In re Estate of John Kiplagat Kibogy (Deceased) (Succession Cause 21 of 2006) [2025] KEHC 14848 (KLR) (3 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14848 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE 21 OF 2006

JRA WANANDA, J

OCTOBER 3, 2025

BETWEEN

BENARDET JEPCHIRCHIR KIBOGY ..... 1ST APPLICANT

KIPKEMBOI KIBOGY MATHEW ..... 2ND APPLICANT

AND

JEREMY KIPTOO KIBOGY ..... 1ST RESPONDENT

LILY CHEPCHUMBA KIBOGY ..... 2ND RESPONDENT

SAMSON SAIDUL KIBOGY ..... 3RD RESPONDENT

JACKIE CHEPKOSGEI KIBOGY ..... 4TH RESPONDENT

ASHA JEPKEMBOI KIBOGY ..... 5TH RESPONDENT

GEORGE KIBET KIBOGY ..... 6TH RESPONDENT

SANDRA JEMATIA KIBOGY ..... 7TH RESPONDENT

DAVID KIPRONO KIBOGY ..... 8TH RESPONDENT

MARGARET RUGUT KIBOGY ..... 9TH RESPONDENT

RUTH CHEPKOSGEI KIBOGY ..... 10TH RESPONDENT

MARY CHEPKEMBOI KIBOGY ..... 11TH RESPONDENT

JOSEPHINE CHEPKORIR KIBOGY ..... 12TH RESPONDENT

LUCY CHEPKORIR KIBOGY ..... 13TH RESPONDENT

RULING

1. This Succession Cause filed in the year 2006, has had a chequered history with a long and protracted legal battle as the multiplicity of parties and number of Applications filed herein attests. As a result, to date, 19 years since this Cause was commenced, the estate is still yet to be distributed amongst the beneficiaries. Meanwhile, as the wrangles persist, the estate is slowly but surely being wasted, even as fresh claimants continue to emerge day after day.

2. The background of this matter is that the deceased, John Kiplagat Kibogy, died on 30/10/2000 at the age of 82 years. By the Petition filed on 27/03/2006, William Kipkoech Kibogy, Lily Chepchumba Kibogy (2nd Respondent), Jackson Cheruiyot Kibogy and Samson Saidul Kibogy (3rd Respondent), the applying as sons and daughters of the deceased, petitioned for Grant of Letters of Administration over his estate. 10 survivors/beneficiaries (including the 4 Petitioners) were named, and several parcels of land, motor vehicles and funds held in bank accounts listed as assets comprising the estate.

3. However, Jeremy Kiptoo Kibogy, the 1st Respondent, through Messrs Limo & Co. Advocates, filed an Objection claiming that the Petitioners had secretly applied for the Grant of Letters of Administration without involving him. I gather that the Objection was however settled since in the Grant issued subsequently on 17/12/2009, the joint Administrators appointed were the said Jeremy Kiptoo Kibogy (1st Respondent), Lily Chepchumba (2nd Respondent), and Samson Saidul Kibogy (3rd Respondent). I also note from the record, that during the intervening period, Jackson Cheruiyot Kibogy died. By this time, Messrs Limo & Co., appears to have taken over as Advocates for all the 3 Administrators.

4. The Administrators then, on 17/10/2018, filed the Summons for Confirmation of Grant of the same date. However, before the Summons for Confirmation of Grant could be heard, the 4th-9th Respondents named above, through Messrs Mutubwa & Co. Advocates, filed Summons seeking, inter alia, revocation and/or annulment of the Grant. The ground alleged was that they were grandchildren of the deceased, being the children of 3 late sons of the deceased, and were thus entitled to inherit the shares of the estate due to their respective parents, but that they had been excluded therefrom by the Administrators.

5. Further, one Charles Kariuki, and one Robert Kihara Ichangai, by the Affidavit of Protest filed on 31/10/2019 through Messrs Kalya & Co. Advocates, also joined the fray and claimed that a portion of the estate land listed as comprising part of the estate of the deceased should be excluded from the distribution since the same was purchased by their late mother.

