



Olweny & 2 others v Olweny & 2 others; Olweny (Interested Party) (Succession Cause 243 of 2017) [2023] KEHC 22392 (KLR) (19 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22392 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 243 OF 2017
SM MOHOCHI, J
SEPTEMBER 19, 2023
IN THE MATTER OF THE ESTATE OF ELIAKIM WASHINGTON
OLWENY (DECEASED)**

BETWEEN

**PHELESIA AKOTH OLWENY 1ST PETITIONER
EDWIN OTIENO OLWENY 2ND PETITIONER
TIMOTHY OCHIENG OLWENY 3RD PETITIONER**

AND

**NORAH ATIENO OLWENY 1ST OBJECTOR
ANNE WANJIRU 2ND OBJECTOR
KEVIN ODHIAMBO OLWENY 3RD OBJECTOR**

AND

ALAN ONYANGO OLWENY INTERESTED PARTY

RULING

1. The Deceased Mr. Eliakim Washington Olweny, alias Washington Eliakim Olweny, Alias Washington Olweny Odawa, a well-known Nakuru based registered land surveyor, died on the 28th November 2016 at the Nairobi Hospital, without leaving a will. He left behind a significant estate and soon thereafter a dispute erupted on the funeral arrangement with the 1st and 2nd Objectors moving court seeking injunctive orders pending recognition as widows and upon being interred following citation proceedings in High Court at Nakuru Succession Cause No 7 of 2017 filed on the 10th April 2017, that ultimately triggered the filing of the instant Petition dated 13th September 2017, on the 15th September 2017.



2. As soon as the Instant Petition was filed before gazettelement and issue of grant of probate of letters of Administration intestate, the 1st and 2nd Objectors on the 1st December 2017, simultaneously filed objections with the 1st Objector filing her draft petition to be considered for issue of grant of probate of letters of Administration intestate as an administrator and which objections have since remained pending determination.
3. The 1st and 2nd Objectors had on 15th October 2018 filed under certificate of urgency, Applications for provision, seeking rendering of an account, restraining orders, conservatory orders and an order that the income of the Estate be deposited into a particular account.
4. Following the stand-off on the 7th February 2019, the 3rd Petitioner moved court by filing a petition for issue of Letters of Administration Pendente Lite, for purposes of collection and preservation of the Estate pending the hearing and determination of the objections and any other litigation(s) relating to the obtaining of a full grant in the estate of the deceased.
5. On the 16th October 2019, the Interested Party- Allan Onyango Olweny entered appearance and filed an application under certificate of urgency, seeking full participation as an interested party and determination and finding that, the 1st & 2nd Objectors were not widows to the deceased and are unqualified to mount any objection and that their respective Objections both dated 1st December 2017, be struck-out and that the Application precedes the hearing of the Objections on the 30th October 2019 and this never came to be.
6. Until the 20th January 2020, when the Court directed that Application dated the 16th October 2019 by the Interested Party shall be heard together with the objections by way of Viva Voce evidence and the Hearing was by consent confirmed for the 10th, 11th and 12th of March 2020.
7. Hearing Viva Voce eventually commenced on the 9th October 2020 and on the 16th October 2019, the Interested Party- Allan Onyango Olweny entered appearance and filed an application under certificate of urgency seeking determination and finding that, the 1st & 2nd Objectors were not widows to the deceased and are unqualified to mount any objection and that their respective Objections both dated 1st December 2017 be struck-out.
8. The Last Objectors hearing viva voce, was on the 6th December 2021, the same being the cross-examination of the 2nd Objector by the Interested Party matter adjourned to the 24th January 2022, by consent for further hearing.
9. On the 24th January 2022, Petitioners were present before court, however the matter was adjourned to the 28th March 2022, owing to the non-appearance by the Objectors.
10. On the 24th March 2022, Petitioners filed an Application under certificate of urgency seeking to initiate contempt proceedings against Norah Atieno Olweny (the 1st Objector) for disregarding the orders of this Court given on 16th August 2022.
11. On the 28th March 2022, Petitioners were present before court, however the matter was adjourned to the 9th June 2022, owing to the non-appearance by the Objectors.
12. On the 18th May 2022, John Kevin Odhiambo Olweny, the (3rd Objector) filed an Application under Certificate of Urgency, seeking to review and/or set-aside or otherwise discharge the orders of this Court given on 16th August 2021, for stay of proceedings and seeking to be listed as a beneficiary.



