IN THE COURT OF APPEAL

AT NYERI

(CORAM: BOSIRE, KEIWUA & NYAMU, JJ.A.)

CIVIL APPEAL(APPLICATION) NO. 259 OF 2002

BETWEEN

GITHINJI NGURE.....1ST APPLICANTAPPELLANT

CHARLES MWANGI GITUNDU.....2ND APPLICANT/APPELLANT

AND

CHARLES WANJOHI WATHUKU.....RESPONDENT

(An application for leave to take additional evidence relating to an intended DNA test in

an appeal from the ruling of the High Court of Kenya at Nyeri (Juma, J.) dated 18th October, 2001

in

H.C.S.C.NO. 60 OF 1997)

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RULING OF THE COURT

This is an application dated 23rd November, 2007 based on ***Rules 29(b) 42(i)(2)*** and ***43*** of the Court of Appeal Rules, the Public Health Act and the Anatomy Act ***Chapters 242*** and ***249*** respectively. It is principally an application for leave to take additional evidence relating to an intended DNA test.

The story behind this case is the stuff for novels. It is quite a thriller and at the same time it is a serious matter for determination. Those connected with the story and have since died could be turning in their graves in anticipation of the outcome and those living to a second coming so that the truth can declare itself.

The appellant who claims to be the natural son of the deceased fought and lost to a brother and a cousin of his "father" a burial dispute or the right to bury his "father" in the Chief Magistrate's court at Nyeri. He not only lost the burial right but was in prison cells during the day of the burial and as would be expected he claims not to know the burial site of his father. On the other hand fortune is never one sided the appellants applied for letters of administration in the superior court and they were granted in their favour.

During the burial dispute, a DNA test was ordered by the Chief Magistrate's Court nearly 14 years ago, but was not undertaken because the appellants were allegedly advised against it by a judge who had the conduct of the succession proceedings in the superior court and because of this, the matter has since acquired a constitutional dimension, the details of which we would rather not touch at this stage. In this application which has remained pending allegedly for the above reason, we have been urged to order that the additional evidence by way of a DNA test be taken so as to put to an end the dispute.

The origin of the application is traceable to a Petition by the respondent for the Grant of Letters of Administration of the estate of ***Wathuku Ngure*** deceased who the respondent claims to be his father. The two applicants in the application before us objected to the Grant being issued to the respondent on the ground that the respondent was not a son of the deceased and that they were the right persons to be granted Letters of Administration as they are brother and cousin respectively of the deceased. By a ruling dated 18th October 2001 ***Juma J,*** as he then was, following a full hearing disallowed the objection and the respondent was declared the only heir of the deceased. This order was subsequently followed by a confirmation of the Grant of Letters of Administration. Aggrieved by the said decision, the applicants lodged an appeal in this Court on 11th September, 2002 which appeal is pending as ***Civil Appeal No. 254 of 2002***. Ground three (3) in the memorandum of appeal, thereof states:-

> **"That the superior court erred in law when it stated that "it was the petitioner (sic) case that he is the biological son of the deceased" and when it held that the respondent "is the son of the deceased", and that "I would still find him a dependant of the deceased in terms of** *section 29(b)* **of the Law of Succession Act Chapter 160."**

As observed earlier it is also important to note that even before the succession proceedings in the superior court as described above, in a burial dispute between the same disputants to wit ***Nyeri Chief Magisrate's Nyeri Civil Case No.496 of 1996***, the court had on 25th November, 1996 made an order for a DNA TEST to be carried out by Kenya Medical Research Institute (KEMRI) but the same could not be conducted on the ground that contrary to the doctors request, the advocates for the disputants did not avail themselves and they did not send their authorized representatives to physically identify the body and present their clients. Besides, the mother of the respondent did not avail herself as well. The court had at that time ordered tests of five persons. The appointed doctor went on to observe as follows:-

> ***"… making preparations for these tests have (sic) been expensive on our part and I wish to impress upon the Honourable Court that such a test in the absence of the deceased's blood sample would give an indirect evidence on relatedness of the disputants a piece of evidence which may still be useful to the Court"…***

At the hearing of this application dated 2nd November 2007, the applicants were represented by learned counsel ***Mr A B Shah,*** whereas the respondent was represented by learned counsel Mr Mwenesi.

Mr Shah in his submissions sought to orally amend the first prayer in the application as under:-

"That an order be made to take additional evidence pertaining to the paternity of the respondent Charles Wanjohi Wathuku."

