IN THE COURT OF APPEAL
AT NAIROBI

CORAM: KARANJA, M'INOTI & MURGOR JJ.A.

CIVIL APPEAL NO. 114 OF 2012

BETWEEN

E M M..... APPELLANT

AND

I G M..... 1st RESPONDENT

R M M..... 2nd RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Rawal, J) dated 29th January, 2010

in

H.S.C. No. 470 of 1990)

****

JUDGMENT OF THE COURT

The appellant, ***E M M*** stakes his claim to the estate of the late ***G M M*** (deceased) on the ground that he is a biological son of the deceased. The respondents, ***I G M*** and ***R M M,*** the widow and daughter respectively of the deceased, vigorously oppose the claim as barefaced abuse by the appellant of the support and generosity that the appellant had extended to him as needy child. Whether one perceives this dispute as an expose of the deceased's double life during his sojourn on earth, or as a devious stratagem to acquire status and inheritance at the expense of his reputation, the net effect of the dispute has been to tie the family of the deceased in legal gargantuan knots for almost a quarter century, and to visit upon it disconcerting and stressful disinterment of his remains for futile Deoxyribonucleic Acid (DNA) testing. We shall briefly outline the background to the dispute before we consider the appellant's grounds of appeal.

The deceased, ***G M M*** was a career civil servant who rose through the ranks to the office of permanent secretary, the pinnacle of achievement in public service, and served in several ministries in that capacity. After his death on 2nd February, 1990, the respondents, in their respective capacities as his widow and daughter, filed in the High Court at Nairobi on 18th April, 1990 a petition for letters of administration intestate of his estate. In that petition, they listed the following as the persons who had survived the deceased:

i. I G M - Widow
ii. R M M - Daughter
iii. R K M - Son (minor)
iv. D N M - Son (minor)
v. S M M - Son (minor)
vi. K M - Father
vii. K M - Mother

By a notice dated 26th July 1990, the appellant objected to the making of grant of representation to the estate of the deceased to the respondents. The basis of the objection was that he was a natural child of the deceased, recognized and accepted as such by the deceased himself, and that he had been inexplicably excluded from the estate. The appellant followed the objection by filing, in November, 1990, an answer to petition and cross-petition for grant of representation in which he applied to be included as a co--administrator of the estate of the deceased with the respondents on the ground that he was a natural son of the deceased, born of a union between the deceased and one ***A S K,*** acknowledged as such and supported by the deceased during his life time.

The petition and cross petition were heard by Githinji, J *(as he then was)* who, on 27th October, 1999, allowed the respondents' petition, issued the grant of representation to them, and directed that the appellant's claim be heard and determined during the application for confirmation of grant. By an application dated 8th November, 1999, the respondents applied for confirmation of grant, setting the stage of escalation of the dispute.

In January 2000, the appellant filed an affidavit of protest against confirmation of grant, claiming once again, that as the natural son of the deceased who was maintained and cared for by the deceased immediately before his death, he had been left out as one of the children of the deceased. The appellant also accused the respondents of non disclosure of the full extent of the assets of the deceased.

The appellant's protest was also supported by A S K, his biological mother who deponed in an affidavit sworn on 7th January, 2000, that the appellant was the biological son of the deceased. She also deponed that the deceased had been responsible for the maintenance of the appellant, that he had paid the appellant's school fees, that by a deed poll the deceased officially procured the change of name of the appellant from plain *E M* to *E M M* and that when the appellant passed his primary school examinations, the deceased was so thrilled that he treated him to a trip to Malawi. Before the application for confirmation of the grant and the protest were heard, the appellant, on 25th April, 2001, applied for detailed and complete accounts of the estate of the deceased and for provision to be made to him as a dependant of the deceased under section 29 of the Law of Succession Act.

All these applications were heard by Aluoch J *(as she then was)* and in a ruling dated 27th June, 2002, the learned judge held that the appellant was the biological son of the deceased, and on her own motion, revoked the grant of letters of administration intestate issued to the respondents by Githinji, J and directed that a new grant be issued in the joint names of the respondents and the appellant.

Aggrieved by that ruling, the respondents lodged in this Court Civil Appeal No. 304 of 2002. On 15th April, 2005, this Court allowed the appeal, set aside Aluoch, J's order and remitted the cause to the High Court for hearing of the appellant's protest for inclusion and provision, as a beneficiary/dependant of the deceased. The Court further directed that the grant of letters of administration issued on 27th October, 1999, do proceed to confirmation showing the assets, identities and shares of those beneficially entitled.

Upon remittal of the cause to the High Court, the parties, on 24th January, 2006, agreed by consent that the issue of whether the appellant was a child or son of the deceased should be determined by *viva voce* evidence and after that, determination of the assets of the deceased and division of the estate would follow. The dispute was then heard by Rawal J (as she then was) who on 29th January, 2010, after hearing evidence from the parties and taking expert evidence on DNA, dismissed the protest with costs. The learned judge further held that the appellant was not a biological son of the deceased and allowed the respondents to proceed with the application for confirmation of grant.

