Branch.For the purposes of the Applicant's upkeep and payment of school fees of the deceased children with the Applicant widow.
7. The application is supported by affidavits sworn by Agnes Ayoo Odindo Awuoche on 6th October, 2021 and 28th May, 2024. She avers inter alia that she is the deceased's widow who died intestate. She has no funds for her and the children's upkeep who also need school fees. The deceased's bank accounts are frozen by dint of order issued by this court on 27th May, 2021.
8. That all the tenants were forbidden from remitting rent by Barack Awuoche, the 1st Respondent herein. Elipa Enterprises, one of the tenants, is willing to remit Kshs. 400,000/= on account of rent arrears if the order of 27th May, 2020 is revised to this effect.
9. She narrated several ailments which she suffers from and all need financial support in terms of getting her medication.
10. She deponed that she suffers physically from a bilateral knee osteoarthritis which has impaired her movement, requiring assistance with house chores and needing her to be on long term medication. The aforesaid injuries led to her early retirement as a nurse on medical grounds because she could not walk. She also suffers from essential hypertension and is on management for anxiety disorder with co-morbid major depressive disorder. She is also undergoing pharmacotherapy and psychotherapy at Chiromo Lane Centre for anxiety attacks and anhedonia that are long lasting in nature. The aforementioned medical conditions have been occasioned by the ongoing court case and freezing of the estate bank account and her personal bank account which was inadvertently frozen.
11. She thus has no source of funds yet she deposited large sums of money into these accounts when she was still working. She is unable to cater to her huge medical bills forcing her daughters to take care of her. She is also unable to pay for upkeep and school fees for family members who depend on her.



12. That an estate agent was unilaterally appointed by Barack Awuoche and he does not report to her and she has no contact with him. Further, that the tenants insist that rent is paid to Barack Awuoche, on his instructions. She implores this court to appoint a neutral estate agent and Barack Awuoche be compelled to account for all the rental income that he has collected since 27th May, 2020.
13. She further accused Barack Awuoche of taking over the following properties: houses in Jericho estate – Nairobi, houses located in Kisumu – Nyalenda – Pandpieri 712 which has 6 bungalows (2 have 4 bedrooms and 4 have 3 bedrooms) and a portion of it has been rented out as a car wash.
14. She also enumerated the rents collected by Barack which is over Kshs. 100,000/= per month.
15. Some of the Estate expenses that she needs to cater for include: Kshs. 8,000/= caretaker monthly salary for Moses Ojwang, Kshs. 750/= caregiver and house help weekly pay for Sarah, school fees for Balala Orwa (nephew), Leah Atieno Awuoche (step – daughter), Richard Odhiambo Opwapo (nephew) and Caleb Odhiambo Awuoche. Her own personal expenses which include: Kshs.50,000/= (medicine), Kshs.20, 000/= (upkeep – transport, water and electricity), Kshs.275, 000/= monthly (medical insurance), Kshs. 5,000/= monthly (doctor visits) all amounting to Kshs. 585, 000/=.
16. The application dated 6th October, 2021 is opposed by Barack Obama Awuoche’s grounds of opposition dated 10th November, 2021 and replying affidavit sworn by Josinter Anyango Awuoche on 11th November, 2021.
17. The grounds of opposition dated 10th November, 2021 is based on the Grounds That:
 1. There is an order by the Learned Justice Muigai, previously seized of this matter, that there shall be no more applications seeking injunctive relief as all attendant matters to the estate, especially those alleged in the present purported application, are capable of determination in the substantive suit, thereby, rendering the multiple application militant against judicial time and economy.
 2. All the items raised in the application are matters which were substantively canvassed during the hearing of the main suit; which now awaits determination of this honourable court.
 3. It is apparent that this honourable court shall render itself upon all these items, thereby, demonstrating that the application herein is ill – motivated and frivolous, in terms; delaying judgment and outcome of this suit.
 4. This honourable court issued orders on 27th May, 2020 to the effect that the parties shall agree upon an estate agent who shall collect rent on behalf of the estate, to which the Applicant herein has remained averse and/or antagonistic; therefore, it is remiss and disingenuous of the Applicant to purport that the tenants are living rent free.
 5. Were the Applicant amenable and cooperative towards appointment of the estate agent then all the rent would have been collected accordingly with the proceeds deposited in court for preservation and financial probity of the estate.
 6. Upon collection of such proceeds from the estate, then any party/beneficiary with any need, requirement or demand may have applied to the honourable court for consideration thereof and adjudication.
 7. The manner and nature of the present application is prejudicial, biased and inconsiderate, against other beneficiaries, as it purports to urge the interests and needs of one beneficiary



