



**Cherutich v Chepyegon & another (Civil Appeal E004 of 2025)  
[2025] KEHC 14083 (KLR) (9 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14083 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CIVIL APPEAL E004 OF 2025  
RB NGETICH, J  
OCTOBER 9, 2025**

**BETWEEN**

**ZEPHANIA KIPKOSGEI CHERUTICH ..... APPELLANT**

**AND**

**MILCAH KABON CHEPYEGON ..... 1<sup>ST</sup> RESPONDENT**

**ZACHARIA KIPROTICH CHEPYEGON ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the ruling of Hon. N.M. Idagwa in Kabarnet  
CMCC Succession Cause No. 16 of 2015 dated 9th March 2022)*

**JUDGMENT**

**Background**

1. This is an appeal against the ruling delivered by the trial court following an objection filed by the Appellant, Zephania Kipkosgei Cherutich, challenging the grant of letters of administration to the Respondent in respect of the estate of the late Chepyegon Chemjor. The Appellant alleged intermeddling with the deceased's property, forgery of the death certificate and chief's letter, and denied that the Respondent was a dependant or beneficiary of the deceased. The Appellant maintained that the deceased was survived by his mother, the Appellant and the Appellant's sister, and that others claimed as children were strangers to the deceased's family.
2. The Respondent denied these allegations, averring that she was lawfully married to the deceased until his demise on 28th February 2008, that the deceased did not inform her of other children, and that the persons presented as children were not properly proved to be the deceased's offspring. The trial court, as reflected in its ruling, found that the Appellant had not proved paternity and accordingly excluded him from participating in distribution of the estate, while recognising the Second Respondent as a dependant on the basis that he had been accepted by the deceased as his son.



3. The Appellant adduced witnesses including Dickson Kangogo Yatich (aged 92), Wilson Chepkeitany and Sote Chebii, who gave evidence that the Appellant was born of the deceased's union with the Appellant's mother and that the Appellant was recognised as the deceased's child by members of the family and community.
4. The trial court declined to find in favour of the Appellant, referring in large measure to the absence of documentary evidence and the fact that no DNA test was conducted. The Appellant now appeals to this Court on ten grounds, summarised to contend that the trial court erred in law and fact by dismissing credible evidence and treating the question of paternity as not established.

### **Appellant's Submissions**

5. The appeal was argued by way of written submissions. The Appellant submitted that he is the son of the deceased born of the deceased's first wife, and therefore falls squarely within the definition of a dependant under Section 29(a) of the *Law of Succession Act*. He relied on oral testimony and community recognition as sufficient proof of paternity on the balance of probabilities and contended that DNA is not mandatory. In support, he cited *Selle v Associated Motor Boat* [1968] EA 123 and *Peters v Sunday Post* [1958] EA 424, emphasizing the duty of a first appellate court to re-evaluate the evidence afresh. He also relied on *Mursal & another v Manese* (Civil Appeal E20 of 2021) [2022] KEHC 282, to argue that an appellate court is entitled to interfere where a trial court misapprehended the evidence or applied wrong principles.

### **Respondent's Submissions**

6. The Respondent opposed the appeal and supported the trial court's findings. She submitted that the Appellant failed to discharge the burden of proof regarding his alleged paternity and dependency, noting that Section 107 of the *Evidence Act* places the burden on the party asserting a fact. It was emphasized that the Appellant produced no documentary proof such as a birth certificate or school records, and that the testimonies he relied upon were inconsistent. Further, that the Appellant failed to pursue DNA testing, which would have been conclusive, and that the trial magistrate therefore properly dismissed the objection.

### **Issues For Determination**

7. On the record and the parties' submissions I identify the following issues:-
  - i. Whether the Appellant proved on a balance of probabilities that he was a child/dependant of the deceased within the meaning of section 29 of the *Law of Succession Act*;
  - ii. Whether the trial court erred in treating the absence of DNA evidence as fatal to the Appellant's claim; and
  - iii. Whether the trial court properly applied the law in excluding the Appellant from inheritance and confirming distribution in favour of the Respondents.