Aggrieved by that decision, the appellant lodged the present appeal, in which he has listed the following 11 grounds of appeal:

1. **The learned judge erred in law and fact in failing to appreciate that the appellant had proved his case on a balance of probabilities;**
2. **The learned judge misdirected herself in law and fact in dismissing the appellant's protest;**

3. **The learned judge misdirected herself in placing reliance on DNA evidence in spite of the experts being unable to get primary sample from the deceased;**
4. **The learned judge misdirected herself in making a finding that the appellant was merely a person who received help for his education in spite of ample evidence that he was a son;**
5. **The learned judge misdirected herself by concluding that the appellant was not a son of the deceased despite that no evidence was tendered to controvert the appellant's mother's evidence that the appellant was sired by the deceased.**
6. **The learned judge misdirected herself in disregarding the documentary evidence provided by the appellant in support of his claim;**
7. **The learned judge misdirected herself in disregarding the evidence of the existence of a father and son relationship between the appellant and the deceased;**
8. **The learned judge misdirected herself in considering matters that were extraneous to the protest before her;**
9. **That the learned judge misdirected herself in failing to appreciate that in any event the appellant was a dependant under section 29 of the Law of Succession Act**
10. **The learned judge misdirected herself in failing to appreciate that in any event the appellant had a right to inherit from the deceased; and;**
11. **The learned judge misdirected herself in failing to consider the law.**

Before us Ms Judy Thongori, learned counsel, appeared for the appellant while Mr Peter Gachuhi, learned counsel, appeared for the respondents. Ms Thongori argued all the grounds of appeal globally save for ground No 3 on DNA evidence which she argued separately. Learned counsel assailed the judgment of Rawal, J for ignoring or misapprehending the evidence adduced on behalf of the appellant which, in her view, proved on a balance of probabilities that the appellant was a son of the deceased. Counsel relied on the following seven pieces of evidence to pitch for the appellant as the biological son of the deceased.

First, counsel referred to the evidence of A S K, the appellant's mother, in which she testified that the appellant was the son of the deceased, having been conceived in the Easter of 1966 and born on 22nd December, 1966. She further testified that the deceased had maintained the appellant, providing for his food, clothing and paying for his education at Nairobi Primary School, Nairobi School and University in India.

Second, learned counsel relied on a *"deed poll by parent on change of name by infant"* made on 13th November, 1979. The deed poll was made by A S K as the mother and legal guardian of the appellant and changed the name of the appellant from ***E M*** to ***E M M.*** That deed poll was supported by a statutory declaration of the identity of the appellant executed by the deceased, also on 13th November, 1979. In the declaration the deceased stated that he had personally known the appellant for 12 years and in paragraph 3 thereof that ***"to the best of my knowledge and belief the person who executed the said deed (A S K) is the parent of the relevant person (the appellant)."***

The significance of this deed poll, in counsel's view, was that the deceased had declared in it that he had known the appellant personally for 12 years at a time when the appellant was indeed 12 years old and that the deed poll was drawn by Messrs Shapley Barret & Company Advocates, who from other documents produced in evidence, were the deceased's advocates. We were therefore invited to conclude that the deceased was responsible for drawing of the deed poll, as deponed by Anne Syokau Kimwele in affidavits and elaborated in her evidence and that the deceased, by that deed poll, was giving his name ***"MATHEKA"*** to the appellant, who was his son.

Third, Ms Thongori invoked the trip to Malawi taken by the deceased and the appellant. According to the evidence of the appellant and his mother, when the appellant passed his Certificate of Primary Education (CPE) with flying colours, the deceased was thrilled and decided to treat him to a trip in Malawi. The trip took place in November 1979 and neither the appellant's mother, nor the 1st respondent or any of her children accompanied the deceased and the appellant to Malawi.

Fourth, learned counsel cited an affidavit of support sworn by the deceased on 17th June, 1987, after the appellant had obtained admission in Jabalpur University, India to pursue a Bachelors of Commerce Degree. In the affidavit, the deceased confirmed to the then Ministry of Education, Science and Technology, of the appellant's admission in the said university and that he, the deceased, was able and would meet all the educational expenses of the appellant during his stay in India. In that affidavit, the deceased deponed ***"that E M M is my son".*** Counsel submitted that the affidavit of support was evidence of acknowledgement by the deceased that the appellant was his son.

Fifth, Ms Thongori relied on a bundle of documents admitted in evidence showing remittance of fees by the deceased to the appellant in India. The first was a letter by the deceased dated 12th July, 1989, addressed to the Ministry of Education in respect of R N M studying in St Catherine, USA, R K M in Cantab College Canada and E M M in Sri Guru Tech Bahadur Khalsa College, India. In the letter, the deceased sought guidance because he had received fees advice in respect of his daughter in the USA, but ***"those of my two sons in Cantab (Canada) and the other in India are yet to come".*** In this letter, counsel submitted, the deceased had referred to the appellant, then studying in India, as his son.