6. Some attempts were then made at Court Annexed Mediation conducted by Dennis K.N. Magare (now Judge of the High Court) but which seem to have only come out with minimal partial settlements. By this time, the 2nd Respondent-Administrator, Lily Chepchumba Kibogy seems to have broken ranks with her two other co-Administrators as she had now appointed Messrs Arusei & Co., as her own independent Advocates in the matter.

7. The latest Application to be filed is the one the subject of this Ruling. It is the Chamber Summons dated 13/12/2024, filed jointly by the latest entrants into the battle-field, one Bernadet Jepchirchir Kibogy and one Kipkemboi Kibogy Mathew. The same is filed through Messrs Chebii & Co. Advocates and seeks orders as follows:

    i. That this Honourable Court be pleased to order that the Applicants Benardet Jepchirchir Kibogy and Kipkemboi Kibogy Mathew on the one hand, and the known children of the

late John Kiplagat Kibogy, namely Jeremy Kiptoo Kibogy, Lily Chepchumba, Samson Saidul Kibogy, Ruth Chepkosgei Kibogy, Mary Chepkemboi Kibogy and Lucy Chepkorir Kibogy, on the other hand, do submit to a DNA test to determine their common paternity to the late John Kiplagat Kibogy.

ii. That the DNA samples be submitted to Moi Teaching and Referral Hospital for onward transmission to the Government Chemist on a date to be agreed and/or as ordered by the Court.

iii. That the results of the DNA test be forwarded to this Honourable Court by the Government Chemist,

iv. That the costs of the DNA test and of this application be catered for by the estate.

8. The Application is premised on the grounds on the face thereof, and the Supporting Affidavit sworn by the said Benardet Jepchichir Kibogy. She deposed that the deceased was their (Applicants') father, and their mother was one the late Albina Jepkoech Kibogy, who was a bar-maid running a bar belonging to the deceased in Kaptagat around 1961 and 1968 when the Applicants were begotten. She deponed that the deceased took care of them, paid their fees, and was in charge of their custody. She urged that sometime in the late 1960's, a case was held at their grandfather's home and the deceased acknowledged the Applicants and took care of them, that they hold identity cards in the name of the deceased and fully resemble him in shape, complexion and appearance, and also resemble their half-brothers in every way but in view of their denial by the children of their step-mother Alice Jemaiyo Kibogy, the Applicants pray that the said children undergo DNA tests to conclusively determine their paternity. They exhibited copies of their national identity cards, and urged that no prejudice will be occasioned to any of the parties if the Application is allowed.

9. The contents of the Application are denied but the prayers therein are supported by the 2nd Respondent-Administrator, Lily Chepchumba Kibogy by way of her Replying Affidavit sworn on 17/07/2024, and filed through Messrs Arusei & Co. Advocates. She deponed that her father, the deceased, had only one wife, that her parents were large scale farmers, and astute business people within Uasin Gishu County, that the deceased was a Councillor and an esteemed member of the society, and thus it would have been common knowledge within the County had he taken another wife. She stated that she has never met nor heard of the Applicants or their alleged mother, and averred that the Applicants have not produced any evidence to corroborate their allegations. In the circumstances, she deponed that it is critical that sibling DNA tests are employed to determine whether the Applicants share common paternity with known children of the deceased, and whether they are therefore entitled to benefit from the estate of the deceased. She accordingly confirmed her readiness and willingness to take the DNA test, and urged that the cost thereof be borne by the Applicants.

10. The Application is opposed by the 1st Respondent-Administrator, Jeremy Kiptoo Kibogy, by way of his Replying Affidavit sworn on 22/08/2024, and filed through Messrs Limo R.K & Co. Advocates. He deponed that the Applicants are strangers to the estate of the deceased (his father), who was married to only one wife, that the Applicants are now all aged over 50 years and remain a mystery, that the deceased died at the age of 82 years and the Application has been brought 24 years after the deceased died, and as such, after an inordinate and inexcusable delay, and that at no given time did the deceased ever mention the Applicants during his lifetime. According to him therefore, the deceased never had any other children, noting that he is the last born and is now aged 52 years. He also pointed out that the Applicants are now aged 63 and 56 years, respectively, and that the Petition was gazetted in 2009.

