

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KIAMBU
CIVIL APPEAL NO. E029 OF 2023
IN THE MATTER OF THE ESTATE OF JOHN WAWERU
KARIUKU (DECEASED)

MARY **WANJA**
KARIUKI.....APPELLANT

VERSUS

MARY **MULANDI.....**
.....RESPONDENT

*(Being an appeal from the Ruling by Hon.
Lilian N. Kwamboka (RM) delivered on
6/01/2023 at Kikuyu Law Courts in Succession
Cause No. 33 of 2021)*

JUDGMENT

BACKGROUND

1. The Appellant herein was issued with the Certificate of Confirmation of Grant, on the 11th April, 2022 in respect of the estate of the deceased herein.
2. The Respondent raised an objection to the Certificate of Confirmation of Grant that had been issued based on the fact that she had been left out as a beneficiary being that she was a biological daughter to the deceased which fact was denied by the Appellant.

3. Subsequently the Respondent filed a Notice of Motion application dated 29th July, 2022 requesting that parties be subjected to DNA testing to determine paternity. The said application was heard and determined and an order was issued on 6th January, 2023 for parties to submit to a DNA test.

4. Being aggrieved by the decision of the Learned Magistrate issued on 6th January, 2023, the Appellant filed her Memorandum of Appeal dated 28th February, 2023 on the grounds that :-

a) The Learned Magistrate erred in law and in fact in failing to find that the Respondent herein had not shown sufficient cause for seeking the order for DNA in failing to show in the circumstances of the case that there was a likelihood that the deceased could be her father.

b) The Learned Magistrate erred in law and in fact in failing to find that based on the facts and the circumstances of this case, the Respondent had failed to establish a sufficient link between herself and the deceased during his lifetime to persuade this court to find it desirable or imperative to make the drastic order of intruding into the bodily security, privacy and integrity of the Petitioner as protected by the Constitution.

c) The Learned Trial Magistrate erred in law and in fact in failing to find that based on the facts and the circumstances of this case, the Respondent had failed

to establish a sufficient link and the impugned photograph was not sufficient.

d) The Learned Trial Magistrate erred in law and in fact in descending into the field of the dispute by allowing herself to be part of an inquiry while our legal system is adversarial.

e) The Learned Magistrate erred in fact and in law by totally disregarding the Appellant's pleadings and submissions, thereby arriving at a wrong conclusion.

f) The Learned Magistrate erred in fact and in law by disregarding the evidence in the Appellant's pleadings thereby arriving at a wrong conclusion.

g) The Learned Magistrate erred in fact and in law by disregarding what she ought to have considered and considering what she ought to have disregarded, thus arriving at a wrong conclusion.

h) The Learned Trial Magistrate erred in law and in fact by failing to take into account existing and specific provisions of law dealing with the circumstance of the case.

i) The Learned Trial Magistrate erred in law and fact by failing to uphold the doctrine of precedent, the already determined decision by the superior court and appreciate and be guided by case law with similar facts.

5. The court directed the parties to canvass the appeal by way of written submissions.

APPELLANT'S SUBMISSIONS.

6. The Appellant submitted that the trial court disregarded her submissions filed at the lower court and that the Respondent did not demonstrate sufficient link between herself and the deceased as she only relied on one photograph. Reliance was placed in the case of ***In Re Estate of PKM (Deceased)***

(Civil Appeal E115 of 2022) (2023) KEHC 24031 (KLR) (24 October 2023) (Judgment). It was submitted that the Respondent should have instead sought for an order for exhumation of the deceased's remains as it has also not been proven scientifically that the Appellant was a child of the deceased.

RESPONDENT'S SUBMISSIONS

7. The Respondent submitted that a DNA test is necessary to conclusively determine the paternity as the Appellant is acknowledged as a daughter of the deceased. Reliance was placed in the case of ***M. W & 3 others vs D. N. (2018) eKLR***. It was submitted that the pursuit of truth trumps over the Appellant's inconvenience as such the trial court was right to grant an order for DNA test. The Respondent was said to have established her link to the deceased having been born in 1984 when the deceased and her mother **MARGARET WANJIRU MUVAA** cohabited as husband and wife. It was submitted that the Respondent had established a link between herself and the deceased. The exhumation order suggested by the Appellant was said to be granted as a

measure of last resort. Reliance was placed in the case of ***In re Estate of JMK (Deceased) (2021) eKLR.***

ISSUES FOR DETERMINATION

8. Having read and considered the court record and the submissions by both parties, this Court has framed only one main issue for determination is;

- (i) Whether the trial court erred in ordering the parties herein to submit to a DNA test.