only to the detriment and exclusion of the other parties; denoting ill assumption that the Applicant's needs surpass or are superior to those of the other beneficiaries.

8. The manner and nature of the orders sought are orders in finality that cannot be issued without this honourable court considering and adjudicating upon the merits and substance of the entire cause; therefore, they cannot be issues at this juncture.
9. Ideally, through the present application and the orders sought therein, it can be argued that the Applicant invites this honourable court to determine her as the only entitled party to the benefits, and proceeds of the estate void of consideration and regard to the other beneficiaries.
- 10) Through the present application and the orders sought therein, especially paragraph 16 of the Applicant's supporting affidavit, the level and extent of the Applicant's self-entitlement is demonstrable wherein there is belief that the proceeds of rental income from the estate ought to be transmitted to her for her own personal use and expenditure contrary to the spirit and intent of the Laws of Succession; especially transmission of rights to all legal beneficiaries.
11. Paragraph 16 of the Applicant's supporting affidavit demonstrates the conception and belief that it is only the Applicant that is deserving of collection of rent to the exclusion, even of, estate agents.
12. In the alternative and without prejudice to the foregoing, the issues raised herein are capable of resolution by conclusive determination of this cause and/ or determination of the application filed for preservation of the estate; through agents, on behalf of the 1st Respondent herein.
13. In the alternative and without prejudice to the foregoing, it emerges, distinctly, if this honourable court were to entertain then numerous injunctive applications that are repeatedly presented then this litigation shall remain in proceeding for longer than twelve (12) years it presently retains.
14. The gist of the application is to sideline the rest of the beneficiaries in a manner that is prejudicial, discriminatory, biased and unjust.
18. Josinter Anyango Awuoche, in her replying affidavit sworn on 11th November, 2021, avers inter alia that the Applicant is seeking for herself and her children's provision to the exclusion of other beneficiaries. This court preserved the deceased's estate vide orders issued on 27th May, 2020 to wit the rental income be collected by an estate agent to be agreed upon by the parties.
19. She accused the Applicant of declining to cooperate on the appointment of an estate agent. The parties she deponed have filed summons for confirmation of grant and proposed mode of distribution and are waiting for this court's judgment which will resolve the Applicant's issues raised in the application dated 6th October, 2021.
- 20) The parties have not filed written submissions to the applications dated 18th April, 2024 and 6th October, 2021.
- 21) The application dated 18th May 2022 by Barrack Obama Awuoche on the other hand seeks the following orders:-
 - (a) That the court be pleased to grant interim stay of execution and or bar any reliance on the DNA test results from KEMRI dated 9th December 2021 pending the hearing and determination of this application.