11. The Application is also opposed by the 4th - 9th Respondents, by way of the Replying Affidavit sworn by the 4th Respondent, Jackie Chepkoskey Kibogy, on 25/08/2024, and filed through Dr. Mutubwa Law,

Advocates, Arbitrators and Mediators. She described herself as an Advocate and the Administrator of the late William Kipkoech Kibogy, one of the late sons of the deceased. She basically reiterated the contents of the Replying Affidavits cited above, including that their father was a prominent person whose death was well-publicised, and whose burial was even attended by the then President of the Republic of Kenya, H.E. Daniel Arap Moi, and that the Applicants would have therefore been aware of his death. She, too, therefore took issue with the Applicants' emergence 24 years since the deceased died. She, too, insisted that the deceased was not polygamous, and contended that the inclusion of the name "Kibogy" in the Applicants' identity cards is of no consequence, and that the Applicants have not demonstrated any involvement in the life of the deceased during or after his lifetime.

12. The same 4th Respondent, Jackie Kibogy, appears to have also sworn another Replying Affidavit on 8/07/2025, filed through Messrs Sagana, Biriq & Muganda Advocates LLP. She reiterated the contents of the other Replying Affidavits cited above, and added that the Application is an attempt to reverse the burden of proof, and to subject the children of the deceased to an invasive process without proper legal basis. She reiterated the inordinate delay of 24 years in the emergence of the Applicants, and the lack of demonstration of any connection with the deceased or involvement by the deceased in the lives of the Applicants, and again termed inclusion of name of the deceased in the Applicants' identity cards as devoid of any evidential value. She deponed that DNA testing, particularly where compulsorily ordered, interferes with an individual's bodily autonomy, dignity and privacy, and which rights are protected under *the Constitution*, and that any limitation thereof must meet the highest threshold of justification, necessity, and proportionality, which has not been demonstrated in this case. According to her, allowing the Application would open the door to abuse of process by allowing individuals to initiate Succession proceedings solely on the basis of suspicion, and force others to assist them in assembling evidence by way of medical tests. She termed the Application a fishing expedition, and also observed the absence of any documentary basis such as certificates of birth, school or hospital records, or written declaration by the deceased recognizing the Applicants as his children.

13. With leave of the Court, the 1st Applicant, Benardet Jepchichir Kibogy swore a Further Affidavit on 25/10/2024, in which she basically merely reiterated the contents of her earlier Affidavit.

14. Although I gave the parties the liberty to file written Submissions, the only Submissions I have come across in the Court file is from the Applicants' Advocates, dated 25/02/2025. The same does not however appear in the Judiciary Case Tracking System (CTS) online portal as required by the rules. Nonetheless, the Submissions basically restates the principles applicable in the handling of Applications seeking conduct of DNA tests in Succession cases, and cites several authorities.

Determination

15. The issue that this Court is called upon to determine in this matter is "whether the Respondents should be compelled to undergo DNA tests to determine whether they share common paternity with the Applicants, for purposes of determining whether the Applicants should be included in the distribution of inheritance of the estate of the deceased".

16. Deoxyribonucleic acid (DNA) is a genetic material which every human being inherits from his/her father or mother. Needless to state, DNA tests give an almost 100% accurate results in determining paternity. It is a fact that although Kenyan law does not expressly donate to the Courts the power to order for extraction of samples from a person's body, whether deceased or alive, for the purpose of conducting DNA test, there is also no provision in our laws that prohibits the Courts from making such orders. The Courts have thus routinely entertained such applications, some successful and others not. Along the way, the Courts have developed various principles to be considered before any such orders can be granted.

17. It is however agreed that for an order for DNA test to be issued, exceptional and compelling circumstances must be demonstrated. The Applicant must also lay a firm basis for grant of the order and also establish a strong nexus or linkage between him and the person whom the order is sought against. The Courts will also before issuing such order, consider its impact on the subject person's constitutional right to privacy. The Applicant must therefore demonstrate that in the circumstances of the case before Court, need to grant the order DNA test would be so important and necessary such that it would override the subject person's right to privacy. In regard thereto, Majanja J, in the case of S.W.W. vs G.M.K. (2012) eKLR held that:

> " 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."