13. On the 10th November 2022, Norah Atieno Olweny (the 1st Objector) filed an Application under Certificate of Urgency, seeking to review and/or set-aside or otherwise discharge the orders of this Court given on 16th August 2021.
14. A deceased person dying intestate automatically triggers the Law of Succession Act and the Probate and Administration rules mandating the Court to act in the interest of the estate of the deceased person, one would argue that, the estate of the deceased has been on “auto-pilot” and unfortunately has been without an official administrator for the last (6) six years and (10) ten months and that it ought not to have been in a ‘state of limbo,’ without a duly appointed administrator.
15. It is Noteworthy that the Estate of the Deceased has not secured and valued and the Parties have maintained conflicting values.
16. On the 13th February 2023, I directed that, the Applications dated 18th May 2022, and that dated 10th November 2022, shall be heard together by way of written submissions and parties were granted leave to file respective supplementary affidavits, written submissions and supplementary submissions where necessary.
17. On the 2nd June 2023, John Kevin Odhiambo Olweny, the (3rd Objector) filed a deed of renunciation of his right to a share the estate of the deceased.
18. What is before this court for determination are, Norah Atieno Olweny (the 1st Objector)’s application dated 10th November 2022, in which she seeks for inter alia orders, to review and/or set-aside or otherwise discharge the orders of this Court given on 16th August 2021 and all the consequential orders requiring her and her son John Kevin Odhiambo Olweny (the 3rd Objector) to submit to DNA maternity test, The application was consolidated with John Kevin Odhiambo Olweny’s application dated 18th May 2022 seeking to review and/or set-aside or otherwise discharge the orders of this Court given on 16th August 2021, for stay of proceedings and seeking to be listed as a beneficiary. Anne Wanjiru (the 2nd Objector) filed a replying affidavit sworn on 16th September 2022 in response to the 3rd Objector’s said application. The 2nd Objector adopted the said Affidavit.

The 1st Objector’s case

19. 1st Objector contends that, the Petitioners petitioned this court for the grant of letters of administration intestate in the estate of the deceased but failed to mention the 1st and 2nd Objectors as the wife and son of the deceased, respectively hence the filing of the objection proceedings. That at the time of the hearing of the objection, the Petitioners insisted on the Maternity DNA testing of the 1st Objector and her son, the 3rd Objector.
20. That at the time, the issue of the maternity DNA testing was raised, the 1st Objector casually agreed to submit herself to the said DNA testing, but the said orders, have been used as a tool for harassment of her and her son, who was not even a party to the proceedings at the time when the orders were made.
21. The Petitioners have also used the said orders, to overzealously seek that she be cited for contempt of court orders, with the knowledge that, they are the ones who have continuously harassed her through intimidation tactics in an effort her to keep her from complying with the court orders. That the said orders were agreed by her at the time by reason of mistake and/or misrepresentation. That the motives of the Petitioners were at the time not clear to her and that she has been now forced to deal with harassment from known and unknown people. The particulars of the harassment are set out in her affidavit in support of her application.



22. The 1st Objector has framed the issues for consideration to be;
- a. Whether the maternity DNA testing of the 1st Objector and her son is necessary for the determination of the issues before the court?
 - b. Whether an account and full inventory of the assets of the deceased's estate should be given?
 - c. Whether the titles to all the registrable and/or fixed assets of the deceased's estate should be surrendered to the custody of the Court? and
 - d. Whether the 1st Objector is in contempt of court orders?

As To Whether The “maternity Dna Testing” Of The 1st Objector And Her Son Is Necessary For The Determination Of The Issues Before The Court?

23. That this court gave orders on 16th August 2022, for the 1st Objector and her son to submit themselves for maternity DNA testing. That at the time of making the order, the 1st Objector casually agreed to the same as there was nothing to hide, but the said orders have resulted in relentless harassment of the 1st Objector and her son. That it is not clear what is Petitioners motive in seeking for the said maternity DNA testing as the same does not have any bearing on whether the 1st Objector was a wife to the deceased. That even at the time of making the said orders, the Petitioners did not lay any basis before the court in seeking for the maternity DNA of the 1st Objector and her son.
24. The 1st Objector placed reliance on in the case Constitutional & Human Rights Division Petition No. 133 of 2015 D.N.M Vs J.K[2016] ekLR, the Honourable Justice J.L Onguto held that,
- “ 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.”
25. That the maternity of the 3rd Objector's vis-à-vis the 1st Objector is not a fact in issue in the objection proceedings by the 1st Objector, who has sought to be determined as a widow of the deceased. DNA question has no bearing on the questions sought to be answered in the proceedings herein. It is a waste of precious judicial time. The matter herein has never taken any positive step since August 2022 when the order for the maternity DNA testing was given. And there has only been a 'back and forth' in the matter with the petitioner making every effort to have the 1st Objector cited for contempt of court and sent to jail. There is also no reason why the maternity DNA testing is necessary as none of the other children and/or wives of the deceased have been subjected to the same, If at all the Petitioners were challenging the paternity of the 3rd Objector then the fairest thing would have been to lay a basis for the same and then subject all the beneficiaries to the DNA testing. Indeed, at the time of making the order, the 3rd Objector was not even a party to the case and the orders were therefore also made by mistake by reason of the prejudice to the 3rd Objector. There is no reason in law or at all for the maternal DNA testing when the issue for determination is whether the 1st Objector was a wife of the deceased.