The unamended prayers 1,2 and 5 as material read:-

1. That an Order be made by this Honourable Court to take evidence pertaining to the Paternity of the respondent herein CHARLES WANJOHI WATHUKU by a process of DNA TEST of the respondent and his mother LYDIAH WANJIRA CHOMBA and the deceased WATHUKU NGURE by DNA by the Chief Government Chemist of Post Office Box Number 30014 Nairobi Kenya.

2. That the Honourable Court do order pursuant to the provision of the Public Health Act, Chapter 242, pursuant to Section 146 and in the presence of the applicants and respondent for the purposes of

identification by <u>ACHEERA CLAN</u> that the deceased <u>WATHUKU NGURE'S</u> body be exhumed which is now interred at land parcel number MUHITO/MBIUINI/654 by a qualified pathologist, namely <u>DOCTOR ANDREW KANYI GACHII</u> and be taken to his clinic namely <u>ANDKAN MEDICAL CLINIC AND DIAGNOSTIC LABORATORIES</u> of Post Office Box Number 1023 Nairobi where according to the DNA testing the large FEMURBONE will be required to be dissimated for this purpose.

3. That further, the Court orders that the samples of the deceased be collected and transmitted to Kenya medical Research Institute (KEMRI) or Kenya Government Chemist.

(i) That for the Judicial and proper determination of paternity it is essential to carry out this DNA TEST which irrespective of the other available evidence or lack of it will finally put to rest the issue as to whether the respondent is the SON of the DECEASED for the purpose of inheritance of the Estate of the deceased WATHUKU NGURE.

(ii) That the families of both the plaintiff and defendants will have no doubt about the relationship of the applicants and respondent.

As is apparent from prayer 1 the effect of the amendment is to leave out the respondent's mother and the deceased from the intended DNA test. In addition, Mr Shah relied wholly on the affidavit of the second applicant sworn on 17th day of March, 2009. The learned counsel submitted that the application was now based on the strength of a letter dated 3rd March, 2009 addressed to the deponent of the affidavit by a director of a firm called ***Biotech Forensic*** which suggested inter-alia that the exhumation of the body of the deceased was not necessary and that if the respondent agreed to give some blood for DNA testing, it would be compared with that of the deceased's brother and that the DNA test would be conclusive. In his submissions, Mr Shah reiterated the contents of the second applicant's affidavit by stating that should the DNA test show that the respondent is a son of the deceased, then the applicants and the extended family would withdraw the pending appeals and accept the respondent as a 'son.' Without reading paragraph 3 of the affidavit in support of the application, the learned counsel in particular drew the Court's attention to para 3(b) of the affidavit which inter-alia alleged that the second applicant did not pursue the application for a DNA test at the superior court level for reasons set out therein. Mr Shah stated that the test as described in the ***Biotech Forensic's*** letter was simple and that no exhumation would be necessary and that the applicants would meet the cost and that it was not the applicants' fault that the DNA test was not taken as ordered by the Chief magistrate Court in 1996. The learned counsel submitted that the DNA test report would constitute additional evidence that could not have been availed earlier. He concluded his submissions by inviting the Court to invoke the overriding objective in order to reach a final resolution of the matter.

Mr Mwenesi, learned counsel for the respondent opposed the application on the grounds that the intended test was to be undertaken by a firm called ***Biotech Forensic*** contrary to the prayers in the application which had identified other specialists and tests on other named individuals including the deceased and the respondent's mother and both had now been left out in the "amended" application for unknown reasons. The scope of ***rule 29,*** the learned counsel contended, is that additional evidence could only be taken by a court or a commissioner appointed for this purpose, the application was incompetent; that the orders now being sought are different from those sought in the body of the application as filed and further that in the application there was no prayer that ***Biotech Forensic*** undertakes the test and therefore prayer 2,3 and 4 were otiose; that the Court's discretion could not be exercised in the circumstances; that the Chief Magistrate court was a competent court and the applicant had not satisfactorily explained why the test could not be taken in 1996 when it was first ordered by the court before the burial of the deceased which had been postponed for six months after the deceased's death, when the chances of having 100% success in the tests were guaranteed as opposed to the current situation where at most only 95% success could be attained; that the applicants had not produced an affidavit, or any proof from the "uncle" volunteering to take part and confirming that he was indeed a real "blood" brother of the deceased; that the bona fides of the application were in doubt in that the number of people to be tested had deliberately been narrowed down to two without any valid reasons being given for the change; that contrary to the applicants' assertions the pending appeal is about administration of the estate and it was clear from the