18. However, in the South African case of Bother vs Dreyer (now Moller) High Court of South Africa (Trans Vaal Province) Case No.4421/08 (unreported), it was stated that:

> " In short, I agree with those judges and commentators who contend that as a general rule the more correct approach is that the discovery of the truth should prevail over the idea that the rights to privacy and bodily integrity should be respected …."

19. As aforesaid, an Applicant for an order for a DNA test bears the burden of demonstrating the nexus linking him, or the matters in issue, to the subject person. This was also reiterated by Odunga J (as he then was) in the case of R.M.K VS A.K.G & Attorney General, Petition No. 18 of 2013, in which he put it as follows:

> " The Petitioner stated that the court should order a DNA test nevertheless as the facts in the deposition have not been challenged. As I have observed, the burden remains on the petitioner to establish by pleadings and evidence sufficient nexus between him and the respondent in order to persuade the court to grant the orders. In this case there is no evidence to support such a course."

20. Another principle applied is that DNA testing would only be allowed where it is demonstrated that the order will not cause substantial loss to the subject person. In connection thereto, M.W. Muigai J, in the case of Wilfred Karenge Gathiomi vs Joyce Wambui Mutura & Another (2016) eKLR stated as follows:

> " Therefore, since under our law Sections 107 108 & 109 of the *Evidence Act* Cap 80 mandates that he who alleges must prove; the Applicant is the one who raised the issue of paternity against the 1st Respondent. He did not prove. The 1st Respondent claimed in spite of the date contained in her ID card she was born in 1950. She did not prove the same. Therefore, the only option is to result to scientific method for conclusive results. Both parties should undergo a sibling DNA testing to confirm if they are of the same father or not.
>
> The court finds that the DNA testing will not cause substantial loss to the applicant, except inconvenience that is less important to finding a lasting solution to the issue raised in the first place .....

> In light of above-cited authorities that DNA is intrusive and interferes with the right to privacy, this court finds basis for the DNA testing. Paternity is central to the dispute at hand, whether the 1st respondent is one of the beneficiaries of the estate of the deceased's estate. It is the only way to resolve the paternity issue, the applicant raised and is now reluctant to pursue the matter to its logical conclusion. The DNA testing will not prejudice the Applicant's case pending appeal, as he has not advanced any proposal on how to resolve issue it was his word against his."

21. In this case, the Respondents have all denied any knowledge of the Applicants, and have termed them as "strangers". The Respondents are emphatic that the deceased, their father, was married to only one wife, their mother. I may however point out that the Applicants have not anywhere alleged that their mother was "a wife" to the deceased. My understanding of their case is that they are simply products of a relationship between the deceased and their mother.

22. On the substantive matters, I note, from the copies of the Applicants' National Identity Cards exhibited, that they were born in 1961 and 1968 respectively, which means that they are currently aged about 64 and 57 years, respectively. The deceased himself died at the very advanced age of 82 years, way back in the year 2000, and it has also not been denied that the 1st Petitioner, Jeremy Kiptoo Kibogy, who is himself currently aged about 53 years, is his last-born child. It is therefore evident that the Applicants have been around for a long time as full adults, and it has not been claimed that they have been under any legal incapacity which would have stopped them from pursuing this matter at a much earlier stage, or within reasonable period from the date of the death of the deceased. It has also not been disputed that the deceased was a prominent businessman, farmer and politician within the Uasin Gishu County environs, whose death was well-publicised and attended. There is therefore no chance that his death was not known to the Applicants such that there would have been justification for them to have only emerged after at this particular time to seek a DNA test.

23. It is however evident that, despite all the foregoing circumstances, the instant Application was brought about 24 years after the deceased died. No explanation has been given by the Applicants for this emergence after 24 years, which delay, insofar as it has not been explained, I find to be inordinate and inexcusable.

24. There is also no evidence tendered to demonstrate that the deceased, at any time, during his lifetime, acknowledged or recognized the Applicants as his children, or made any declarations to that effect to any person. Such evidence, had it been produced, may have demonstrated the existence of some nexus or link between the Applicants and the deceased. Further, although the Applicants have referred to their said mother as "the late", they have also not tendered any evidence to indicate that she, at any time during her lifetime, fingered the deceased as being the father to her children, the Applicants.