26. The 1st Objector in further submission of the irrelevance of the DNA testing as ordered by the court, further relies on the case Constitutional & Human Rights Division Petition No. 133 of 2015 D N M Vs J. K (SUPRA), the court stated that;

“In conclusion, I hold the view that where paternity is in dispute then within reasonable limits and in appropriate cases DNA testing of non-consenting adults may be ordered even at an interlocutory stage. 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.”

27. That no reason has been tendered before this court as to the necessity of the 1st Objector's maternity DNA test. The same is a constitutional violation of the 1st Objector and 3rd Objector's rights. Is there any issue to be determined by this court that touches on the maternity of the 3rd Objector? In Re Estate of JSM (Deceased) 2019] eKLR the Justice LA. Achode (as she then was) in dismissing an application for DNA testing stated that;

“The nature of the order sought by the Applicant at this interlocutory stage is 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 vs. GM.K (2012) eKLR Majanja J 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”.

28. The maternity of the 3rd Objector is not in dispute in the proceedings herein and the order for the 1st Objector and the 3rd Objector to submit themselves for maternity DNA testing is therefore unnecessary and the 1st Objector is therefore entitled to an order of review and/or discharge of the said orders.

29. That, it is therefore clear that the issue of who is a beneficiary of the estate herein among those who have made a claim, can be determined without the court having to require the and 3rd Objectors submit to the maternity DNA test as earlier ordered by the court. The 3rd Objectors interests in the estate is clearly not an issue for determination by the court at all That, the case laws relied by the Petitioners in their submissions do not offer any assistance, in establishing whether, the maternity DNA testing is necessary or even relevant in the instant case as the said authorities seek to establish the paternity of the deceased's children and not their maternity as in the instant case. Totally distinguishable. That any purported attempt to use the estopped principle in support of the contempt application, does not hold, as the principle cannot be used as a sword but as a shield. That, in the case of Republic Vs Kenya Railways & another ExParte Inviolatte Wacike Siboe [2014] eKLR, the court stated that,

“First and foremost, and as was held in Muljijetha Ltd Vs. Commissioner of Income Tax Nairobi HCCC No. 594 of 1966 [1967 EA 50:

... It is well settled that the principle of equitable estoppel cannot be used as a means of founding a cause of action.



From the proceedings herein apart from all else it is clear that the applicant invoking the doctrine of equitable estoppel as a Sword rather than as a shield. I accordingly find that the doctrine is inapplicable in these circumstances.

30. The 1st Objector thus submits that, the maternity DNA testing of the 1st and 3rd Objectors herein is grossly irrelevant and unnecessary as the same does not seek to resolve any of the issues herein and the orders of 16th August 2021 therefore ought to be reviewed and/or set-aside

As To Whether An Account And Full Inventory Of The Assets Of The Deceased's Estate Should Be Given?

31. The 1st Objector contends that, from the time of the deceased's death, to-date, all the assets of the deceased's estate have been in the control and custody of the Petitioners who are solely benefitting from the same and they have been very hostile towards the 1st Objector. This court on 30th October 2018 made conservatory orders in respect of the income generating properties of the deceased's estate and the 1st Objector is reasonably apprehensive that the said orders are not being complied with and the assets and the income thereof have been subjected to waste and/or intermeddling to the detriment of the estate and the beneficiaries thereof.

32. That Rule 25 (5) of the Probate and Administration rules provides that.

“the court after the making of a grant may at any time and from time to time require the personal representative to render a true account of the estate of the deceased and of the administration of it”

33. That the grant of administration was issued to the Respondents herein and the 1st Objector is apprehensive that the estate of the deceased is being subjected to waste by the said Respondents which is to the detriment of the beneficiaries of the deceased's estate. Reliance has been placed In the case of In re Estate of Reuben Walter Muvva Muiu (Deceased) 2019) eKLR, the Honourable Justice D.K Kernei held that,

“with regard to an order for account, an intermeddler becomes an executor de son tort. This is where the obligation to render accounts stems from. Further Section 83(h) of the Law of Succession Act provides that the legal representatives are liable to produce to the court, if required by the court, either of its own motion or on application of any interested party in the estate. a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.

Thus, this commends me to make an order that the applicant and the 1st and 2nd Respondents either jointly or severally do prepare and file in this cause, statements of accounts showing the monies which have come into their hands from the estate of the deceased and what they have spent within a certain timeline. As administrators they are under obligation to render accounts either jointly severally by giving an inventory of the estate of the deceased from the date of his death to date.”

34. The income generated from the assets of the deceased have been in the control of the Petitioners herein and the 1st Objector has reason to believe that the same is being subjected to wanton waste. The 1st Objector therefore submits that an order for a full inventory of the deceased's estate is necessary to ensure the preservation of the estate and all the assets of the estate for the benefit of the beneficiaries.



As To Whether The Titles To All The Registrable And/or Fixed Assets Of The Deceased's Estate Should Be Surrendered To The Custody Of The Court?