- (b) That the third Respondent be barred and or restrained from relying on the DNA test results from KEMRI to interfere and or intermeddle with the estate by purporting to caution the estate that the Applicant has been determined not to be a child of the deceased thereby not administrator pending the hearing and determination of this application.
 - (c) That the 3rd Respondent be barred from relying on the DNA test results from KEMRI to interfere with the estate by compelling the tenants of the estate to deposit rental into Standard Chartered Bank account no 0151240598900 Harambee Avenue branch which is primarily operated and or access by herself and the 2nd Respondent.
 - (d) That all previous beneficiaries and parties that undertook DNA test at KEMRI to submit to a supplementary DNA test at the Government Chemist for verification and comparative DNA analysis pursuant to the order of this court issued on 10th February 2020.
 - (e) That the author of the DNA test report from KEMRI dated 9th December 2021 attend the court when the matter is fixed for hearing to be cross examined by counsel for the Applicant and any other counsel who wishes to do so as to the contents and findings of the report.
 - (f) That the Applicant be at liberty to call his expert witness to analyze and address the court on the contents of the impugned KEMRI DNA test report as well as his own independent report that demonstrates various anomalies and irregularities in the initial report.
- 22) The Applicant prayed for costs as well.
23. The application is based on the sworn affidavit of the said Barack Obama Awuoche dated 18th May 2022.
24. The substance of the application is that after the results of the DNA analysis by KEMRI the 3rd Respondent has proceeded to intermeddle with the estate and advised the tenants that the Applicant was not a beneficiary to the estate herein by virtue of the said results.
25. That the above agitation has led to the tenants being advised to deposit the rent to the 3rd Respondent's account based at Standard chartered bank.
26. He therefore cited Article 10 of the *Constitution* to demand that another DNA test be conducted and the marker of the initial test be called during hearing for purposes of cross examination as there were many anomalies in his report. He called for an independent expert to get a better set of results.
27. A similar application dated 31st August 2022 was filed by Jacinta Anyango seeking orders that:-
- (a) That the DNA test report dated 9th December 2021 prepared by and submitted by KEMRI be set aside and expunged from the record.
 - (b) That this court orders that a paternity test be dispensed with to allow the court deliver its judgment in this matter.
28. The Applicant's application is premised on her affidavit sworn on the same date.
29. The gist of the affidavit is that she was not satisfied with the above DNA results from KEMRI after receiving them from the Deputy registrar of this court. She sought interpretation from one Dr Chris Onditi a forensic medicine expert who advised her that there were many glaring inconsistencies.
30. Consequently, she deponed that any reliance on the same will cause great injustice as there seemed to have been some interference.



Analysis and Determination

31. I have gone through the applications the responses and the lengthy submissions and the cited authorities filed by the parties. For want of time I do not intend to reproduce them here.
32. At the same time this court shall deal with the applications cumulatively as they relate to all the parties herein and the issues are discernable.
33. There are four issues for determination and some of them have been captured by the parties in their submissions.
34. The first issue is whether or not the KEMRI DNA test results was conclusive in the circumstances and if not whether a supplementary test ought to be done at the Government chemist.
35. This objection made by Barack Awuoche and Jecinta Anyango are based on the fact that the same was not conclusive. Jecinta in particular brought in an opinion from Dr Chris Onditi who faulted the said report.
36. Barack on the other hand simply narrated that the same had been used by Agnes to interfere with the tenants whom she directed that they remit the rent to the Standard chartered bank account which she was a signatory. Her reasons for her directives to the tenants was based on the DNA report which indicated that he was not related to the deceased herein.
37. I have anxiously pondered over this DNA issue and from record it is evident that Muchelule J (as he then was) vide the consent of the parties on 15th November 2021 directed:-

“That the beneficiaries (children and Jecinta Anyango) shall on 23.11.2021 at KEMRI at noon present themselves for DNA to confirm if they were children of the deceased.”
38. This being the case they presented themselves to KEMRI and the report that came it appears was not favorable to her and thus she sought interpretation from Dr Onditi.
39. Taking the circumstances herein, save for the fact that Agnes was using the results to coerce the tenants to pay rent to her account Barrack essentially had no difficulty with the results from KEMRI other than asking for a supplementary test.
40. I think to alley any fears and to put to rest any suspicion and so as for this court to get a second opinion there is need to get another DNA analysis. On this note I agree with the submissions by the Respondents that the consequence of the DNA results are always far reaching and with great finality.
41. This court is alive to the fact that there was a consent on how the tests were to be done. However, to answer to Dr Onditi’s findings a second opinion is necessary. This test nonetheless shall be met by Barrack Awuoche and Jecinta Anyango as they are the ones who have raised the doubt.
42. Further and once the results are out and considering that this matter had been closed the makers of all the reports shall be called to produce the reports and the parties be at liberty to cross examine them.
43. For purposes of certainty and because the Applicants had issues with KEMRI findings this second tests shall be undertaken at the Government Chemist unless there is written evidence that the said agency is unable to conduct the same for whatever reasons. That communication must be made to this court within seven days after the parties have presented themselves.