25. It is also clear that the only supporting documents exhibited by the Applicants are copies of their National Identity Cards which, I believe, they produced to show that they bear the surname of the deceased "Kibogy". In the absence of any other connected evidence such as certificates of birth, hospital or birth records, school records, or declarations by the deceased, to demonstrate that the said surname is actually the one taken from the deceased, with his consent and/or knowledge, I am not persuaded that the mere existence of the surname "Kibogy" in the Applicants' Identity Cards can qualify as sufficient demonstration of any nexus to the deceased. It may as well simply be a coincidence in names as it has not been alleged that only the deceased, and nobody else, bears the same surname. There must be hundreds of "Kibogys" out there. The identity cards alone are not therefore enough. They ought to have been supported by some further evidence that may have served as some kind of corroboration. The same applies to the claim that the Applicants resemble the deceased and also the Respondents in appearance.

26. I also note that the Applicants have maintained a loud silence as to why they have not produced copies of their certificates of birth. Since they have not alleged that they do not have such certificates, I am constrained to make the "adverse inference" that had the certificates been produced, they would perhaps have damaged the Applicants' case thus their informed decision to withhold the same. This is in accordance with the provisions of Section 112 of the *Evidence Act*, which entitles the Court, where a party has custody of, or is in control of crucial evidence but which he fails or refuses to tender or produce, to make the "adverse inference" that if such evidence was produced, it would be adverse to his case. This was reiterated in the case of Kimotho –vs- KCB (2003) 1 EA 108, the decision of Odunga J (as he then was) in Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR, and also the decision of Mabeya J, in Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR.

27. I may also state that although the Applicants have at paragraph 9 of their Supporting Affidavit deponed that they have availed Affidavits sworn by their close Affidavits who know them as children of the deceased, I have not found any such Affidavits in the record. Clearly. none was exhibited as alleged.

28. The allegation that the deceased paid the Applicants' school fees, and also maintained them pursuant to a meeting held at their maternal grandfather's home is also not supported by any evidence, as no minutes or details of any nature of such meeting has been disclosed.

29. In view of the foregoing, I am constrained to agree with the Respondents that the instant Application appears to be an attempt by the Applicants to reverse the principle that the burden of proof lies with the person making an allegation, and to subject the Respondents to an invasive medical process without proper legal basis. Allowing the Application as presented will therefore appear to be assisting the Applicants to assemble, or compile evidence by way of medical tests. Granting the Application without first establishing the necessary nexus will also, under the circumstances of this case, be tantamount to opening flood-gates for litigants to seek orders for DNA tests on the basis of mere suspicion, and purely as a fishing expedition. As further correctly argued by the Applicants, DNA testing, particularly where compulsorily ordered, interferes with an individual's bodily autonomy, dignity and privacy, and which rights are heavily protected and safeguarded under our Constitution. Any limitation thereof must therefore meet the highest threshold of justification, necessity, and proportionality, which, I am afraid, has not been demonstrated in this case.

30. In the circumstances, my finding is that the Applicants have failed to demonstrate any prima facie evidence of involvement or participation by the deceased in their lives during his lifetime, or any kind of acknowledgment by the deceased of the Applicants as being his children. The Application has also been brought after an inordinately long and unexplained delay of 24 years. I am therefore not persuaded that the Applicants have laid any basis, or met the requisite threshold, for granting of an order to compel the Respondents to undergo DNA tests.

Final orders

31. The upshot of my findings above is that the Applicant's Chamber Summons dated 13/12/2024 is hereby dismissed but with no order on costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 3RD DAY OF OCTOBER 2025

.....

WANANDA JOHN R. ANURO

JUDGE

Delivered in the presence of:

Ms. Munyua h/b for Dr. Chebii for the Applicants

N/A for the 2nd Respondent-Administrator

Ms. Kinyua h/b for Mr. Sagana for the 4th Respondent and others

Ms Kibii for the 1st and 3rd Respondents

Court Assistant: Brian Kimathi