35. The 1st Objector contends that, there is danger of the deceased's estate and/or the properties thereof being disposed-off to third parties, to the detriment of the beneficiaries thereof. The Petitioners have proven that they will go to great lengths to ensure that the 1st Objector and the 3rd Objector are denied and kept away from any rightful inheritance of the deceased's estate. The Petitioners have so far ensured that the 1st and 3rd Objectors do not get access to a full list of the assets of the deceased thereof and have also kept the said assets to themselves and using and deriving benefits from the same to the exclusion of the 1st and 3rd Objectors.
36. The 1st Objector is therefore very apprehensive that if this court does not take measures to protect the registrable assets of the deceased's estate, the respondents will proceed to dispose of the same to the detriment of the 1st and 3rd Objectors. The 1st Objector therefore submits that this court has the jurisdiction to order that the titles to all the registrable assets of the deceased's estate be deposited in the custody of the court for safe keeping as a measure of ensuring preservation of the deceased's estate as well as to protect the interests of all the beneficiaries of the deceased's estate pending the determination of the succession cause herein.

As To Whether The 1st Objector In Contempt Of Court Orders?

37. That, the Petitioners seek that the 1st Objector and the 3rd Objector be cited and punished for contempt of the orders of this court given on the 16th August 2021. The 1st Objector has in her replying affidavit in opposition to the contempt application averred that she went to the Government Chemist on two occasions and due to the harassment of known and unknown persons, her samples were not taken for purposes of conducting the DNA testing. The 1st Objector has further averred that these harassments have caused her to be afraid to even submit to the said tests. The Petitioners have not disputed that the 1st Objector went to the Government chemist but her samples were not taken. The Petitioners only seek to have the 1st Objector punished by committal to civil jail for unknown ulterior motives. The Petitioners further claim that the 1st Objector benefitted from the Kshs. 10,000/= sent to her for purposes of the DNA testing but they do not want to acknowledge that the same was utilized for the two occasions she visited the lab but her samples were never taken.
38. In the case of Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR, the court stated that;

“It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book Contempt in Modern New Zealand who succinctly stated:-

“There are essentially four elements that must be proved to make the case for civil contempt the applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that: -



- a. the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- b. the defendant had knowledge of or proper notice of the terms of the order;
- c. the defendant has acted in breach of the terms of the order; and
- d. the defendant's conduct was deliberate.

.. Do constitutional values permit a person to be put in prison to enforce compliance with a civil order when the requisites are established only preponderantly, and not conclusively? In my view, a high standard of proof applies whenever committal to prison for contempt is sought because contempt or court is quasi-criminal in nature. Two principals emerge.

The first is liberty: - it is basic to our Constitution that a person should not be deprived of liberty, albeit only to constrain compliance with a court order, if reasonable doubt exists about the essentials...

The second reason is coherence. It is practically difficult, and may be impossible to disentangle the reasons why orders for committal for contempt are sought and why they are granted. in the end, whatever the applicant's motive. the court commits a contempt respondent to jail for Rule of Law reasons: and this high public purpose should be pursued only in the absence of reasonable doubt...

Third accidental or unintentional disobedience is not sufficient to justify one for holding guilty of contempt...

39. The 1st Objector's submission that she never willfully refused to comply with the orders of the court but she made several attempts to have her samples taken for purposes of the maternity DNA testing. This has not been controverted. The 1st Objector is therefore not guilty of contempt of court orders as compliance with the orders was made impossible by the constant harassment by the Petitioners and other person's unknown to her but apparently at the behest of the 3 Petitioners. The 1st Objector has in any event applied for review of the said orders as the same are unnecessary in the proceedings and do not in any way assist in having the matters in issue in these proceedings settled.
40. In conclusion that, the orders of this court given on 16th August 2022 directing the 1st Objector and the 3rd Objector to submit themselves for maternity DNA testing have no bearing on the issues sought to be answered in the cause herein. The 1st Objector was subjected to oral testimony before the court where she gave evidence on her marriage to the deceased but before the same could be concluded, orders were made for her to submit herself and her son John Kevin Odhiambo Olweny (3rd Objector) to a maternity DNA testing. The said maternity DNA testing is also an infringement of the rights of the 1st and 3rd Objectors which can only be ordered in deserving cases. No reason and/or explanation has been given for the 1st and 3rd Objectors to submit to the said maternity DNA testing. The 1st Objector therefore submits that, the orders given herein on 16th August 2022 should therefore be discharged and/or reviewed.
41. That, this court has been called upon to determine the twin issues of who are the beneficiaries of the estate of the deceased and the extent of their entitlement to the deceased's estate. The 1st Objector contends that she is a beneficiary of the deceased's estate by virtue of being a wife to the deceased. The 1st Objector gave oral and documentary evidence and also called witnesses who testified on her behalf



on the germane issue of her marriage to the deceased. The 1st Objector further contends that by virtue of the said marriage, she sired children with the deceased including the 3rd Objector herein, John Kevin Odhiambo Olweny. The 3rd Objector had at the time not made any claim to the estate though being fully aware of the proceedings. Indeed, it is very worth noting that the 3rd Objector has since executed a formal Renunciation of share in the estate herein, meaning that he is only keen of setting-aside the orders made for him to submit to maternity test and once that is done, he will not be interested in the proceedings and/or the estate whatsoever.

