

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NYERI**  
**SUCCESSION CAUSE NO. 11A OF 2024**

**IN THE MATTER OF THE ESTATE OF HARRY KIRITU GITHAE**  
**(DECEASED)**

**FLORENCE WANJIRU KIRITU ..... 1<sup>ST</sup>**  
**PETITIONER**  
**CATHERINE WANJIRU KIRITU ..... 2<sup>ND</sup>**  
**PETITIONER**

**VERSUS**

**NAOMI WAMBUGO KIRITU..... 1<sup>ST</sup>**  
**RESPONDENT**  
**ANTONY NJIIRI KIRITU ..... 2<sup>ND</sup>**  
**RESPONDENT**

**AND**

**AMBROSE ONDATI ARIGA .....**  
**OBJECTOR**

**RULING**

1. The Applicant made an oral application for DNA today, which is a mention date unfortunately. The question I have to deal with, extempore is whether, the court can issue substantive orders on a mention date. This question was dealt with in the case of **Gitonga v Njuguna & Another** [2025] KEHC 6288 (KLR). In that case the court relied on the decision of **Paul Odhiambo Ogunde -Vs- Maersk Kenya**

**Ltd (2016) eKLR** that substantive issues cannot be given on a mention date and stated as follows:

A related issue is whether it is in order to enter default judgment on a mention date. It is settled in law that substantive orders are not to be granted on the date a matter comes up for mention (see *Rahab Wanjiru Evans v Esso Kenya Limited* (Civil Appeal No 13 of 1999) and *Kenya Commercial Bank Limited v Naphtaly J.B. Hawala* (Civil Application No 240 of 1997)). In light of this jurisprudence, it seems to me that it is not open for the Court to make substantive orders on a mention date. This is mainly because parties do not have an opportunity to make substantive submissions on a mention date and orders thus made could well occasion an injustice.

2. The Court of Appeal in the case of **Wanjiku v Esso Kenya Ltd** (1995-1998) 1 EA 332 CAK when faced with the issue of substantive orders issued on a mention date, had this to say:

Where a matter is fixed for mention, the court has no business determining the substantive issues therein on that date, and it can only do so, if the parties so agree and of course after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties. There must be good reasons for adopting contrary procedure repugnant to the administration of justice.”

3. The other issue relates to the propriety and fidelity of an oral application in matters concerning DNA testing. It is imperative

that each of the proposed persons be afforded an opportunity to either consent to or decline participation in the DNA test, thereby enabling the court to draw an appropriate inference. Additionally, the individuals sought to be examined must be expressly named, and the nature of their relationship to the subject of the proceedings clearly set out. In that context, a written application is more prudent, transparent, and procedurally hygienic. This ensures procedural transparency, fairness, and clarity of purpose. In *S.W.M v G.M.K* [2012] KEHC 5512 (KLR), D.S. Majanja was of the view that before ordering for a DNA, there has to be a sound basis. He posited 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.**

4. In the circumstances I agree with the respondents to the oral application that a formal application will be proper to enable each of the affected parties respond. It will also settle the nature and extent of material to be recovered and costs of testing. I therefore direct that the applicant should file a formal application in the next 21 days and serve the

beneficiaries affected. The beneficiaries do respond within 7 days of service. Parties to file submissions limited to three pages.

Determination

5. Arising from the foregoing, the court makes the following orders:

- a) The applicant to file a formal application in the next 21 days and serve the beneficiaries affected.
- b) The beneficiaries do respond within 7 days of service.
- c) Parties to file submissions limited to three pages.
- d) Directions on 2<sup>nd</sup> February, 2026.

**DELIVERED, DATED and SIGNED** at **NYERI** on this **13<sup>th</sup>** day of **October, 2025**. Ruling delivered physically in open court.

**KIZITO MAGARE**

**JUDGE**

**In the presence of:-**

Ms. Chitechi for the Applicants

Mr. Muchiri Wa Gachuhi for the 3<sup>rd</sup> Respondents

Mr. Igati Mwai for the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners

Court Assistant - Michael

ORIGINAL