44. The second issue is the question of rent collection. It is evident that the parties did not comply with order 4 of the order dated 27th May 2020. In other words, they did not agree on the issue of the agent to manage and collect the rent from the tenants.
45. It appears then that Barrack has continued to collect the same to date unless he proves otherwise.
46. In view of the complaint by Agnes I direct that the parties should within 14 days from the date herein come up with an agreed duly registered estate agent and in default the Deputy Registrar of this court be at liberty to choose one without any reference to the parties.
47. The third issue flowing from the above issue of the rent is the question of accounts. If it is true that Barrack has been collecting rent from 27th May 2020, an issue which he has not denied, then he ought to provide accounts to the court. The amount so far collected belong to the estate and not him or administrators. This is a contested estate and there must be accountability.
48. In the premises I direct that Barrack Awuoche shall within 30 days from the date herein file accounts in respect of all the rents he has collected from 27th May 2020 and submit it before the Deputy Registrar of this court.
49. The fourth issue is the prayer by Agnes that she needs some money from the estate for her medication and upkeep. I have read the medical report presented to this court together with the other upkeep requirements like the bills etc. The same prima facie is legitimate.
50. Although the Respondents think that granting her request will be determining partially the estate, I think it will be prejudicial if this court will not grant her some access so as to meet her medical treatment. There is no prejudice to be suffered by the estate since in any case her claim is still contested and if it will be found that she was not entitled then this court will find a way of recovery under its wide discretionary powers.
51. Nonetheless and despite the orders freezing the accounts she cannot be allowed to suffer medically without any recourse. The interest of the parties must be weight even as the court protects the estate.
52. The only direct amount so far is from ELIPA ENTERPRISES which it is holding Kshs.,400,000 due to the estate. Granting that amount to the Applicant will not be breaching the order freezing the accounts. I find the same to be independent of the accounts.
53. Consequently, I direct that the said Elipa Enterprises does release the sum of Kshs. 400,000 it is holding to Agnes Ayoo Awuoche for her medical treatment and her general upkeep. She must however keep the records of the same pending the determination of this cause.
54. As clearly submitted by the parties and as found above this cause was at its tail end. The issue of DNA was the challenge. Once the reports are out the matter should be fixed for further hearing and the makers of the DNA reports be called unless parties agree otherwise.
55. In summary therefore these are orders summing up the above applications dated 6th October 2021, 18th May 2022 and 31st August 2022.
 - (a) The parties at the costs of Agnes Ayoo Awuoche and Barack Obama Awuoche shall submit themselves to the Government chemist within 14 days from the date herein for purposes of DNA analysis and in default the matter shall be fixed for hearing forthwith and this prayer disallowed.



- (b) The parties shall within 14 days from the date herein agree on an estate agent to manage the deceased rental/business premises and in default the Deputy Registrar of this court shall be at liberty to choose one without further reference to the parties.
- (c) Within 30 days from the date herein Barack Obama Awuoche shall deliver to the Deputy Registrar of this court a full and accurate accounts of the rents collected from the deceased rental or business premises from May 2020 to date.
- (d) M/s Elipa Enterprises shall immediately release to Agnes Ayoo Awuoche the sum of Kshs.400,000 in their custody for her medical treatment and general upkeep.
- (e) Costs of these applications shall be in the cause.

DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 3RD DAY OF OCTOBER 2024.

H K CHEMITEI

JUDGE