42. That this court has the power under the probate and Administration rules, to order for an inventory of the deceased's estate either on its own motion or on application by a party to the proceedings. The 1st Objector therefore submits that the said orders are necessary to ensure preservation of the deceased's estate.
43. The 1st Objector submits, that the orders herein are therefore necessary and the application dated 10th November 2022 should therefore be allowed as prayed.

The 2nd Objectors Case.

44. The 2nd Objector is supportive of the 1st Objector and 3rd Objector but never filed written submissions as the Applications in issue do not directly affect her she awaits the disposal to pave way of the conclusion of the stalled objector proceedings.

The 3rd Objector's Case

45. The John Kevin Odhiambo Olweny, the (3rd Objector) on the 2nd June 2023, filed a deed of renunciation of his right to a share the estate of the deceased thereby abandoning his Application filed on 18th May 2022.
46. He submits that his renunciation notice should be admitted by the Court.

Petitioner's Case

47. Petitioners have filed a replying affidavit sworn by the 3rd Petitioner, Timothy Ochieng' Olweny, in opposition to the 1st Objector's application. The Petitioners aver in their replying affidavit that the 1st Objector is undeserving of this court's audience by virtue of the fact that she is yet to comply with the orders of the court given herein on 16th August 2021.
48. Petitioners filed an Application under certificate of urgency On the 24th March 2022, seeking to initiate contempt proceedings against Norah Atieno Olweny (the 1st Objector) for disregarding the orders of this Court given on 16th August 2022.
49. Petitioners submit on the limited question of right of audience pre-purging of contempt.
50. For brevity, the Petitioner urges the Court to consider the facts against which the supplementary affidavit is anchored,
 - a. The grounds and supporting affidavit pleaded in the notice of motion dated 24th March 2022;
 - b. Supplementary Affidavit by Caroline Rono dated 6th May, 2022;
 - c. The Replying Affidavits dated 28th June, 2022, & 25th May, 2023; and
 - d. Written Submissions as well as the list and bundle of authorities both dated 25th May, 2023.



51. That by consent of Parties, and minded to expedite the determination of this Petition, parties consented on compromising all pending applications to enable the timeous hearing and determination of the objections by the 1st and 2nd Objectors; both of whom allege to have been married to the deceased. Materially, the 1st Objector in support of her claim of an interest in the subject Estate, alleges to have begotten a son (John Kevin Odhiambo Aka John Kelvin Odhiambo, the 3rd Objector) with the deceased. The 1st Objector has uttered three (3) documents alleging that the 3rd Objector was born to her:
- a. First, supposedly in Gomongo Huruma Maternity & Nursing Home, in Gomongo-Nairobi on 12th September, 1999, while she was aged 38 years;
 - b. Second, supposedly by homebirth in Viwanda, Nakuru on 9th November, 1999, when she was aged 39 years;
 - c. Third, supposedly by the Road at Uplands, enroute Nairobi on the Nakuru-Nairobi Highway.
52. Material to the adjudication of her objection - as is evidenced by the averments at para 1, 2, 4, 5, 7, 8, 11, 12, 14 & 17 of her Objection lodged in Court on 1st December, 2017; as read with the depositions on oath by Timothy Olweny dated 12th June, 2018, particularly at paragraph 27, at para (a) to (i)- is whether there was any marital relationship between her and the deceased that begot a child, which entitles her to claim in the estate, as she alleges.
53. That Section 70, Law Succession Act empowers the Court to examine the 1st and 3rd Objectors; or call for further evidence the rights of (the 1st and 3rd Objectors as alleged) dependents and of persons claiming interests on intestacy, or any other matter which appears to require further investigation.
54. That whereas the 1st Objector has brought into issue her alleged marital union with the deceased being further evidenced by the birth of the 3rd Objector renders this, a material and relevant issue for determination in her objection.
55. The Petitioners place reliance, on the ratio in *DLK v CM* [2020] eKLR where the Court held that:
- “A party should not choose or pick which orders to obey, and which ones to disregard. Put differently, a party does not choose how to obey a court order, he should comply with it as framed.
- A party should first comply with a court order even as it asks the same court, or even a higher one, to review the orders. A court order is not a proposition or suggestion, it is a command. It must be obeyed first, and complaints raised later. Purporting to comply with a Court Order in a manner that a party pleases rather than terms of the Order is itself contempt,”
56. The Court of Appeal decision in *Pharmacy and Poisons Board v Sipri Pharmaceuticals Limited & the Republic Civil Application No. NAI 103 of 1998 (43/98 UR)* (unreported), cited and followed by the same Court in *Dorothy K. Kwonyike T/A Luguyan Enterprises Vs Victoria Commercial Bank Limited* [2000] eKLR,
- “the position in law as set out clearly in *The Pharmacy and Poisons Board v Sipri Pharmaceuticals Limited & the Republic Civil Application No. NAI 103 of 1998 (43/98 UR)* (unreported), is that no matter whether the order of Mulwa, J. be right or wrong, it must, unless properly set aside by way of review or an appeal, be complied with.”