### **Analysis And Findings**

7. The duty of this Court as a first appellate court is to reconsider and re-evaluate the evidence and draw its own conclusions, bearing in mind that it neither saw nor heard the witnesses. This principle was restated in *Selle v Associated Motor Boat* [1968] EA 123 and *Peters v Sunday Post* [1958] EA 424, and more recently in *Mursal & another v Manese* (Civil Appeal E20 of 2021) [2022] KEHC 282, where the High Court underscored that an appellate court is entitled to interfere with findings of fact where the



- trial court failed to consider relevant evidence, misapplied the law, or drew conclusions not supported by the record.
8. Section 29(a) of the *Law of Succession Act* defines 'dependant' to include the children of the deceased. The standard of proof in civil and succession matters is on a balance of probabilities. While scientific proof such as DNA testing is a powerful method of establishing paternity, the law does not make such testing the exclusive mode of proof. Courts have repeatedly recognized that parentage may be established by a constellation of facts including credible oral testimony, acts of recognition by the deceased, community acknowledgment and contemporaneous documentary material when available.
  9. On a careful re-evaluation of the evidence in the record, certain matters weigh in favour of a finding that the Appellant was a child of the deceased:
    - (a) several witnesses gave consistent evidence that the Appellant's mother was lawfully married to the deceased and that the Appellant and his sister were born of that union;
    - (b) there was evidence that the Appellant was treated by members of the family and community as the deceased's child (including recognition during the deceased's funeral and steps taken to register and transfer land in the Appellant's name); and
    - (c) the Appellant's testimony regarding his parentage was not undermined by decisive contradiction on material points. These facts, taken together, satisfy the balance of probabilities standard.
  10. The trial court placed significant emphasis on the absence of a DNA test and on the non-production of documentary records such as a birth certificate. I accept that documentary and scientific proof would have rendered the question incontrovertible, but the absence of such proof is not, in itself, fatal where credible oral evidence and circumstances point to paternity. The trial court erred to the extent that it elevated the lack of DNA to a conclusive defect rather than treating it as one factor among others in the assessment of the totality of evidence.
  11. With respect to the Second Respondent, the trial court's finding that he was a dependant accepted by the deceased is supported by the record. There is evidence that the Second Respondent was brought into the household at an early age and received recognition. That finding is not disturbed by this Court.
  12. For these reasons I find that the Appellant has proved on a balance of probabilities that he was a child and dependant of the deceased within the meaning of section 29 of the *Law of Succession Act*. The Trial Court's decision to exclude the Appellant from the estate therefore occasioned a miscarriage of justice and must be set aside to the extent indicated below.

**Orders:-**

13. Accordingly, I make the following orders:-
  - i. The appeal is allowed. The trial court's finding that the Appellant is not a child and dependant of the deceased is set aside together with consequential orders.
  - ii. The Appellant, Zephania Kipkosgei Cherutich, is hereby declared to be a child and dependant of the late Chepyegon Chemjor within the meaning of section 29 of the *Law of Succession Act*.
  - iii. I hereby declare that the beneficiaries entitled to share in the estate of the deceased are: the Appellant Zephania Kipkosgei Cherutich, the Appellant's sister Jematia, and the 2<sup>nd</sup> Respondent Zacharia Kiprotich Chepyegon and they shall share the estate equally.



- iv. This matter is remitted to the trial court (Kabarnet CMCC Succession Cause No. 16 of 2015) for the purposes of effecting redistribution of the estate in accordance with this judgment.
- v. Each party shall bear their own costs of the appeal.

**JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 9<sup>TH</sup> DAY OF OCTOBER, 2025.**

.....

**RACHEL NGETICH**

**JUDGE**

In the presence of:

Mr. Chebii for Appellant.

No appearance for Respondents.

CA, Elvis.