ANALYSIS

9. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In ***Selle & Another vs. Associated Motor Boat Co. Ltd & Others (1968) EA 123***, this principle was enunciated thus

"...this Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

10. The Respondent herein objected to the issued Certificate of Confirmation of Grant as she was left out by the Appellant who denies the fact that the Respondent is a beneficiary to the estate of the deceased as claimed.
11. The Respondent avers that she was born in 1984 when her mother and the deceased were cohabiting and that even after their relationship ended in 1988 the deceased continued to take care of her.
12. The Appellant denies that the Respondent is a daughter to the deceased and that in any case, the Respondent had not established the link between herself and the deceased.
13. The Respondent submits that a DNA test is necessary to conclusively determine the paternity and that she has established a link between herself and the deceased.
14. The Respondent contends that she was born in 1984 when her mother was cohabiting with the deceased and that the deceased continued to acknowledge her as his daughter until his demise. She produced a photograph to show an event they attended together with the deceased.
15. From the evidence adduced before the trial court it was satisfied that the Respondent had established on a balance

of probabilities that there existed a link between herself and the deceased.

16. As submitted by the Appellant, this court concurs that there exists two schools of thought on the issue of DNA testing.

17. Refer to the case of ***In re Estate of Ruiru Muchohi Gikonyo (2022) KEHC 1458 (KLR)*** where Thande J. held that ;-

“It is noted that Courts have been divided on the issue of DNA testing. Some are of the view that an order for a DNA test will result in the violation of the right to an individual’s right to privacy. Other Courts hold the view that DNA should be used as a fact finding mission as it is the only scientific and concrete way of settling questions relating to paternity.”

18. The Respondent submits that the pursuit of truth trumps over the Appellant’s inconvenience whereas the Appellant submits that no link was established as between the Respondent and the deceased for the trial court to order for DNA testing.

19. The trial court after considering the rival submissions granted the prayer by the Respondent to subject the parties

herein to DNA testing noting that the right to privacy must not override the Appellant's right of inheriting her alleged deceased's father's estate as and when the paternity will be established.

20. The dispute herein involves whether the Respondent is a beneficiary of the deceased's estate having claimed that she was left out of the succession proceedings by the Appellant as such she objected to the issued Certificate of Confirmation of grant.

21. It is this court's considered view that the trial court did not err when it granted the request for DNA testing as this was the only way the court could have applied to determine whether the Respondent was a daughter to the deceased and by extension whether she was a beneficiary of the estate of the deceased who has been left out by the Appellant in this succession cause.

22. In the case of ***Benjamin Kibiwot Chesulut v Mary Chelangat & another (2015) eKLR*** it was stated that;-

"I interpret this test to mean that, DNA ought only to be permitted where it is necessary for the determination of the issue before court. Where it

is not going to determine a key issue in the case, then DNA ought to be denied. This is because DNA is seen as an intrusive procedure that has the effect of invading one's right to privacy.”

23. This Court is alive to the fact that the Appellant has a right to privacy and that bodily integrity should be respected but in the same breath the Court is also alive to the fact that DNA testing will conclusively determine the issue of paternity.

24. In the case of ***In re Estate of SKC (Deceased) (2019) eKLR, Githinji, J.*** stated thus;-

“DNA is intrusive and interferes with the right to privacy. However, paternity is central to the dispute at hand, and DNA is justifiable in determining the truth on whether the applicant is a child and dependent of the deceased and therefore beneficiary of deceased’s estate. It is the only way to resolve the paternity issue.”

25. In the end, the issue of the determination of the Respondent’s paternity far outweighs the Appellant’s right to privacy and that of her bodily integrity being respected.

FINDINGS AND DETERMINATION

26. This Court makes the following findings and determinations

- (i) The appeal is found to be devoid of merit and it is hereby dismissed.
- (ii) The Order of the lower court issued on 6th January, 2023 for parties to submit to a DNA test be and is hereby upheld.
- (iii) The Appellant to bear the costs of this Appeal.

Orders Accordingly

**DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU
THIS 27TH FEBRUARY, 2026.**

A.MSHILA

JUDGE

In the presence of;-

Mwariri - for Appellant

Endusa h/b for Nyarongo - for the Respondent

Sanja - Court Assistant