57. In *Republic v Director of Fisheries & another* [2001] eKLR, the Court of Appeal in Kisumu, declined to hear an application seeking to stay an existing valid order until the contemnor complied and held thus;

“In view of the applicant's continuous failure to comply with the order of the Court to return the nets he cannot be heard. This application is accordingly stayed.”

58. More recently in *Dr. Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 Others*, Civil Application No. Nai. t of 2017, [2018] eKLR the Court of Appeal when faced with a contemptuous litigant who had declined to comply with a Court Order, and who sought to urge that the Order was unenforceable hence need to excuse their contempt; held as follows;

“this Court has itself set its face firmly against granting contemnors audience until and unless they first purge their contempt and it shall continue to do so in such cases as evidence a head-strong contumaciousness proceeding from a bold impunity, open defiance or cynical disregard for the authority of the Court and the integrity of the judicial system.

Such pernicious conduct cannot be countenanced, and those hell-bent on it will find neither help, nor refuge under a convenient and self-serving appeal to natural justice where their impudent conduct threatens the very foundation of the rule of law.”

59. The circumstances of the 1st Objector's case before this Court merit, entry of an order declining audience until the contemptuous act is purged by the concerned party presenting themselves at the Government Chemist Offices, at Nairobi for purposes of sample collection and/or extraction to facilitate maternity DNA examination between Mr John Kelvin Odhiambo and Ms Norah Atieno Wasonga - has Demonstrably Stalled the matter, and enquiry on a Material, and Relevant fact.

60. That, the 3rd Objector has been participating in these proceedings as a named beneficiary and alleged dependent, at all material times. Equally important he has sworn that being aware of the order, he was minded to comply. It is apparent that the 1st and 3rd Objector, are keen to frustrate the definite determination by the Court of this pertinent question for which an adverse inference must be drawn, including betraying what appears to be a nefarious scheme by the 1st Objector coming apart

61. That in ensuring the ends of justice are met, it is imperative that the court first ensures compliance in submission of samples. The non-compliance is directly frustrating the Court's ability to fairly, expeditiously and objectively determine the 1st Objector's claim, and the conduct of the suit herein, as well.

62. The petitioners conclude by placing reliance on the assurance on the erudite holding in *Teachers Service Commission v Kenya National Union of Teachers & 2 others* 2013] eKLR where the court usefully observed that;

“A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed”.

63. In conclusion the Petitioners humbly pray that, the contemnors be denied audience, pending purging of the unequivocal order; since as demonstrated herein a contemptuous litigant cannot enjoy audience until they purge their contempt on an existing Court Order, not because it placates an applicant who moves the Court by taking out the contempt or restores the dignity of a Court whose authority



is challenged by the defiance but because authority and integrity of the rule of law, cannot be compromised if we are to maintain a peaceful, just and orderly civilized society.

Analysis and Determination

64. After a careful scrutiny of the Applications, supporting Affidavits, Supplementary Affidavits Pending Applications, documentary exhibits annexed to affidavits in support or opposition of the motions the Bundles of documents and authorities availed by the parties I have come to the conclusion that DNA which is the short version of Deoxyribonucleic acid, is a genetic material which one inherits genetically from a father or mother. It has been proved that science through DNA can only achieve 99.9% accurate results in determining paternity where the Deceased's Sample is available.

65. Deoxyribonucleic acid sampling, may vary from a Paternity test, a sibling test and patrilineal lineage test, I am of the view that the consent entered into by parties to undertake a DNA examination in general terms, resulted in the stalemate and I associate myself with the position by Lady Justice S. N. Mutuku in *FNT & another v CM on behalf of CSNT* [2021] eKLR holding that;

“Should DNA be conducted to prove paternity? It seems to me that the Applicants are assuming that they carry the DNA of the deceased. That is why they volunteer to have DNA samples extracted from them. The only way these samples can be 100% accurate is if the samples are taken from the body of the deceased. This way, both the Applicants and the minor can be confirmed to be either his children if the 32 results are matching or not if the results fail to match for either of them. Yet the Applicants are not keen on having the body of the deceased exhumed for this purpose.”

95. This court concurs with Lady Justice L. Achode (as she then was) In *re Estate of JMK (Deceased)* [2021] eKLR that, DNA scientific examination should only be undertaken in specific terms (emphasis is mine) and she held that;

“It is my view that where sufficient evidence exists which resolves the issue in controversy without necessarily ordering for a DNA test, an order for a DNA test would be inappropriate. However, in this case, there is sufficient evidence to link the children of the applicant and the deceased to warrant the exercise of discretion in favour of an order for DNA testing sought by the applicant.”.

