



REPUBLIC OF KENYA



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**In re Estate of Gerald Theuri Kanyugo (Deceased) (Succession Cause
685 of 2014) [2023] KEHC 19667 (KLR) (4 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19667 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 685 OF 2014**

HK CHEMITEI, J

JULY 4, 2023

IN THE MATTER OF THE ESTATE OF GERALD THEURI KANYUGO (DECEASED)

BETWEEN

JEDIDAH WANJIRU THEURI OBJECTOR

AND

GEORGE MWANGI KANYUGO ADMINISTRATOR

RULING

1. This ruling is in respect to the chamber summons application dated November 4, 2021 which prays for the following orders; -
 - a) Spent.
 - b) That the objector (Jedidah Wanjiru Theuri) and the alleged child of the deceased (LM) be directed to provide DNA samples and undergo a DNA test by the Government Chemist together with the administrator (George Mwangi Kanyugo) to establish the likelihood of the deceased's paternity over LM.
 - c) That the consequent DNA test results and report be filed in court.
 - d) That costs of this application and the consequential processes do abide the outcome of the cause.
2. The application is supported by the grounds on the face of it as well as the sworn affidavit of the applicant. He deposed that upon the demise of the deceased who was his brother on January 14, 1994, without having married or sired a child, their mother Serah Muthoni Kanyugo requested him to apply for letters of administration in respect of his estate in her place. That they obtained all the documents necessary for application for letters of administration in respect of the deceased estate, including an introduction letter from the area chief where the deceased hailed. Further, that he personally filed the



- requisite petition documents in this cause seeking appointment as the administrator of the deceased's estate.
3. He deposed further that his application was published in the Kenya Gazette under gazette notice No 7446 dated October 17, 2014 and having received no objections, the court proceeded to issue him with letters of administration dated December 2, 2014. That thereafter he was issued with a certificate for confirmation of grant dated August 14, 2015. Additionally, that on October 1, 2020, the objector/respondent filed summons for revocation of the grant on allegations that he did not disclose her as a wife to the deceased and LM (the subject) as a child of the deceased.
 4. The applicant went on to depose that the objector/respondent filed a copy of a purported birth certificate of the subject allegedly issued on May 24, 2016 as proof of the deceased's paternity over the subject. That from his personal knowledge the deceased did not marry at all or sire any child, therefore the birth certificate had been falsified moreover, having been issued 22 years after the deceased's demise to support the objector's application for revocation.
 5. Further, that his advocates on record had advised him, that DNA evidence offered the only cogent and final proof of paternity. Additionally, that he had been advised by a doctor that it was possible to establish the likelihood of someone's paternity over a child by analyzing DNA samples of that person's biological sibling (with whom they share a father and mother), the child and the child's mother.
 6. The objector/respondent opposed the application by filing a replying affidavit dated November 18, 2021. She averred that on or about the year 1989, she got married to the deceased under the Kikuyu customary laws and they lived as wife and husband in their matrimonial home at Ndege in Nakuru. That their marriage was blessed with two (2) children namely LM and SM (deceased). It was therefore a misstatement of the truth for the administrator/applicant to attempt to portray that the deceased never married or had any children.
 7. She averred further that on January 14, 1994 the deceased passed on and due to the hostility already shown by his family towards her when the deceased was in hospital, she was not able to continue staying in their matrimonial home and so she went back to her parents together with their two children.
 8. She stated that the administrator/applicant applied for the letters of administration in respect of the estate of the deceased without involving her as the wife of the deceased and that he caused land parcel No Nakuru Municipality Block 29/126 (Rhonda) to be transferred from the deceased name to his name fraudulently by concealing material facts and as such she filed summons for revocation of the grant which was pending before this court.
 9. Further, that the subject LM was born out of their marriage with the deceased as shown on her birth certificate which correctly indicated that they were the parents and the same was issued at P.G.H Nakuru. Additionally, that the move by the administrator/applicant to have DNA evidence was a fishing expedition aimed at delaying justice to her and her daughter.
 10. Finally, she averred that the administrator/applicant was a brother to the deceased but he was not the biological father to the subject herein hence the DNA test if any was to be carried out lacked a conclusive paternity proof and as such she was opposed to it and it should be dismissed with costs.
 11. In response to the objector's/respondent's replying affidavit, the administrator/applicant filed a further affidavit dated June 3, 2022. He deposed that his application was simple and straightforward and only sought that an avuncular DNA test involving the objector/respondent, LM (the subject) and himself be carried out to establish the likelihood of the alleged paternity of the deceased over LM.