The other documents were two applications by the deceased to the Central Bank of Kenya to be allowed to make remittances outside the scheduled territories under the then ***Exchange Control Act, cap 113 Laws of Kenya.*** The beneficiary of those applications was the appellant. There was also an application by the deceased applying under the same legislation to purchase foreign currency payable to Sri Guru Tech Bahadur Khalsa College, India.

Sixth, Mrs Thongori drew our attention to a photograph in the Sunday- Nation of 18th February, 1990, taken at the funeral service of the deceased showing the applicant sitting together with the 1st and 2nd respondents and two sons of the deceased and captioned ***"Mrs I M, (right) leads her children in prayer during the funeral service of her husband, the late G M M..."*** Counsel submitted that the evidence on record proved that the appellant had travelled all the way from India for the funeral and was funded by the 1st respondent to buy a suit for the occasion. That the appellant was given such a prominent place in the funeral of the deceased, counsel submitted, was evidence that he was a biological son of the deceased.

Seventh, learned counsel referred to a Christmas card (the year is not indicated), addressed to ***"Mum, Eric and Richard"*** and signed ***"From Dad".*** This card was said to have been sent by the deceased to A S K, and her sons Erick and Richard. Ms Thongori submitted that the deceased had referred to himself as ***"dad"*** in respect of the appellant in this card. Reference was also made to another writing said to be from the deceased to the appellant reading ***"Enjoy your Christmas and enter into the 90s as a happier man. From parents and brothers."***

Learned counsel submitted that taken in totality, the above evidence was clear enough that the appellant was the natural son of the deceased, the deceased had acknowledged him as his natural son and had supported him and assumed responsibility over him.

Turning from the evidence relating to the appellant as the biological son of the deceased, learned counsel invoked the ***Law of Succession Act, Cap 160 Laws of Kenya,*** to argue that the appellant was ***"a child" of*** the deceased as defined in that legislation. ***Section 3(2)*** which defines a child to include a child whom the deceased had expressly recognized or accepted as a child of his own for whom he had voluntarily assumed permanent responsibility was cited to argue that the appellant fell within that definition. ***Section 3(3)*** was invoked to support the submission that the deceased and the appellant had in law the same relationship as if the appellant was born in wedlock while ***section 29*** which defines a ***"dependant"*** to include a child who the deceased had taken into his family as his own, was cited to show that the appellant fell within the definition of a dependant of the deceased.

Learned counsel cited the cases of ***MACHARIA VS NJOMO & ANOTHER, (2008) 1 KLR (G&F) 754*** to show a child born out of wedlock inheriting from her deceased father, **NDOLO VS NDOLO**, **(2008) 1 KLR (G&F) 742** for the proposition that even a testator cannot be allowed to disinherit a dependant who

has depended on him during his lifetime and ***JOHN NDUNG'U MUBEA VS*** **MILKA NYAMBURA MUBEA, CA NO. 76 OF 1980** *to show that children born* out of a customary union contracted by the father during a subsisting monogamous union, were entitled to inherit as dependants upon the death of the father. In the latter case, this Court stated as follows:

> **"The claim by the appellant and his sisters to a share in the deceased's estate did not depend on whether or not the marriage between their mother (Wangari) and the deceased was valid in the eyes of the law. Their claim as we understand it rests on the simple proposition that they are children of the deceased who were treated by the deceased as such during his lifetime. For the purpose of their purpose of their claim, it does not matter how they became children of the deceased."**

Turning to ground No. 3 on the DNA evidence, learned counsel submitted that the trial judge erred in relying on the DNA evidence whilst it had credibility gaps and was not conclusive. It is common ground that when the remains of the deceased were disinterred for DNA testing for purposes of determining whether the appellant was a biological son of the deceased, Mr John Kimani Mungai, the forensic expert at Government Chemist could not generate DNA profiles from the remains, due to degradation of the samples over time. The remains were sent to South Africa, where again it was confirmed that DNA samples could not be extracted.

After failure of the primary DNA sample, the expert settled for sibling testing. He received blood samples, on the one hand, from the appellant and his mother A S K and on the other from the 1st respondent, the 2nd respondent, D M and S M. After conducting DNA analysis, the expert produced a report dated 21st November, 2008 in which he concluded:

> **"Based on the above findings, E M, A K's son is excluded as a biological son to G M."**

Dr Mungai's report was analysed and reviewed, on behalf of the appellant, by Dr Solomon Mpoke of the Kenya Medical Research Institute. In a report dated 15th June, 2009, Dr Mpoke made pertinent observations on the Government Chemist's DNA analysis. On the interpretation of the results, Dr Mpoke stated as follows:

> **"The DNA profiles in Table 2 however do confirm that Anne is the biological mother of Eric. The sample conclusion here is that Eric cannot possibly be a biological son of the father of David, Stephen and Rita."**