66. This court is guided by the case of *Re Estate of Alice Mumbua Mutua (Deceased)* (2017) eKLR where it was stated 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 asset. Disputes of course do arise in the process. The provisions of the Law of Succession Act and then Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. Such have to



be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators”.

The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3). which provides as follows Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under ... the Civil Procedure Rules Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime, the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court 's work 26 would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above. "

67. It is the Duty of this Probate Court to seize control of the proceedings and deter unnecessary litigious jingoism and acrobatics by parties, as was held in the Case of Re Estate of Solomon Mwangi Waweru(deceased) (2018| eKLR, the sheer multitude of Applications filed herein at times in supersonic speed and sequence is telling how parties had a field day in creating a conundrum.
68. While Considering the Order for DNA Maternity Testing given herein on 16th August 2021, sought to be reviewed or varied, this Court find, the same to have been issued in General terms, without a clear direction as to how its findings would enrich the determination of the cause and settlement of the estate.
69. This Court shall now take charge and remedy the situation, the common denominator is to settle the estate of the deceased, such that the Late Mr. Eliakim Washington Olweny shall “rest in peace”.
70. The unfortunate derailment of the Objector Proceedings and Petition for issue of the grant, and the stand-off by parties, on a maternity DNA test, intended to determine the relationship between the 3rd Objector and the 1st Objector and the subsequent motion to commence contempt proceedings, all amounted to side-show(s) lasting over two years and is grossly irrelevant and unnecessary as the same does not seek to resolve any of the issues herein
71. No Evidence has been placed before this court that, the income generated from the assets of the deceased have been or are being wasted by anyone.
72. This court has the powers to Order for an inventory of Assets of the deceased's estate either on its own motion or on application by a party to the proceedings but such an Order can only be directed



to an Administrator Appointed as such and subject to the Court. Rule 25(5) of the Probate and Administration rules provides that.

“the court after the making of a grant may at any time and from time to time require the personal representative to render a true account of the estate of the deceased and of the administration of it”

73. This Court is of the considered view that, disobedience to court orders is recipe for anarchy and breakdown in the rule of law, it encourages citizens to take the law into their hands; it whittles down the confidence of the citizenry in the judicial system.
74. In *Basil Criticos – v- Attorney General & 8 Others*, (2012) eKLR, and in *Kenya Tea Growers Association – v – Francis Atwoli & 5 Others*, Petition No. 64 of 2010, it was stated that, where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary. In *Hadkinson – vHadkinson*, (1952) 2 All ER 211 it was stated that a party who knows of an order, whether null and void, regular or irregular cannot be permitted to disobey it.
75. While the Court cannot condone wanton disregard of its Orders by any Party, I am unpersuaded that the same application to commence contempt proceedings was NOT ripe, for consideration, in the best interest of justice geared toward determining the dispute at hand in an expedited manner.
76. The 1st Objector twice Presented herself to the Government Chemist but the 3rd Objector who Orders were issued against without his input resisted the same by not cooperating.
77. On the Converse the Notice of Motion was in the estimation of the Court an instrument of delay by the Petitioners.
78. This Court postulates that Notice of Motion Applications have no place in the Probate and Administration process, that it’s jurisdiction is a special jurisdiction not strictly bound or aligned to the Civil Procedure Act and or Civil Procedure Rules. The same position applies to the Petitioners Application dated 24th March 2022 is a Notice of Motion pursuant to Articles 48, 50(1) and 159 (2) (a) of the Constitution and Section(s) 1A, 1B, 3, 3A & 63 of the Civil Procedure Act as Read with Section 3 of the Judicature Act.
79. Article 48 of the Constitution obligates the State ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. Its ironical its being invoked by the petitioners under these circumstances and it is irrelevant and or of no consequence in this succession matter
80. Article 50. (1) of the Constitution provides to “every person” the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
81. Article 159 (2) (a) to (d) of the Constitution would constitute the principles of administration of justice or the celebrated ‘oxygen principle’s that;

“(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

- a. justice shall be done to all, irrespective of status;
- b. justice shall not be delayed;



- c. alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
- d. justice shall be administered without undue regard to procedural technicalities; and
- e. the purpose and principles of this Constitution shall be protected and promoted”.

82. In *Kamani v Kenya Anti-corruption Commission* 2010 eKLR, the court considered the new amendments which introduced the oxygen principle. The court drew comparisons between amendments and the Woolf reforms, which introduced similar provisions in England in 1998 by way of the Civil Procedure Rules. The court’s attention was also drawn to the English case of *Biguzzi v Bank Leisure PLC* (1999) 1 WLR 1926 in which Lord Woolf himself talked about the concept of overriding objective as follows:

“Under the [Civil Procedure Rules] the position is fundamentally different. As rule 1.1 makes clear the [rules] is a new procedural code with the overriding objective of enabling the court to deal with cases justly. The problem with the position prior to the introduction of the [rules] was that often the court had to take draconian steps such as striking out the proceedings...” As stated, the court declined to strike out the appeal, and granted the appellant leave to file a supplementary record of appeal to include the omitted documents. “It is, accordingly, clear to us that the amendment to section 3 of the Appellate Jurisdiction Act, did not, without more, come in to sweep away well-known and established principles of law hitherto in place before the said amendment...the notice of appeal is incurably defective and that such defect could not in the circumstances we have outlined above, be cured by invocation of sections 3A and 3B of the Appellate Jurisdiction Act. This to our understanding means sections 3A and 3B of Cap. 9 cannot be invoked as a matter of course, so as to excuse all and any kind of failing on the part of a party to abide by the requirements of the rules made to regulate appeals to this Court.”

