



**BGG & another v EWK & another (Civil Application E584 of 2023) [2024] KECA 484 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KECA 484 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E584 OF 2023  
F TUIYOTT, JM MATIVO & GWN MACHARIA, JJA**

**MAY 9, 2024**

**BETWEEN**

**BGG ..... 1<sup>ST</sup> APPLICANT**

**GMG ..... 2<sup>ND</sup> APPLICANT**

**AND**

**EWK ..... 1<sup>ST</sup> RESPONDENT**

**MWN ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for stay of execution of the Ruling and Order of the High Court at Nairobi (Ogola, J.) dated 14th November 2023 in Succession Cause No. E687 of 2020)*

**RULING**

1. The 1<sup>st</sup> and 2<sup>nd</sup> applicants, BGG and GMG respectively come before us by way of a Notice of Motion dated 13<sup>th</sup> December 2023, brought under the provisions of rule 5(2)(b) & 31 of the Court of Appeal Rules, 2022. They seek an order of stay of execution pending the hearing and determination of the intended appeal against the ruling and order in High Court Succession Cause No. E687 of 2020 (Ogola, J.) dated and delivered on 14<sup>th</sup> November 2023. EWK and MWN are the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively.
2. The brief background to the application is that grant of letters of administration intestate dated 23<sup>rd</sup> February 2021 in respect to the estate of JSJM (the deceased), were issued to PWG and the applicants (the administrators). The 1<sup>st</sup> respondent then filed objection proceedings vide an application dated 17<sup>th</sup> September 2021, which was later deemed to be an affidavit of protest to the Summons for Confirmation of Grant filed on 8<sup>th</sup> October 2021 by the administrators. Further, the 2<sup>nd</sup> respondent filed an affidavit of protest dated 1<sup>st</sup> November 2021. Her complaint was that on 5<sup>th</sup> June 2016 she sired a child, JAW., with the deceased and as such, she is entitled to benefit from the deceased's estate.



3. The 1<sup>st</sup> respondent filed a second application dated 5<sup>th</sup> November 2021 wherein amongst other prayers sought was that, the court orders that the applicants submit to DNA tests through matching samples to be extracted from their bodies against the samples to be extracted from her body, to prove paternity. She prayed that the test be done by Kenya Medical Research Institute (KEMRI) or PATH Care Kenya or Lancet Kenya or any other body that the court may deem fit.
4. In considering the issue of parties subjecting themselves to a DNA test, the learned Judge held that there were two schools of thought on what is required for an order of DNA test to be made: one, being that there has to be an established nexus or link between the applicant and the person the order is being sought against; and two, that DNA should be intended to establish the truth and enable the court to reach a just conclusion even where no nexus or link has been demonstrated, if the need is imminent.
5. The learned Judge found that the objectors before him failed to establish a link with the deceased. However, since the centre of the dispute is the issue of paternity, he was of the view that justice would prevail if the approach of establishing the truth was undertaken, as it took precedence over the right to privacy and bodily integrity. Accordingly, the court ordered parties to submit themselves to DNA analysis.
6. The grounds upon which the application before this Court is premised are contained on its face and the affidavit of BGG (the 1<sup>st</sup> applicant), sworn on 13<sup>th</sup> December 2023 on his own behalf and that of the 2<sup>nd</sup> applicant. It was deposed that on 14<sup>th</sup> November 2023, the High Court ordered that all the parties herein subject themselves to a Deoxyribonucleic Acid (DNA) test; that the order for subjecting the applicants to a DNA test was a violation of their constitutional rights to privacy despite the respondents not having a proper basis for seeking such an order; and that the DNA request by the 1<sup>st</sup> respondent has been made long after she is past 50 years of age and only because the deceased died and has already been buried.
7. The applicants believe that a DNA test is intrusive and against their will. They are of the view that the issue at hand which is dependency, can be proved in other ways besides conducting the test. They are apprehensive that they will be cited for contempt of court if stay is not granted, as they were ordered to subject themselves to the test within 14 days from the date of the High Court's order.
8. The application is opposed. The 1<sup>st</sup> respondent filed a replying affidavit sworn on 19<sup>th</sup> January 2024, vide which she contends that the applicants have failed to obey the trial court's order requiring them to subject themselves for a DNA test. She states that she is a child of the deceased, a fact which the applicants are denying, hence, the need to conduct the test. It is contended that, while the test may be inconveniencing, it will not cost the applicants any substantial loss.
9. The 1<sup>st</sup> respondent also states that at the time when the deceased was alive, there was no need for a DNA test since he knew and acknowledged her as his child; that she was even named after the deceased's mother as per the Agikuyu traditions; and that she has never been a stranger to the deceased's family as she has been working in the deceased's hotels known as [Particulars Withheld] and [Particulars Withheld] respectively, and it was of common notoriety that she is the deceased's first born child.
10. She adds that, as a child of the deceased, she is a dependant of his estate and that it is immaterial whether or not she was being maintained by the deceased; and that since the issue in dispute is paternity, justice will prevail if the court takes the approach of discovering the truth which takes precedence over the right to privacy and bodily integrity. It was urged that the application be dismissed with costs.
11. The 2<sup>nd</sup> respondent did not file a response.