Ultimately he expressed the following professional opinion:

> **"The DNA sibling testing results as analysed in sub-heading 3 above have clearly pointed to the existence of two different individuals, one who sired Eric and another who sired David, Stephenand Rita. My professional opinion is that these results DO NOT answer the fundamental question; "who between these two individuals is the late G M?"**

In criticizing the DNA evidence further, Ms Thongori cited ***section 20 (1) of the United Kingdom Family Law Reform Act, 1969*** and ***Halsbury's Laws of England Vol 5, 4th Edition, Butterworths, 1993,*** to make the case that only blood samples taken from the person whose paternity is in issue and the father or the mother are deemed reliable. ***Section 20(1)*** provides as follows:

> **"In any criminal proceedings in which the paternity of any person falls to be determined by the court hearing the proceedings, the court may, on an application by any party to the proceedings, give a direction for the use of blood tests to ascertain whether such tests show that a party to the proceedings is or is not thereby excluded from being**

> **the father of that person and for the taking, within a period to be specified in the direction, of blood samples from that person, the mother of that person and any party alleged to be the father of that person or from any, or any two of those persons."**

Learned counsel further cited the unclassified **U.S Department of State for Foreign Affairs Manual Vol. 9 (2009) (Visas**) *on DNA testing to show* unreliability of DNA testing involving sibling testing. On the part of the manual headed ***"When not to recommend genetic testing to verify relationships",*** Ms Thongori relied on the following passage:

> **"Do not recommend direct sibling testing without parental testing. Direct testing between siblings may show an apparent lack of relationship even when the individuals are full siblings because of the variations in genetic contribution by each parent to individual children."**

Lastly counsel relied on a publication of Cellmark Accredited DNA Relationship Testing Services in the UK entitled ***"Cellmark DNA Immigration Testing"*** in which sibling DNA testing was considered inconclusive in the following terms:

> **"DNA relationship testing, where alleged siblings are tested, is not conclusive as parentage testing. This is due to the nature of the inheritance of DNA markers. On average full siblings will share more DNA markers than half siblings, who in turn will share more DNA markers than unrelated indimduals. However, due to the nature of inheritance, this analysis can only give an indication of the relationship-it is not conclusive."**

Counsel concluded her arguments by submitting that overall there was consistent evidence that the appellant was the biological son of the deceased, recognized as such, supported and maintained by the deceased immediately before his death, and that the learned judge was in error in over relying on the DNA evidence to the exclusion of all other evidence adduced by the appellant, which the DNA evidence was at best, inconclusive.

Mr Gachuhi, learned counsel for the respondents opposed the appeal and vigorously supported the judgement of the High Court. Counsel submitted that the central issue in the litigation in the High Court and in this appeal was not whether the appellant was a dependant of the deceased within the meaning of the Law of Succession Act, but rather, whether he was a biological child of the deceased. That explained the reason why, in his view, the determination by the High Court was restricted to the issue of paternity.

In answer to the arguments put forth by the appellant to show that he was the biological son of the deceased, counsel submitted that the appellant's birth certificate No. 2615303 did not bear the name of the deceased as his father. The space for ***"name and surname of father"*** was conspicuously blank. When the appellant was born on 22nd December, 1966, the deceased and the 1st respondent were not yet married. The marriage took place in 1968 and there was no reason why the deceased could not have been entered in the birth certificate as the father of the appellant, if indeed he was the father.

Regarding the deed poll on change of name from E M to E M M, counsel submitted that in the declaration in support of the deed poll, the deceased did not state that the appellant was his son. He merely declared that to the best of his knowledge and belief, A S K is the parent of the appellant. The deceased excluded himself as a parent of the appellant and nothing would have been easier than for the deceased to declare that he was the father of the deceased in that deed poll. Moreover, counsel submitted, there was no evidence to indicate that the name Matheka, which was being adopted by the appellant, meant and was understood to mean Matheka, the deceased. This was the case in light of the failure by the deceased to expressly state so in the declaration when he had all the opportunity.

Urging this point further, counsel submitted that from the evidence on record, the appellant's younger

brother, who it is admitted is not the son of the deceased, goes by the name of ***R M M,*** yet the fact of the use of the name Matheka by Richard has not led to the conclusion that Richard is a son of the deceased.

Regarding the support of the appellant by the deceased, Mr Gachuhi submitted that no evidence had been adduced of support that would amount to assumption of permanent responsibility on the part of the deceased. He urged that no school fees statements or receipts had been produced relating to the appellant's education at Nairobi Primary and Nairobi School. Counsel referred to the appellant's Pupil's Record dated 23rd January 1980 from Nairobi School in which the question, ***"who pays your fees, etc?"*** was answered, ***"mother pays for my school fees".*** To the questions, ***"does your parent/guardian have problems in raising fees for you and your brothers and sisters in school? If so, state briefly",*** the recorded answer was ***"my mother has problems in raising our school fees because we are two and my brother is in Nairobi Primary."*** Counsel submitted that if the deceased had been maintaining the appellant, that information would have been reflected on the Pupil's Record. In addition, he noted, the space for ***"father's name, occupation and address"*** was blank in the appellant's pupil's record.