superior court judgment that the court had relied on oral evidence of witnesses concerning who the rightful heir of the deceased was and therefore the intended test could only be incidental and unlikely to displace the other evidence relied on by the court; and finally that in terms of the ***rule 29***, the applicant had not demonstrated due diligence and had not satisfactorily explained why no application for the DNA test was made before the superior court which was the court which granted the Letters of Administration to the respondent which are now the subject matter of the filed appeal and no attempt was made to clarify by way of an affidavit the alleged involvement of the judge in advising against the DNA test at the superior court level.

We have on our part considered the submissions as outlined above. ***Rule 29(b)*** of this Court's Rules as material states:-

> ***"in its discretion, for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court or by a commissioner."***

We have no doubt that the court's discretion as per the rule is wide and could be used to serve the ends of justice without hindrance both under the rule and pursuant to the overriding objective. In our view the discretionary power given to the Court should only be invoked in deserving cases. It is therefore necessary for us to ascertain whether in the circumstances, an order for the taking of additional evidence would be appropriate. In this regard as urged by Mr Mwenesi, we would like to take the same position as that taken by our predecessor . The Court of Appeal for East Africa in the case of ***K. Tarmohamed v Lakhani [1958] EA 567*** the Court of Appeal for Eastern Africa held:-

> ***"except on grounds of fraud or surprise the general rule is that an appellate court will not admit fresh evidence unless it was not available to the party seeking to use it at the trial, or that reasonable diligence would not have made it available"***

Applying the holding to the situation before us, we find that the applicants had an opportunity to obtain the evidence in both the Chief Magistrate's court and the superior court, but failed to use it since 1996, a period exceeding 14 years. In addition, the exercise of reasonable diligence at the superior court level would have made evidence now being sought available by filing an appropriate application. Besides, we agree with Mr Mwenesi, that although the efficacy of the tests could have attained 100% success when the consent order for the DNA test was entered into by the parties in 1996, the rate of success has diminished with each passing year and is now considerably lower. As at 1996 when the test was first ordered, the tests were to be undertaken on five persons and there was a possibility of the blood of the deceased being tested whereas the intended test per the application before us has now been narrowed down to two people excluding the mother of the respondent. In our view, the likely usefulness of the test has been put to doubt by the contents of the brochure of the US firm which had been identified to undertake the test and which is attached to the affidavit in support of the application. The brochure states:-

> ***"DNA testing examines the genetic material that a child inherits from his/her biological parents. Samples (blood, buccal swabs, or other body tissue) are taken from the parties to be tested. From the sample, the child's genetic material is extracted and compared with the genetic material from the mother. The child's DNA characteristics that are not found in the mothers DNA material are inherited from the biological father. If the genetic material from the tested man does not share common characterizations with the child's genetic material, then the tested man is excluded as the biological father. If the DNA does contain those genetic characteristics, then the probability that the tested man is the true biological father is reported …"***

This being an interlocutory appeal, we are constrained not to arrive at any firm conclusions to avoid prejudicing the appeal. However, in exercising our discretion under ***rule 29***, we have taken into account the basis for such an application as set out in the decision cited above and have also taken into account on a ***prima facie*** basis the scientific usefulness or efficacy of a DNA test for the two (2) people instead of the intended five (5) people as proposed in 1996. We have also taken into account the lengthy delay in getting

the DNA test undertaken and the effect the unexplained delay has had in terms of doing justice to both parties. In the circumstances, we are of the view that the application falls short of the basic requirements which could trigger the exercise of this Court's discretion in their favour. With respect, the applicants could, with the exercise of due diligence have obtained the additional evidence but failed to do so. The lengthy delay has, as is apparent affected both the quality of the test and could in the circumstances be prejudicial to one of the parties or to both parties. In the circumstances and by applying the proportionality test and taking into account the overriding objective we are of the view that it would not be just to the parties to allow the application. The application is accordingly dismissed with costs to the respondent.

It is so ordered.

DATED and delivered at Nairobi this 10th day of December, 2010.

S.E.O. BOSIRE
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JUDGE OF APPEAL
MOIJO OLE KEIWUA
……..……
JUDGE OF APPEAL
J.G. NYAMU
……..……..……..
JUDGE OF APPEAL

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

DEPUTY REGISTRAR