12. The applicants further filed a supplementary affidavit dated 29<sup>th</sup> January 2024 in response to the 1<sup>st</sup> respondent's replying affidavit. They refute the allegation that vide a family meeting held on 3<sup>rd</sup> March 2020, the 1<sup>st</sup> respondent was recognised as the deceased's daughter; and that such an allegation is not only false but also misleading; that furthermore, the alleged minutes recorded the deceased as 'the late', yet he was still alive as he died later on 2<sup>nd</sup> May 2020. They deny they signed the minutes, and according to them, the signatures thereon can only be authenticated at a full hearing of the succession cause on cross-examination.
13. We heard the parties virtually via the Goto virtual platform on 5<sup>th</sup> March 2024. Learned counsel Mr. Nduati appeared for the applicants, learned counsel Ms. Ngotho appeared for the 1<sup>st</sup> respondent and learned counsel Ms. Ondieki appeared for the 2<sup>nd</sup> respondent. All counsel relied on their respective written submissions which they were given an opportunity to highlight. Both oral and written submissions were a regurgitation of the averments in the affidavits in support of, and opposition to, the application, and as such we shall not rehash them save for the very salient issues.
14. The applicants relied on Succession Cause No. 1129 of 2006 - [\*Hellen Cherono Kimurgor v Esther Jelagat Koskei\*](#) (2008) eKLR where the High Court declined to order a DNA test as no link between the persons involved was established. Also cited is this Court's decision in Civil Appeal No. 258 of 2008 - [\*Ruth Nyambura Chuchu & 2 Others v Stephen Gathuga Chuchu alias Stephen Mungai Githu\*](#) (2015) eKLR where it was held that courts should avoid making orders in vain or orders which are ineffectual as they cannot be enforced at all, or at any rate, without undue supervision by the court.
15. Notably, the applicants through their counsel told the Court that since the respondents had failed to establish the link between themselves and the deceased, they (applicants) were not willing to subject themselves to a DNA test, and in that case, it will be difficult for the Court to enforce the order sought.
16. The 1<sup>st</sup> respondent on the other hand relied on the cases of [\*Wilfred Koinange Gitbiomi v Joyce Wambui Mutura & Another\*](#) (2016) eKLR and [\*RE: Estate of NKM \(Deceased\)\*](#) (2021) eKLR for the proposition that a DNA test is the only way to resolve paternity issues between siblings. Whilst citing section 29 of the [\*Law of Succession Act\*](#) and Succession Cause No. 89 of 2010 [\*RE: Estate of the Late Annelies Anna Graff\*](#) (2019) eKLR, she contended that as a child of the deceased, dependency is automatic, hence the clarion need to establish that she was indeed a child of the deceased.  
  
She emphasised that during the lifetime of the deceased, a DNA test was not necessary as his family acknowledged her as his daughter. It was urged that in the interest of justice, the application be dismissed.
17. The 2<sup>nd</sup> respondent on her part placed reliance on Succession Cause No. 283 of 2013 [\*In the Matter of the Estate of SKC \(Deceased\)\*](#) (2019) eKLR where it was held that in as much as a DNA test is intrusive and interferes with the right to privacy, paternity being a central issue, it is justifiable. She also cited Article 53 of the [\*Constitution\*](#) and Petition No. 138 of 2012 [\*PKM v JW\*](#) (2014) KEHC 7488 (KLR) to posit that a child's interest should prevail over the inconvenience that accompanies the process of doing a DNA test. To the 2<sup>nd</sup> respondent, the test will pave way for her child to inherit from the estate of the deceased pursuant to section 29 of the Law of the Succession Act which provides that dependency is not a prerequisite to inheriting from the deceased where a child is involved. She contended that the deceased in any event acknowledged her child as his, a fact that was never disputed.
18. We have considered the application, the responses thereto and the respective rival submissions. The application is brought under the provisions of rule 5 (2) (b) & 31 of the Court of Appeal Rules, 2022. Primarily, what the applicants are seeking are stay orders which are issued under this Court's discretionary powers.