On the payment of the appellant's school fees in India and foreign currency applications and remittances, counsel submitted that this took place at the time of foreign currency control and restriction, which required elaborate applications and procedures. It was natural for the deceased, as senior officer, to sign documents and make applications in support of a needy child without meaning that he was the biological father of that child. Mr Gachuhi referred to the evidence of the 1st respondent that the deceased was supporting about six other needy children and that even after the death of the deceased, the 1st respondent continued for some time to support the appellant in India. In this context, counsel submitted, it was not unusual that the deceased would address the appellant as ***"son"*** or describe himself in relation to the appellant as ***"dad".***

On the relationship between the deceased and the appellant, counsel submitted that it was never close as would be expected of a father and son. The appellant admitted under cross-examination that he had never lived with the deceased and his family, or even visited the deceased's home, a fact which was confirmed by the 1st respondent in her evidence in chief. Counsel further urged that if indeed the appellant was the son of the deceased, it was surprising that the appellant could not produce any letters written to him by the deceased over 24 years save the one Christmas card signed ***"from parents and brothers".*** On the same vein, counsel submitted that if there was any substance in the appellant's claim, it was natural to expect that more photos of father and son would be produced, but instead only one photo, from the Sunday Nation during the funeral service of the deceased, was produced.

Mr Gachuhi relied on **WELLINGSTONE MUCHIGI KIMARI VS RAHAB WANJIRU MUGO, CA NO. 168 OF 1990** *for the proposition that the definition* of "child" in ***section 3(2) of the Law of Succession Act*** that was invoked by the appellant applied only to a child whom the deceased had accepted or assumed ***permanent*** responsibility over and that temporary responsibility cannot suffice. In this case, counsel argued, there was no evidence of permanency in the support that the deceased had extended to the appellant.

The case of ***KIMANI MATHENGE MURIUKI & 2 OTHERS VS PATRICIA M. MURIUKI & ANOTHER, HC SUCCESSION CAUSE NO. 976 OF 1994,*** which in many respects, raised issues similar to those raised in the present appeal, was also cited in support of the respondents' case that support must be permanent rather than occasional and intermittent. Counsel urged us to find the above reasoning sound and to adopt it, even though we are not bound by the decision.

On the DNA evidence, learned counsel submitted that the DNA testing adopted in this case concluded beyond doubt that the appellant was not a biological child of the deceased. He submitted that the sibling DNA testing which had excluded the appellant as a child of the deceased was conclusive because it focused on male siblings by testing male Y chromosome profile.

Counsel referred to an email dated 16th February, 2007 from a Dr Carolyn Tsilimigras of South Africa, which was admitted in evidence. It was addressed to the 2nd respondent and expressed the view that it

would be almost impossible to extract DNA from samples as old as those of the deceased. The doctor suggested an alternative testing in the following terms:

> **"Alternatively, as the 'child[1] in question is male- are there any DIRECT male offspring or male relatives of your deceased father? Do you have any brothers? If such relatives are available, we can test Y chromosome profiles. Should the Y chromosome profile of the child in question match a male offspring or a male relative of your father - we would not be able to exclude him-the match would suggest that he came from the same male line."**

Mr Gachuhi relied on the **"Cellmark DNA Immigration Testing"** publication which was produced by the appellant as an authority, to show that it also confirmed the views of Dr Carolyn Tsilimigras that male Y chromosome profiles testing was conclusive. Under *"Alternative Testing",* the publication states:

> **"In some instances, where both siblings are male, testing using another type of DNA test called a Y chromosome test may provide useful exndence of the relationship. This type of test can confirm conclusively that two males do not share the same father."**

Mr Gachuhi concluded by asking us to dismiss the appeal, bearing, in mind that holding that the appellant is a biological child of the deceased while in fact he is not, has grave and long term psychological and emotional consequences for the family of the deceased, far beyond mere inheritance of his property.

This appeal, being a first appeal, we have considered the evidence adduced before the trial court, evaluated it ourselves and drawn our own conclusions. We have borne in mind and made allowance for the fact that we did not have the opportunity which Rawal J had to see and hear the witnesses who testified. See ***SELLE AND ANOTHER V ASSOCIATED MOTOR BOAT COMPANY LTD & OTHERS, [1968] EA 123, RAMJI RATNA AND COMPANY LIMITED V WOOD PRODUCTS (KENYA) LIMITED, CA NO. 117 OF 2001*** and ***HANH VS SINGH, (1985) KLR 716).*** We also remind ourselves that this Court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the trial judge is shown demonstrably to have acted on wrong principle in reaching the findings that he did. Nevertheless we are entitled to and will interfere if it appears that the trial judge failed to take account of particular circumstance or probabilities material to an estimate of the evidence or where his or her impression, based on the demeanour of material witness, is inconsistent with evidence in the case generally. See ***EPHANTUS MWANGI AND ANOTHER V DUNCANMWANGI WAMBUGU, [1982-88] 1 KAR 278.***

The real issue before us on this appeal is whether the appellant proved before the High Court on a balance of probabilities that he is a child of the deceased. Under ***section 29(a) of the Law of Succession Act,*** if the appellant is able to prove that he is a biological child of the deceased, he would be a dependant of the deceased without having to prove that he was maintained by the deceased immediately prior to his death.

