



**SMM & another v SMM (Civil Appeal E208 of 2023)
[2025] KECA 295 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KECA 295 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E208 OF 2023
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
FEBRUARY 21, 2025**

BETWEEN

SMM 1ST APPELLANT

JCM 2ND APPELLANT

AND

SMM RESPONDENT

*(Being an appeal against the Ruling and Orders of the High Court of Kenya at Mombasa
(J. N. Onyiego, J.) dated 30th September 2022 in Succession Cause No. 3 of 2018)*

JUDGMENT

1. The appeal before us arose from the Ruling and Orders of the High Court of Kenya at Mombasa (J. N. Onyiego, J.) dated 30th September 2022 in Succession Cause NO. 3 of 2018 relating to the estate of ETM (the deceased), who died testate on 9th June 2018. Prior to his death, the deceased executed a Will dated 15th April 1983 thereby appointing Barclays Bank Trust Company Limited (the trust company) as executor and trustee, his wife, PCM, as Guardian of his infant children. It is noteworthy that copies of the Will, the inventory of the assets comprising the deceased’s estate and the beneficiaries thereto are not contained in the record as put to us.
2. On 11th October 2001, the trust company aforesaid renounced its appointment as executor and trustee under the Will whereupon the appellants, SMM and JCM, petitioned for grant of letters of administration with a Will annexed to the estate of their deceased father and obtained a Grant of Probate of Written Will issued on 17th March 2021.
3. By a Notice of Motion dated 11th April 2019, the respondent, SMM, sought orders: that the court do make a finding that she was a lawful beneficiary of the deceased’s estate; that the petition for grant of probate be amended to expressly include her as a beneficiary of the deceased’s estate; that the court do



make an order for reasonable provision from the estate of the deceased; that the Grant of Probate made in the cause be revoked in its entirety; and that the costs of the application be provided for.

4. The respondent's Motion was supported by her annexed affidavit sworn on 11th April 2019 essentially deposing to the grounds on which it was anchored, namely: that she was a biological daughter of the deceased and GM, and that she was born on 3rd October 1975; that, prior to his demise, the deceased provided for her reasonable needs; that, after her father's demise, the appellants unprocedurally applied for grant of representation excluding her (the respondent) from the list of beneficiaries despite having been acquainted with her relationship with the deceased; and that the omission was calculated to deny the respondent her rightful share in her father's estate to which she was entitled.
5. By an order of the court dated 12th November 2020 made prior to the hearing and determination of the respondent's Motion, Njoki Mwangi, J. directed that the respondent to undergo a DNA analysis at Lancet Laboratories, Mombasa, to establish if she is the deceased's daughter; and that DNA samples be extracted from the deceased's brother, WW, and the deceased's daughter, EMM.
6. By a DNA examination report dated 20th January 2021, Lancet Laboratories, Mombasa, concluded that "it [was] 20 times more likely that EM and SMM [were] related as half siblings and sharing the same father".
7. Despite the DNA examination report, and in opposition to the respondent's Motion, the appellants raised a preliminary objection dated 2nd February 2021 contending that the respondent had committed fraud in that she had claimed to be a beneficiary of the deceased's estate while she knew or ought to have known that she was not; that the respondent had previously lodged a claim as a beneficiary of the estate of one FJM (deceased) in Mombasa P and A NO. 49 of 2017 as the deceased's last born; that the respondent had perjured herself and ought to be punished by the court; that the respondent's Motion was an abuse of the court process; and that she had come to court with dirty hands.
8. From the proceedings as recorded, it appears that the respondent's Motion proceeded to hearing by way of viva voce evidence on 23rd December 2021 and the impugned ruling delivered on 30th September 2022. In his ruling, the learned Judge declared the respondent a biological daughter of the deceased, disallowed the prayer for revocation of the Grant and directed the appellants to file an application for confirmation of Grant within 30 days next following. The learned Judge further ordered that any person aggrieved by the application for confirmation of Grant and the proposed mode of distribution be at liberty to file a protest, and that the appellants do value the estate and make provision for liabilities before distribution. Finally, he directed that costs of the application be in the cause and set a date for mention on 7th November 2022 to confirm compliance. Expressing his considered view, the learned Judge had this to say:

“59. I am convinced from the DNA result which was not rebutted by any other forensic or medical evidence that the objector and E were on a prima facie basis step- sisters and their only possible bond in view of the evidence on record is the father who is the deceased herein.”