12. That his advocates on record wrote to the Government Chemist and received a response to the effect that it was possible to establish the likelihood of paternity from such a DNA test. That the concern of the objector/respondent which constituted her only substantive opposition to his application had been addressed by the relevant expert so his application ought to be allowed.
13. The application was disposed by way of written submissions and only the objector/respondent filed the same while the administrator/applicant filed list and summary of authorities.
14. The objector/respondent in her submissions identified three issues for determination. On the first issue, whether the court should go ahead and order for compulsory DNA test she submitted that a person's DNA was a personal and private matter which one had a right over under article 31 of the Constitution which provides for the right to privacy. She submitted that she opposed the DNA test demands by the administrator to be compulsory carried out.
15. She placed reliance on the case of SMW v GMK [2012] eKLR where the court held that a DNA test to any person for whatever reason was an intrusion of his right to bodily security and integrity and also the right to privacy protected under the bill of rights. Additionally, that the court in constitutional application No 526 CMS v LAK held that a *prima facie* case ought to have been established before the case of compulsory DNA was heard, ordered and subjected to test.
16. On the second issue, whether the DNA of the administrator/applicant should be used to determine the relationship of the subject to the family she submitted that the administrator/applicant was on record claiming that him and the deceased were siblings but had not adduced any proof of the same. That the best and sure way of determining truthfulness of a DNA test was when the samples were extracted from the real parents as was established the case of Estate of Peter Muraya Chege alias Muraya Chege (deceased) [2019] eKLR.
17. Lastly, on whether by virtue of the deceased providing and never raising questions about the subject, formalized the child as his she submitted that the subject according to the Law of Succession was entitled to inherit and be recognized as the administrator of the deceased with or without the DNA test proving that she is the daughter. She placed reliance on section 29 (b) and 66 of the Law of the Succession Act and the case of Re Estate of Komu Muthigani (deceased) [2019] eKLR.

Analysis and Determination

18. I have considered the pleadings, the submissions filed by the objector/respondent and the authorities relied on by both parties. The issue for determination is whether the administrator/applicant herein has laid sufficient basis to warrant the issuance of an order compelling the objector/respondent to present the subject child for sibling DNA testing.
19. In the instant suit, the objector's/respondent's child who is the subject matter of this application is an adult having been born on May 18, 1992.
20. This court also takes note that the nature of the orders sought by the administrator/applicant at this interlocutory stage are mandatory and the court must therefore be satisfied that there exist special circumstances sufficient to warrant the issuance of such order. In the case of S.W.M v G.M.K [2012] eKLR the court 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.”

21. In the instant application, the administrator/applicant has alleged that the family of the deceased had no prior knowledge of the objector's/respondent purported marriage to the deceased and that the subject child was not a child to the deceased. The administrator/applicant in his affidavit swore that from his personal knowledge the deceased did not marry at all or sire any child, therefore that the birth certificate had been falsified moreover, having been issued on May 24, 2016 which was 22 years after the deceased's demise.
22. The objector/respondent on her part opposed the administrator's/applicant's application and argued in her submissions that a person's DNA was a personal and private matter which one had a right over under article 31 of the Constitution which provides for the right to privacy She submitted that she opposed the DNA demands by the administrator to be compulsory carried out.
23. The court in Constitutional & Human Rights Division petition No 133 of 2015 DNM v JK [2016] eKLR observed as follows:

“ Even though the court's core role is to determine disputes, the courts often deploy methods of compulsion not necessarily to get to the truth but to help determine disputes fairly. It is thus common to see witnesses being summoned and also being compelled at the risk of jail, to answer questions. In all instances though, the party seeking the court's assistance must lay a firm legal and factual foundation for his case. It is not different where DNA testing is sought. In the case of DNA testing the basis must be laid even where a child is involved, as ordering DNA testing is not a mere procedural matter but is substantive enough given that an individual's constitutional rights may be limited through such testing.”
24. Further, in the case of DNM v JK [2016] eKLR, the court held that:

“ 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.”
25. I have anxiously weight this matter in light of the provisions of the Constitution cited above and in particular the issue of privacy under article 31 of the Constitution. The courts as seen from the above authorities have been very careful to allow such an application without laying down the basis and sufficient reasons.
26. The respondent has not explained sufficiently why it took her 22 years to obtain the certificate of birth of the subject who is by now about 31 years old or thereabouts. Was it an afterthought.? Even if the relationship between her and her in laws was not good I am certain that waiting for that long was inordinate. In any case the subject being 31 years by now and barring any objection ought to have taken her certificate of birth.
27. I find therefore that the applicant has laid a good basis for the exercise to be undertaken. Whether the same will yield the desire outcome will be determined by the scientist who in this case and according to the applicant suggest that the results shall be positive. I do not find that the responded nor the subject will suffer any prejudice or embarrassment.
28. The applicant shall meet the costs of the exercise as he is the one who has requested.



29. In the premises the application is allowed as hereunder;

- (a) The applicant, the subject LM and the respondent, Jedidah Wanjiru Theuri shall avail themselves to the government chemist Nairobi for the DNA analysis within 60 days from the date herein and report shall be filed forthwith.
- (b) The applicant herein shall meet the costs of the said exercise.
- (c) Costs of this application shall await the outcome of the succession cause.

Dated signed and delivered at Nakuru via video link this 4th day of July, 2023.

H. K. CHEMITEI

JUDGE