Independent of being a biological child of the deceased, and therefore an automatic dependant, the appellant would also qualify as a dependant of the deceased if he can prove that he is a child whom the deceased had taken into his family as his own, and who was being maintained by the deceased immediately prior to his death. Unlike the dependant under ***section 29(a),*** the dependant under ***section 29(b)*** has to establish that the deceased had taken him or her into his family as his own child and that he or she was being maintained by the deceased immediately prior to his death.

Ms Thongori and Mr Gachuhi took different positions on whether the appeal before us was limited to

determination of the appellant's paternity or whether it also extended to determination of his having been taken by the deceased into his family as his own child and being maintained by the deceased immediately before his death. Mr Gachuhi took the view that the issue on appeal was paternity only, limited to ***section 29(a)*** whilst Ms Thongori saw the issue more broadly to encompass whether the appellant was a dependant within the meaning of ***section 29(b).*** In our opinion, the issue before us is not restricted to only whether the appellant is the biological child of the deceased. We take that position for the following reasons.

First, the consent order recorded by the parties on 24th January, 2006 and which set the parameters of the hearing before Rawal, J provided that the issue of whether the appellant was a child or son of the deceased would be determined by viva voce evidence. Once that issue was settled, the determination of the assets of the deceased and division of the estate would follow. There is nothing on record to suggest that the consent order was restricted to the narrow issue of whether the deceased was a biological child of the deceased.

Secondly, the pleadings on record and the affidavits filed by the parties leave no doubt that the contest encompassed the paternity of the appellant and/or whether the appellant was a child whom the deceased had taken into his family as his own and was maintaining immediately prior to his death.

Thirdly, the evidence that was led by the parties covered both the issue of paternity of the appellant and his alleged acceptance into the family of the deceased as a child of the deceased and maintenance by the deceased immediately before his death.

Lastly, in her judgment, Rawal J. pronounced herself on both these issues as follows:

> **"Only because the deceased paid school fees and to facilitate the purchase of foreign exchange described the objector as his son, the objector does not become his son. The deed poll does not help him as it was solely filed by his mother, the mere photo as the funeral where hundreds of mourners attended and viewed the body also does not support his contentions. The Christmas card also included Richard, who is admittedly not a son of the deceased. His case, to crown the issue has been disapproved by the DNA findings presented by consent".**

On the whether the appellant was the biological son of the deceased; the primary evidence that was produced was the DNA analysis by the Government Chemist. The appellant has laboured to discredit that evidence as inconclusive due to lack of primary DNA sample from the deceased. He has placed before us literature to suggest that the DNA results in this case are unreliable. We however have on record the professional opinions of experts, which in our opinion do not differ on the central issue. Even if they did, we would still be required to express our opinion and the reasons therefor, for as this Court *stated in* **Ndolo vs Ndolo**, **(supra, at page 751):**

> **"[B]ut as has been repeatedly held the exndence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say-"because this is the evidence of an expert, I believe it." That, we think, is the proper direction which a court dealing with the opinion of an expert or experts must give itself and the assessors when it is necessary to direct the assessors on such evidence. Of course, where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other emdence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected. But if a court**

is satisfied on good and cogent grounds(s) that the opinion though it be that of an expert, is not soundly based, then a court is not only entitled but would be under a duty, to reject it"

After analyzing the report of the Government Chemist, Dr Mpoke, the appellant's expert witness, noted the DNA profiles confirmed that A S K was the appellant's biological mother and that the sample conclusion was that the appellant could not possibly be a biological son of the father of Rita, David and Stephen. His conclusion was that the DNA results pointed to the existence of two different individuals, one who sired the appellant, E M M, and another who sired Rita, David and Stephen. Up to that point, the appellant's expert witness was not saying anything different from the Government Chemist. The real point of departure, however, was the following opinion by Dr Mpoke:

"My professional opinion is that these results DO NOT answer the fundamental question; "who between these two individuals is the late G M?"

What the expert was saying was that, there was no dispute that the appellant did not share a father with the three children of the 1st respondent.