9. Dissatisfied with part of the ruling, the appellants moved to this Court on appeal on 6 grounds set out on the face of their memorandum of appeal dated 1st December 2023 faulting the learned Judge for: finding that the respondent was a biological daughter of the deceased; finding that the respondent ought to have been listed as a beneficiary to the estate of the deceased; holding that the respondent had proved her case on a balance of probability; disregarding the appellants' expert witness evidence; finding that the respondent was entitled to maintenance from the estate of the deceased; and for finding



that kinship DNA evidence, which had not involved samples from the biological mothers of the two test subjects, as being sufficient proof of the respondent's paternity.

10. In support of the appeal, learned counsel for the appellants, M/s. W. G. Wambugu & Company, filed written submissions and a case digest dated 5th June 2024 citing 4 judicial authorities, namely: *Ngengi Muigai & Another v Peter Nyoike Muigai & 4 Others* [2018] eKLR, contending that the respondent was born when one Frederick John Mwachiti and Gladys Mtunguli had not separated and that, therefore, she was the legitimate daughter of Frederick Johnson Mwachiti; *Faraj v Mwawasi & 2 Others* [2023] KECA 1322 (KLR), submitting that kinship analysis which the court relied upon was not conclusive unlike a DNA report; *Re Estate of Gurdip Kaur Sagoo* [2021] eKLR, submitting that the respondent does not and cannot qualify to be a beneficiary of the estate since the deceased died testate, and that the court is bound by the terms of the will; and *John Gitata Mwangi & 3 Others v Jonathan Njuguna Mwangi & 3 Others* [1999] eKLR for the proposition that, in order for a court to make an order for reasonable provision, the applicant has a duty to provide the court with all the requisite information pursuant to rule 45(2)(g) and (h) of the *Probate and Administration Rules, 2017* and that the respondent did not provide such information.
11. On their part, learned counsel for the respondent, M/s. Ambwere T. S. & Associates, filed written submissions and a list of 6 High Court decision, namely: *Re Estate of Dorcas Omena Binayo (Deceased)* [2021] eKLR; *Re Estate of JPN v G (Deceased)* [2021] eKLR; *Re Estate of the Late Annelis Anna Graff* [2019] eKLR; *Peter Mutemi Mwendwa v Rachel Sala Kilungu* [2012] eKLR; *FKW v DNM* [2015] eKLR; and *Re Estate of Julius Kiragu Kiara (Deceased)* [2018] eKLR, all on the question as to who is a dependant, and on the importance of a DNA test in a paternity dispute.
12. To our mind, two issues commend themselves for our determination, namely: whether the learned Judge was at fault in concluding that the respondent was a biological daughter and a beneficiary to the deceased's estate; and, if the answer is in the affirmative, whether she was entitled to a share in the deceased's estate notwithstanding his written Will.
13. On the 1st issue as to the respondent's paternity, the appellants submitted that the respondent was the daughter of one FJM and GM, and that she was born before the two had separated; that her father hailed from Mariakani sub-County and died on 7th August 2015; that their expert witness discredited the DNA evidence of her paternity; and that the kinship analysis relied on by the court "was not conclusive unlike a DNA report".
14. In rebuttal, counsel for the respondent submitted that the DNA report presented in evidence clearly established the respondent as the deceased's daughter; that the results were not disputed; that a kinship test is usually intended to establish whether two or more individuals shared a father or a mother; that the witness referred to by the appellants as an expert was not qualified as such; and that he did not produce any documentary or scientific evidence to challenge the DNA results in issue.
15. We take to mind the learned Judge's decision where he concluded thus:

"58... DNA were extracted from Elizabeth the undisputed daughter of the deceased and when compared with those of the objector, it was found to be more than twenty times probable that they were step-sisters. It could not be a coincidence that the two shared the same DNA without sharing a common source.

