



REPUBLIC OF KENYA



In re Estate of the Late James Kinuthia Karaka (Deceased) (Succession Cause E466 of 2020) [2024] KEHC 14110 (KLR) (Family) (14 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14110 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE E466 OF 2020
HK CHEMITEI, J
NOVEMBER 14, 2024
IN THE MATTER OF THE ESTATE OF THE
LATE JAMES KINUTHIA KARAKA (DECEASED)**

BETWEEN

PETER KIHARA KAMWENDE 1ST RESPONDENT

SUSAN WANJIKU WAITHIRA 2ND RESPONDENT

AND

ESTHER MURINGI KINUTHIA 1ST APPLICANT

JENIFFER WANGARI KINUTHIA 2ND APPLICANT

RULING

1. In their application dated October 23, 2023 the Applicants are asking for the following orders:-
 - (a) That the Applicants and the 2nd Respondent be subjected to a DNA test to determine whether they have same or common paternity.
 - (b) That the DNA test be undertaken at the Government Chemist within 21 days of the order being given.
2. The application is based on the grounds thereof and the sworn affidavits of the Applicants dated the same date.
3. The gist of the Applicant's application is that the deceased herein was their biological father. The 1st Applicant deponed that the deceased bore her through the relationship with her mother one Nelly Waithira Muga and they lived at Buruburu.



4. The 2nd Respondent on the other hand claimed that the deceased bore him through his relationship with her mother Margaret Kamwende Kihara and they also lived in Buruburu.
5. Both Applicants claim that the deceased took them through their studies where he paid for their fees and other necessities. They have also claimed that they heavily participated in the deceased burial a fact which was well known to the Respondents.
6. The Applicants have attached a set of photographs which appear to be the deceased and the 1st Applicant in particular and perhaps other members of the family. She deponed that her children would refer the deceased as their grandfather.
7. In effect therefore they believed that if the DNA analysis is carried out the truth shall come out.
8. In response the 2nd Respondent vide her replying affidavit sworn on 6th December 2023 has opposed the application vehemently stating that there were no sufficient evidence to show the relationship between the deceased and the Applicants and that the mere fact of being educated which had not been proved by way of evidence was not a right to demand a DNA analysis.
9. That the Applicants have not demonstrated how they were involved in the burial of the deceased as they never featured anywhere either by way of photographs or in the eulogy. To them the Applicants were in a fishing expedition and they only intend to delay this matter.
10. She further denied that they stayed in the deceased property but that they were simply tenants and not owners. The deceased later evicted them.
11. They prayed that the application be dismissed and they be allowed to complete the succession process.
12. The court directed the parties to file written submissions which they have complied.
13. In support of the application the Applicants submitted that the only way out of getting the truth is by undergoing the DNA analysis in this matter. They relied among others on the case of S.M.M(Deceased) 2019 eKLR.
14. On their part the Respondents submitted that the application ought not to be allowed as it intruded in their privacy and was simply brought to delay the fair and fast conclusion of the matter.
15. They relied on the case of Jackson Mulwa (deceased) (2021) eKLR to support the line that mere production of photographs does not of itself indicate the relationship between the deceased and the Applicants.
16. They further relied on the case of George Matheka (Deceased) (2010) eKLR arguing that DNA profiling is akin to disturbing the dead. They prayed that the application be dismissed.

Analysis and determination.

17. The court has extensively perused the application and the issue that needs determination is whether the parties ought to be subjected to the DNA process. Is the process intruding into the Respondent's privacy as claimed by them?
18. What is before the court is not unique. The Applicants are claiming to be the deceased children whereas the Respondents who are also deceased children are denying. The only possible persons who may be aware about the position taken by the parties are their parents. Unfortunately, they are not in this contest.



19. DNA is a scientific profiling to ascertain the paternity question. Section 29 of Cap 160 and the related portions explains who are the children of the deceased. It does not only include the category of the Respondents alone but such others who were born by the deceased even outside wedlock.
20. The same states that:-
- “For the purposes of this Part, "dependant" means—
- a. the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;”
21. Although the Applicants may not have provided much evidence to indicate their relationship with the deceased except the photographs and although they may not have appeared in the eulogy, it does not necessarily mean that they were not born by the deceased. That is why in my view the issue of DNA is germane.
22. The Respondents who in any case have no issue with their parentage have absolutely nothing to lose. The outcome of the DNA exercise shall rest what has been bedeviling the parties. Other than the DNA proof, the court for now is not aware of any other procedure to prove parentage.
23. Consequently, I do find the application merited. The only rider is that the Applicants will have to meet the costs of the procedure since they are the ones who asked for it.
- a. The application is allowed as hereunder:-
- (b) The Applicants and the 2nd Respondent Jenifer Wangari Kinuthia do subject themselves to a DNA analysis at the Government Chemist within 30 days from the date herein.
- (c) The costs of the above exercise shall be borne by the Applicants.
- (c) Costs shall be in the cause.

DATED SIGNED AND DELIVERED AT NAIROBI VIDE VIDEO LINK THIS 14TH DAY OF NOVEMBER 2024.

H K CHEMITEI

JUDGE