His problem was that he could not state that the three children of the 1st respondent's were the children of the deceased. In our view, that question ought not to have bothered Dr Mpoke because in these proceedings, that was never an issue, and nowhere was it ever suggested that the children of the 1st respondent were not the children of the deceased. As the maxim goes, *pate rest quem nuptiae demonstrant* - a child born to a married woman is presumed to be that of her husband. In any event, under ***section 118 of the Evidence Act, Cap 80 Laws of Kenya,*** there was conclusive proof in law that the children of the 1st respondent, born during the subsistence of the marriage between the deceased and the 1st respondent, were the legitimate children of the deceased, which conclusive proof was never called into question. The issue before the experts, put in a different way, was whether the appellant shared a father with the children whose DNA samples had been taken (that is, Rita, David and Stephen), which father the law presumed to be the deceased. It was therefore not open to Dr Mpoke to suggest, in view of ***section 118 of the Evidence Act,*** that the children of the 1st respondent were not the children of the deceased, or that the father of the 1st respondent's children could be a person other than the deceased.

We are not convinced by the appellant's authorities and literature that the DNA results from the Government Chemist are suspect and inconclusive. We have pointed out that Dr Mpoke did not appear to have a problem with the Government Chemist's conclusion, save that he misdirected himself by purporting to raise questions which the law precluded him from raising. The UK Family Law Reform Act, 1969 which was relied upon by the appellant relates specifically to "testing of blood" rather than DNA testing and therefore the applicability to DNA testing, of the limitations placed by that statute on blood testing, is veiy doubtful. Professor, Nigel V. Lowe, in a paper entitled **"The Establishment of Paternity under English Law"** *(Presented at* colloquy organised in Strasbourg to mark the 50 years of existence of the International Commission on Civil Status) which was cited by the appellant, distinguishes between blood and DNA testing in the following terms:

"In cases where paternity is in issue, the most cogent evidence is likely to be obtained by blood tests in general and DNA tests in particular. Such tests may be used either to rebut the presumption or allegation of paternity or to establish parentage.

Until DNA tests became publicly available reliance was placed on blood tests. The great drawback of such tests, however, is that, although they can definitely show that a man cannot be the father, they can only show with varying degrees of probability that he is the father. In contrast, DNA tests (or genetic

fingerprinting as it is sometimes known) can, by matching the alleged fathers DNA with that of the child's (having excluded those bands that match the mother's) make positive findings of paternity with virtual certainty."

What we understand Prof Lowe to say is that in the determination of paternity, blood testing is less reliable than DNA testing. If that be the case, is it surprising that the UK statute puts in section 20 limitations on who can be tested in blood testing? In our view, the limitations placed by that statute and which the appellant sought to rely upon to discredit the DNA testing in this case do not apply because they were intended to apply specifically in cases of blood testing.

We also find it difficult to accept the statements in the U.S. Department of State Foreign Affairs Manual, Vol. 9 as statements of general application. It appears to us that the document is an internal manual intended specially for the use of the employees of the U.S. Department of Foreign Affairs in the processing of applications for visas to the United States of America.

We have already cited opinions on DNA Y chromosome testing, including, from the literature relied upon by the appellant, that states this type of testing can confirm conclusively that two males do not share the same father. When Dr John Kimani Mungai testified, he was never asked whether in examination- in-chief, or cross-examination, the DNA testing method that he had used. However, to his report he attached DNA profiles generated from the samples collected from Mrs Matheka, Rita, David, Stephen, A K and E M classified as male and female and their respective chromosomes (XX) for female and (XY) for male clearly noted. There is therefore strong suggestion that Dr Mungai may have used Y chromosome testing, and that may further explain why, Dr Mpoke did not fault Dr Mungai's results and conclusion. Merely because the profiles of females (Mrs Matheka, Rita and A K) were generated does not in itself disprove use of Y chromosome testing in view of Dr Mungai's clear separation and classification of the profiles into female (XX) and male (XY) chromosomes.

Beyond the scientific evidence which we find was conclusive, there are other aspects of the appellant's claim that, in our view, seriously undermine his allegation, and that of his mother that he is the biological son of the deceased. First is the fact that the name of the deceased was never entered into the appellant's birth certificate. The learned trial judge adverted to the inconsistent reasons advanced by A S K to explain the failure to enter the name of the deceased in the birth certificate. We find it difficult to believe that if A K was as sure as she asserted that the deceased was the appellant's father, she could have omitted to enter the name of the deceased in the birth certificate, which she was responsible for obtaining.

Secondly, we do not think that the deed poll by which A S K changed the name of the appellant and which was supported by a declaration made by the deceased can be the basis for concluding that the appellant is the biological son of the deceased. Beyond declaring that he had known the appellant for 12 years, the deceased merely confirmed what was not in doubt, namely that A K was the appellant's parent. The deceased, deliberately, did not include himself as a parent of the appellant, and A K appears not to have found that odd, if indeed the deceased was the appellant's father.