83. Section 63 of the Civil Procedure Act Cap21 provide for Supplemental proceedings in order to prevent the ends of justice from being defeated, the court may, if it is so prescribed—

- (a) issue a warrant to arrest the defendant and bring him before the court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to prison;
- (b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the court or order the attachment of any property;
- (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold;
- (d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;
- (e) Make such other interlocutory orders as may appear to the court to be just and convenient.

86. Section 63 of the Civil procedure Act is inapplicable before in the probate court.



87. Rule 63 of the Probate and Administration Rules provide for the Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules as hereunder;
1. Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16,19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.
 2. Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.
88. Rule 59(1) and (2) of the Probate and Administration Rules provide for Nature of Pleadings in succession matters to include; a petition, caveat or summons as may be appropriate and in the case of a pending proceeding the court or a registrar may of its or his own motion or at the request of any party, but without a formal application, cause the matter to be set down for mention before the court or registrar upon notice to such persons (if any) as the court or registrar may direct.
89. I am unpersuaded on the Petitioners invitation to summon the 1st Objector to show cause why she should not be cited contempt of court, it remains a mystery as to why and how similar Orders were not sought against the 3rd Objector.
90. I am unpersuaded on the Petitioners invitation to warrants of Arrest against the 1st Objector even before she is cited for contempt of court, it remains a mystery as to why and how similar Orders were not sought against the 3rd Objector.
91. I am unpersuaded on the Petitioners invitation to summon the 1st Objector to be cited contempt of court, it remains a mystery as to why and how similar Orders were not sought against the 3rd Objector
92. I am unpersuaded as no evidence, basis or reason has been presented or laid on the Petitioners invitation to Sentence the 1st Objector to Imprisonment of not less than one (1) year plus monetary fine of not less than two (2) million Kenya Shillings, it remains a mystery as to why and how similar Orders were not sought against the 3rd Objector, the stiff penalties sound cruel, punitive and are framed in minimalistic mandatory sounding restrictive, constraining the exercise of the discretion of the court and would thus be unconstitutional ab initio

Conclusion

93. In the upshot, I issue the following orders;
- a. The 1st Objector's Summons, dated 10th November 2022, seeking to review and/or set-aside or otherwise discharge the orders of this Court given on 16th August 2021 is hereby found to be meritorious and is allowed on the following terms;
 - i. The Order dated 16th August 2021 is hereby reviewed and varied.
 - ii. The Order for DNA testing, is hereby set aside and in substitute thereof, a direction is hereby issued to the Petitioners to discredit, in submissions in support of their summons for issue of grant, any form of relationship between the 1st Objector and any other person related to the Deceased Person including her own siblings.



- b. The 3rd Objector's Summons dated 18th July 2019, to strike out the Objectors is hereby marked as withdrawn.
- c. The 3rd Objector's formal notice of renunciation of his right to a share in the deceased's estate, dated 5th June 2023, filed on the same date, is hereby admitted and allowed.
- d. The 3rd Objector's name, shall be expunged from further proceedings herein.
- e. The Petitioners Notice of Motion dated 24th March 2022, seeking to initiate contempt proceedings against the 1st Objector is hereby found to be without merit and is accordingly dismissed;
- f. The 3rd Petitioner, is hereby appointed as the Administrator Pendete Lite pursuant to Section 54, Paragraph 10 of the 5th Schedule to the Law of Succession Act, Rules 12 and 74 of the Probate and Administration Rules.
- g. The Petitioners, shall proceed to present their Petition Viva Voce, whilst responding to the 1st and 2nd Objectors cases.
- h. The 3rd Petitioner, shall within the next (60) days collect and preserve the Estate of the deceased, file and serve a full inventory of the Assets (with an estimated value), liabilities and any expenditures incurred and income received from the estate of the deceased, since his demise.
- i. No Party, shall file any Application herein without the leave of the Court.
- j. Any aggrieved party has (30 days) leave, to Appeal this Ruling upon Notice.
- k. This being a family matter, parties shall bear their own costs.
- l. Mention date for direction immediately after 60 days from today to be fixed by the Court Assistant.

It is so ordered.

SIGNED, DELIVERED VIRTUALLY ON TEAMS PLATFORM ON THIS 15TH SEPTEMBER 2023

MOHOCHI S.M

JUDGE