19. Before we exercise our discretion, we are required to examine whether the applicants have satisfied the twin principles under rule 5(2)(b), being whether the appeal is arguable and if the orders sought are not granted, the intended appeal will be rendered nugatory, thus making the proceedings an exercise in futility. We do not hesitate to add that the twin principles must be determined conjunctively and not disjunctively, and to this Court's satisfaction.
20. We are also minded that we should not make definitive findings at this stage so as not to embarrass the hearing of the main appeal. These principles were reiterated by this Court in the case of *R K K v M W K & 2 others* (2016) eKLR as follows: -
- “It is now settled that an applicant need not demonstrate a litany of arguable points. It is sufficient even if there be a solitary arguable point. It has been held by this Court in many decisions that in determining whether the appeal is arguable, the Court will advisedly avoid delving into the merits of the appeal to eschew prejudicing the appeal or intended appeal.”
21. As to whether there is an arguable appeal, the test is that it should be one which is not frivolous. It is sufficient that the applicant has an arguable appeal even if it is on a single point of law. This principle was restated in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* (2013) eKLR where this Court described an arguable appeal in the following terms:
- “An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.”
22. In the instant case, the applicants have not explicitly submitted on what would be their arguable grounds in the appeal, but we can infer from the grounds mentioned in the application that the arguable point would be whether the right to privacy supersedes the need for a DNA test to be conducted.
23. Article 31 of the *Constitution* guarantees every person a right to privacy as follows:
- Every person has a right to privacy, which includes the right not have-
- a. their person, home or property searched;
  - b. their possessions seized;
  - c. information relating to their family or private affairs unnecessarily required or revealed; or
  - d. the privacy of their communication infringed. (emphasis ours).
24. We agree with the applicants that indeed Article 31 (c) of the *Constitution* cushions a person against unnecessary intrusion into their private life. That is to say that a person's private affairs should not unnecessarily be required of, or revealed. To the extent that the applicants' DNA samples are required to be collected for purposes of ascertaining the 1<sup>st</sup> respondent's and the 2<sup>nd</sup> respondent's son paternity, it is an intrusive affair. Thus, courts have to tread carefully before making an order that a DNA test be conducted. The test must be that there has to be a justifiable reason of making the order.
25. In the context of the matter before us, the DNA test was ordered as a result of a paternity dispute between the applicants and the respondents. On the part of the 1<sup>st</sup> respondent, she claims to be the daughter of the deceased, while on the part of the 2<sup>nd</sup> respondent, she claims to have sired a child with the deceased whose paternity is in issue. According to the learned Judge, and as a matter of fact which



we fully agree with, is that the respondents can only establish their blood relationship with the deceased by explicitly proving paternity.

26. 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, conducting it overrides the right to privacy as provided for under Article 31 of the Constitution. It is the only means by which the trial court shall substantively tie up the link between the deceased and the respondents.
27. Further, while cognizant that we are not required to delve into the merit of the intended appeal, we nevertheless emphasise the provisions of Article 53(2) of the Constitution which are couched in mandatory terms that, “A child’s best interests are of paramount importance in every matter concerning the child.” As regards the 2<sup>nd</sup> respondent’s case, a child who cannot speak for itself is involved, and the case fronted on its behalf is that of a paternity dispute. As stated above, the respondents having satisfied the basis for conducting a DNA test, and we accordingly are of the view that the test, on this occasion, transcends the right to privacy. And once the issue of paternity is settled, the trial court will no doubt be in a position to reach a just conclusion on the true beneficiaries of the deceased’s estate.
28. Furthermore, the DNA test will be conducted in the process of a fact-finding mission; of discovering the truth. Indeed, the courts would be doing a great injustice to a party who was deserving to be entitled to the estate of the deceased if the test is not conducted. It then follows that, justice is better served if the test is conducted.
29. In sum therefore, we find that the appeal is not arguable.
30. Since the first limb under rule 5(2)(b) has not been satisfied, we are not obligated to delve into the second limb, which is whether the appeal will be rendered nugatory if the orders sought are not granted. It automatically falls by the wayside.
31. As we come to the end of our discourse, we make an observation of this Court’s decision in Ruth Nyambura Chuchu & 2 Others (*supra*) which the applicant relied upon. This Court differently constituted cautioned courts from making orders in vain or orders which are ineffectual. We have read and appreciated the facts in that case and contrasted them with the facts before us. In that case, the Court observed that the issue of whether the respondents in the High Court should have undergone a DNA test was not canvassed before the learned Judge. It was a decision which the trial court made suo moto without affording the parties an opportunity to be heard. Conversely, what is before us represents a different scenario since parties were given an opportunity to be heard on what their views were on the issue of subjecting themselves to a DNA test before a decision was reached.
32. In conclusion, we find that the Notice of Motion dated 13<sup>th</sup> December 2013 is devoid of merit and we hereby dismissed it. Costs shall abide the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF MAY 2024.**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**J. MATIVO**

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**JUDGE OF APPEAL**



**F. W. NGENYE-MACHARIA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