59. I am convinced from the DNA result which was not rebutted by any other forensic or medical evidence that the objector and E were on a prima facie basis



step-sisters ... and I am not persuaded by the evidence of DW1 which is more of a hypothetical and theoretical explanation.”

16. Short of exhumation proceedings to obtain DNA samples from the deceased for comparison with that of the objector, sibling DNA test is, in our considered view, the next best way of determining her paternity. Indeed, sibling DNA test is the most practical way of determining whether two persons whose samples are the subject of analysis share a father or mother. Addressing itself to the question as to whether to stay the trial court’s order that the parties submit to a sibling DNA test, this Court in *BGG & another v EWK & Another* [2024] KECA 484 (KLR) had this to say:

“20. Although the applicants have alluded that paternity can be established through other means, they have not offered an alternative solution. It seems to us, on the strength of the material placed before us and the circumstances of this case, that, in as much as the DNA test will be intrusive, ... [i]t is the only means by which the trial court shall substantively tie up the link between the deceased and the respondents.”

17. In the same vein, the High Court of Kenya at Nairobi (M. W. Muigai, J.) correctly observed as follows in *Wilfred Koinange Gathiomi v Joyce Wambui Mutura & Florence Njeri Njoroge Kamau* [2016] KEHC 7005 (KLR):

“... the only option is to result to [a] 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 DNA result is crucial to determining the beneficiaries and/or dependents of the deceased’s estate.”

18. In addition to the forgoing decisions, we take to mind and share the view expressed by the High Court of Kenya at Mombasa in *Re Estate of NKM (Deceased)* [2021] KEHC 2956 (KLR) in the following words:

“26.the petitioner’s children are presumed to be the children of the deceased as there is no dispute about it. It therefore follows that those children are possessed of the deceased’s DNA as their father and if the deceased sired the objector’s children as claimed, there can be a match of DNA hence the centrality of their paternity.

27. In the instant case, justice will still be served through extraction of samples from the two sons of the petitioner for examination and matching with samples of the objector’s disputed children.”

19. Having considered the evidence on record, the un rebutted DNA results linking the respondent’s paternity to the deceased, the rival submissions and the cited authorities, we find nothing to fault the learned judge’s conclusion that the respondent was the deceased’s biological daughter. And without evidence demonstrating other parentage, nothing turns on the assertion that she was born before one Frederick Johnson Mwachiti and Gladys Mtunguli had separated.

20. In addition to the foregoing, it is noteworthy from the evidence on record that the deceased had bought the respondent a house in 2016 and set up a business for her in the name and style of Nebo Water Distribution Company, both of which the appellants dismissed as merely demonstrative of their



deceased father's acts of philanthropy, and not evidence of paternity. Be that as it may, the evidence of such gestures went a long way in reinforcing the uncontroverted scientific evidence of paternity.

21. Turning to the 2nd issue as to the respondent's right of claim to a share of the deceased's estate, it is noteworthy that, even though she did not challenge the validity of the deceased's Will, she nonetheless took issue with the fact that she was not included in the list of beneficiaries. On this issue, the appellants' case was that the deceased died testate, and the court was bound by the terms of his Will; and that the court cannot rewrite the deceased's Will or alter his express wishes.
22. On her part, the respondent relied on the provisions of sections 26 and 29 of the *Law of Succession Act*, Revised 2012 (1972) pursuant to which she sought reasonable provision and enforcement of her beneficial interest in the deceased's estate. We hasten to observe that the learned Judge was not at fault in observing that such provision and distribution will be invariably at the stage of confirmation of the Grant of Probate. Suffice it for the moment to observe that the respondent is entitled to a share of her deceased biological father's estate, and that settles the two issues in contention in the appeal before us.
23. Having considered the record of appeal, the grounds on which it is founded, the rival submissions of counsel for the appellants and for the respondent, the cited authorities and the law, we find that the appeal fails and is hereby dismissed with costs to the respondent. Consequently, the Ruling and Orders of the High Court of Kenya at Mombasa (J. N. Onyiego, J.) dated 30th September 2023 be and is hereby upheld. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF FEBRUARY 2025.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