If the deed poll and the adoption of the name Matheka was meant to prove that the appellant was the son of the deceased, then we must wonder why the deceased's name was never entered as the father of the appellant in the appellant's pupil record at ***[particulars withheld]*** School in January, 1980, barely two months after the deed poll was executed and gazetted. As we have noted, the space provided for the particulars of the appellant's father in the pupil record was left a yawning gap. If we take into account the timing of the deed poll, A K's application for a passport for the appellant, and the trip to Malawi, it is difficult to avoid the irresistible inference that the real purpose of the deed poll was to secure for the appellant three names which are normally required for purposes of obtaining official documents such as a passport.

Nor can the mere use of the name Matheka by the appellant lead to the conclusion that he was the son of the deceased, for the simple reason that even his younger brother, R M, in respect of whom there is common agreement that he is not the son of the deceased, used the name Matheka.

Having considered all the evidence adduced on the paternity of the applicant, we are satisfied that it ruled out the appellant as the biological son of the deceased. In other words, the appellant did not prove on a balance of probabilities that he is the biological son of the deceased. We are accordingly satisfied that on that issue, the learned trial judge arrived at the correct decision.

The next issue is whether the appellant proved on a balance of probabilities that he was a child of the deceased whom the deceased had taken into his family as his own and was being maintained by the deceased immediately prior to his death. We have already referred to the various pieces of evidence relied upon by both the appellant and the respondents to prove or disprove dependency. The evidence of both the applicant and A S K was that from the birth of the appellant in 1966 to the death of the deceased in 1990, the appellant was supported and maintained by the deceased.

It truly strikes us as odd that beyond the assertions by the appellant and his mother, no evidence of any support whatsoever (save during his stint in India) was adduced. We would have expected some form of evidence to show support from the deceased towards the appellant while he was a pupil at Nairobi Primary and when he was a student at Nairobi School. On the contrary, what we have is the appellant's pupil record in Nairobi School indicating unequivocally that the appellant's school fees was being paid by his mother, who was struggling as she had another son in Nairobi Primary.

The only tangible evidence of some support that was produced by the appellant related to fees and foreign currency remittances when the appellant was studying in India. In our opinion, the explanation given by the respondents to explain this support and the attendant letters by the deceased is plausible. The 1st respondent testified that the deceased was educating and supporting some other six or seven children, which was not disputed. The first respondent herself continued sending money to the appellant in India for sometime after the death of the deceased, something one may not expect from a "hostile step mother". Viewing all the evidence in totality, we find reasonable the respondents' contention that the deceased extended support to the appellant out of his own volition and generosity.

Even assuming that was not the case; would the support of the appellant by the deceased while in India alone amount to the deceased having taken the appellant into his family as his own child and having assumed responsibility for maintaining him? It is common ground between the appellant and the respondents that the appellant had never visited, let alone lived in the deceased's home. How then can such evidence form the basis for concluding that the appellant was a dependant of the deceased within the meaning of ***section 29(b) of the Law of Succession Act?***

Additionally the definition of a "child" in ***section 3(2) of the Law of Succession Act*** includes a child whom the deceased has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility. We agree with the respondent that the appellant has to show a reasonable degree of permanency in the responsibility that the deceased is alleged to have voluntarily assumed over the appellant.

Episodic support, as is the case here will not suffice. In, ***Kimani Mathenqe*** **Muriuki & 2 Others vs Patricia M. Muriuki & Another** *(supra), which we* have already pointed out, had uncanny resemblance to the current dispute, Githinji, J, in dismissing an application for provision of a dependant, delivered himself as follows:

"As for Lucina Muthayo Wanjeri, she was born after her mother left the deceased. It is the burdenof the mother to prove on a balance of probabilities that the deceased was the father of the child. Her mother merely said that the deceased was the father without providing concrete evidence. The respondents dispute that she is a child of the deceased. Her certificate of birth shows that her mother did not give the name of the deceased as her father. It would appear she was not named after the mother of the deceased...There is emdence that Lucina did not live with the deceased though it is accepted that she used to visit the deceased occasionally. There is no concrete evidence
of direct assistance by the deceased. It is true that she accompanied the deceased abroad once and deceased referred to her as his daughter in the affidavit to support application for passport. It is

also true that she was named in the funeral programme as a child of the deceased. But the deceased was dead and had no control of the events after his death. I do not think the mere occasional references of Lucina as his child in a few documents without concrete evidence that deceased was the natural father of the child; that they lived together as father and child; that she was absorbed in the family of the deceased or that the deceased voluntarily assumed permanent responsibility over her, is sufficient to show that she was a dependant of the deceased in such sensitive matters as inheritance.

I conclude therefore that it has not been proved that Lucina is a dependant."

We are of the opinion that the above reasoning is sound and we would apply the same in the present case.

We have ultimately arrived at the conclusion that, on the basis of the evidence on record, the High Court arrived at the correct decision that the appellant had not proved on a balance of probabilities that he was the biological child of the deceased or that he was a dependant of the deceased within the meaning of the Law of Succession Act. Accordingly, this appeal is dismissed with costs. Those are our orders.

Dated and Delivered at Nairobi this 25th day of October, 2013.

W. KARANJA

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

A. K. MURGOR

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR