



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
MISC. SUCCESSION CAUSE NO. 3 OF 2015
IN THE MATTER OF THE ESTATE OF GICHINI KIBUI Alias GICHINI KIBUI
(DECEASED)

**ANDREW MWANGI WANGITHI alias ANDREW MWANGI
KABUNGO.....APPLICANT**

VERSUS

ANDREW MWANGI KABUNGO.....RESPONDENT

RULING

The 1st Application

[1] By Summons dated 6/9/2023 under Rules 49, 63 and 73 of the Probate and Administration Rules, the Applicant seeks that:

1. *The Honorable court be pleased to order that the applicant ANDREW MWANGI WANGITHI alias ANDREW MWANGI KABUNGO and the respondent ANDREW MWANGI KABUNGO do undergo a DNA test to confirm if they are biological sons of the late KABUNGO KORI who was only beneficiary to late GICHINI KABUI alias GICHINE KABUE the deceased in this matter who died on 17th October 1976.*
2. *The Honorable court be pleased to order that the applicant and the respondent do submit to the DNA test through the matching of samples to be extracted from their bodies to determine their paternity.*
3. *The Honorable court be pleased to order that the DNA test be done at the Government Chemist Laboratories at a date agreed upon by the parties within 14 days of issuance of the court orders.*
4. *The cost of this application be provided for.*

[2] The application is premised on the grounds on the face of it and supported by an affidavit sworn by Andrew Mwangi Wangithi alias Andrew Mwangi Kabungo, the

applicant herein on even date. He avers that the deceased herein was his grandfather and the respondent is his brother from a different mother. The deceased herein married his mother, Wangithi, after the death of the respondent's mother, and following the death of the deceased, the respondent chased them away from home. The respondent has since denied him a share of the estate despite being fully aware that he is equally entitled to it, by reason of being a grandson. It is in the interest of justice that a DNA test is conducted to confirm whether the parties herein share the same father, namely Kabungo Kori (now deceased), who was the only beneficiary of the estate herein.

- [3] The applicant swore a supplementary affidavit on 6/9/2023 in support of his application.
- [4] The applicant, his mother, namely Wangithi Gacuki alias Jane Wangithi Kathuri and a neighbour, namely Patrick Murage Njega, filed witness statements dated 6/9/2023 in support of the application.
- [5] The respondent swore a replying affidavit on 6/10/2023 in opposition to the application. He terms the birth certificate produced by the applicant as highly suspect, as it was issued in 1995 after Kabungo Kori died in 1992. The application for DNA testing is an intrusion into his right to bodily security, privacy and integrity, and it ought to be dismissed with costs. He questions why the applicant took out an ID card using his mother's name if he had a birth certificate bearing his alleged father's name.

The 2nd application

- [6] By summons dated 6/11/2024 under Rule 49, 63 and 73 of the Probate and Administration Rules, Elisiba Wangui Mwangi, the legal representative of Andrew Mwangi Wangithi alias Andrew Mwangi Kabungo (now deceased), seeks that:
1. *The orders prayed in the application dated 6th September 2023 do remain as they are save that the children of the applicant ANDREW MWANGI WANGITHI alias ANDREW MWANGI KABUNGO who is now deceased namely PAPETIAL WANGITHI MWANGI and MARK MURIUKI MWANGI who are minors do undergo the said DNA test on his behalf.*

2. *Cost be in cause.*

- [7] The application is premised on grounds on the face of it and supported by an affidavit sworn by Elisiba Wangui Mwangi, the deceased applicant's wife on even date. She avers that the deceased applicant had filed an application dated 6/9/2023, which has not

yet been heard and determined. The deceased applicant left 2 issues, namely Papetial Wangithi Mwangi and Mark Muriuki Mwangi (minors), and she prays that the said minors undergo the DNA test on his behalf.

[8] There was no response to the application.

Submissions

[9] The applicant urges that the DNA testing will not prejudice the respondent, and cites **Wilfred Koinange Gathoni v Joyce Wambui Mutura & Another (2016) eKLR and In the matter of J.K (Deceased), Nairobi H.C Succession Cause No. 123/2017 (U.R).**

[10] The respondent faults the deceased applicant for failing to invoke the provisions of section 76 of the Law of Succession Act to have the grant revoked, instead of resorting to intrusion of privacy, and cites **Tau Kakungi v Margrethe Thorning Katungi & Another (2014) eKLRMAO v JOO & another (Civil Appeal E034 of 2021) [2022] KEHC 3364 (KLR) (25 May 2022) and R.M.K v A.K.G and Attorney General (2013) eKLR.**

Analysis and determination

[11] Whereas the applicant contends that the deceased applicant was a stepbrother to the respondent, the respondent is adamant that the deceased applicant was a stranger to the estate. The deceased applicant is accused of procuring the birth certificate in 1985 after the death of his alleged father in 1982. The question that lingers is whether the death of a parent extinguishes a child's right to have the parent's name reflected on the birth certificate.

[12] The court notes on the certificate of birth of Mwangi, that the mother is indicated as Jane Wangithi Kathuri and the father as Kabungo Kori. That is sufficient proof, on a balance of probabilities, that the deceased applicant was a son of Kabungo Kori and Jane Wangithi Kathuri.

[13] The respondent's assertion that the said birth certificate was obtained fraudulently remains unproven and unsubstantiated. The respondent contends that the deceased applicant ought to have invoked the provisions of section 76 of the Law of Succession Act rather than resort to the intrusion of his privacy through DNA testing. This court wonders what purpose an application for revocation would serve where the pertinent

issue of paternity remains unresolved. Moreover, the object of DNA testing exercise as a fact finding process of the Court is a reasonable limitation of the right to privacy and bodily security under Article 31 of the Constitution.

[14] I respectfully note ***Re Estate of Ruiru Muchohi Gikonyo (2022) eKLR***, where the court (*M. Thande J.*) said that;

“The Court notes that the 2nd Respondent is entitled to have his right to privacy as guaranteed under Article 31 of the Constitution of Kenya, 2010, protected by this Court. His right to autonomy and protection of his bodily integrity must also be protected. The aforesaid is rights are however, not absolute. These right can be overridden in certain circumstances, for example, the right to know one’s paternity. There must always be a balance between the right of a non-consenting person not to submit himself to medical examination and the right of another person to know his heritage through a medical examination. In the present case, having considered the facts and the law and the cited authorities, I am persuaded that the 2nd Applicant’s right to know biological truth far outweighs the 2nd Respondent’s right to privacy, autonomy and protection of his bodily integrity. This truth is important for the 2nd Applicant not just so that he may benefit from the estate of the deceased but also that he gets to know his true heritage. The paternity test will confirm his heritage once and for all so that the need to know will be forever settled. As Lenaola, J stated in P K M v Senior Principal Magistrate Children’s Court at Nairobi & another case (supra), for the 2nd Respondent, it would be a minor inconvenience for him to subject himself to DNA testing once, but for the 2nd Applicant to not know his father and benefit from his estate, the damage may linger for the rest of his life. Additionally, given that the 2nd Applicant’s paternity is central to the dispute herein, the DNA test will be the most accurate method to establish the truth required, to arrive at a just conclusion.”

[15] This Court would agree that the ends of justice will be met if the sought DNA testing is undertaken, so as to conclusively put the contested issue of paternity to rest.

ORDERS

[16] Accordingly, for the reasons set out above, this court finds both applications dated 6/9/2023 and 6/11/2024 to be merited and are hereby allowed in the following terms:

1. *The respondent herein and one of the minors herein shall submit themselves for DNA testing at the Government Chemist within thirty (30) days.*
2. Mention for further directions on **26/1/2026**.

[17] There shall be no orders as to costs.

Order accordingly.

DATED AND DELIVERED THIS 16TH DAY OF DECEMBER 2025.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Igati Mwai for the Applicant.

Mr. Mageto for the Respondent.

Mr. Andrew Mwangi Kabungo, Respondent present.