



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Job Kipyegon Selim (Deceased) (Succession Cause
345 of 2015) [2025] KEHC 1279 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1279 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
SUCCESSION CAUSE 345 OF 2015
JK SERGON, J
FEBRUARY 27, 2025**

BETWEEN

JANET CHEROTICH APPLICANT

AND

ESTHER CHEPTONUI CHEBOCHOK 1ST RESPONDENT

PHILIP SELIM 2ND RESPONDENT

THE PUBLIC TRUSTEE 3RD RESPONDENT

RULING

1. The application coming up for determination is a summons dated 14th September, 2024 seeking the following orders;
 - i. Spent
 - ii. That the order on distribution of the estate of the deceased, Job Kipyegon Selim be reviewed and/or set aside.
 - iii. That the applicant Janet Cherotich be apportioned a reasonable part or portion of the estate of the deceased, Job Kipyegon Selim, as this honourable court may consider fair and just in the circumstances.
 - iv. That the applicant undergo a DNA test to confirm her biological relationship with the deceased, unless the respondents change their stance of her paternity.
 - v. That costs be in the cause.
2. The application is supported by grounds on the face of it and the supporting affidavit of Janet Cherotich the applicant herein and a biological daughter to the deceased.



3. The applicant avers that the deceased died on 11th April, 2013, at the time of his demise, the deceased was estranged with the mother of the applicant herein. The applicant avers that she attended his funeral. She avers that soon after she left for Nairobi to make ends meet and it was during her absence that the petition in the instant succession cause was filed leading to the distribution of the estate of the deceased as per the certificate of confirmation of grant dated 23rd October, 2017.
4. The applicant avers that she did not know of the existence of these proceedings until July, 2023 when her paternal aunt Jane Selim asked her whether she got a share of the estate of the deceased which necessitating the filing of the application dated 18th July, 2024 under a certificate of urgency, seeking to salvage a portion of the estate of the deceased for her benefit.
5. The applicant avers that this court vide a ruling delivered on 5th March, 2024 declined to nullify the grant as the conditions for making such orders were not met.
6. The applicant avers that she is hereby seeking justice by way of review of the distribution of the estate so as to make provision for her as a biological daughter of the deceased.
7. The applicant avers that at the time of distribution there was nothing before the court to suggest that the deceased had a daughter who would be entitled to a share of the estate and therefore this court did not apportion a share of the deceased's estate.
8. The applicant avers that she is willing to undergo DNA Testing for purposes of establishing her paternity before the court can determine her entitlement to the estate of the deceased.
9. The applicant urged this court to consider the interests of justice and review the distribution of the estate of the deceased and provide her with a reasonable portion of the deceased's estate.
10. The applicant avers that section 47 of the Law of Succession and rule 73 of the Probate and Administration Rules give the probate court power to make orders that serve the ends of justice with the power to revise distribution of the estate of the deceased and order for DNA Testing.
11. The applicant avers that under order 45 rule 1 of the Civil Procedure Rules, 2010 which is applied to succession matters under rule 63 of the Probate and Administration Rules, allows this court to review its decisions on several grounds including discovery of new evidence and for any other sufficient cause.
12. This court has noted the affidavit of Charles Selim, Jane Selim and Joseph Kiprotich Biegon in support of the application, however, it cannot capture the averments thereon as these are strangers to the instant succession suit.
13. The respondents filed a replying affidavit sworn by Philip Selim and administrator to the estate of the deceased with the consent of his co administrator Job Kibyegon Selim.
14. He avers that the family does not recognise the applicant as a biological daughter to the deceased as the applicant's mother is the first cousin to the 1st respondent which raises concerns about the validity of the DNA results which may not reflect the true position as the applicant and respondents are relatives.
15. He avers that the deceased who was of sound mind at the time of his demise did not introduce the applicant as his child. The applicant never resided with them or with the deceased. He avers that the applicant did not attach any evidence of payment of school fees, Mpesa statements demonstrating that the deceased supported her prior to his demise.
16. He avers that sometime in 2011 the deceased brought a small girl named Eunice Chepchumba and placed her under the care of their mother the 1st Respondent and before his demise the deceased customarily adopted the young girl as his daughter.



17. He avers that the applicant has previously attempted to revoke the confirmation of grant in respect to the deceased's estate and her efforts were unsuccessful. He further avers that the current application seeking DNA Testing is in bad faith aimed at exhuming the body of the deceased for DNA testing a move that is unnecessary and disrespectful to the memory of the deceased.
18. He avers that the family maintains that the deceased did not father the applicant and that the applicant has no evidential proof of being the daughter of the deceased as her birth certificate did not bear the deceased's name. He faulted that applicant and her mother for failing to raise any claim concerning the applicant's parentage during the funeral when all the attendees were invited to present any claims before the deceased was buried as required in the Kipsigis customs.
19. The respondents filed a notice of preliminary objection on the following grounds;
 - i. That that applicant has no locus standi to seek review of the confirmed grant given that she is neither a petitioner nor beneficiary in the deceased's estate.
 - ii. That the applicant's application is bad in law, incompetent, fatally defective and an abuse of court process.
20. The respondents submitted that they raised a preliminary objection dated 2nd December 2024, contending that the applicant lacks locus standi to bring the application as she is neither a petitioner nor a beneficiary of the estate. The respondents reiterated that a preliminary objection is valid when it raises a pure point of law that can dispose of the matter without delving into facts. They cited *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, where the court defined a preliminary objection as a point of law which, if upheld, would dispose of the matter entirely. The respondents reiterated that the issue of the applicant's lack of locus standi is a pure point of law that renders the summons fatally defective. The respondents maintained that the applicant lacks locus standi to seek review and/or set aside of the confirmed grant, and has not demonstrated any legal or factual basis to warrant the review or DNA test.
21. The respondents argued that the applicant lacks locus standi as she is neither a petitioner nor a recognized beneficiary of the estate. Section 76 of the *Law of Succession Act* provides that only interested parties, such as dependents or beneficiaries, have the legal capacity to challenge a grant. They cited *In Re Estate of Karuri Gikandi (Deceased)* [2021] eKLR, the court emphasized that a person seeking to revoke or review a grant must demonstrate a direct interest in the estate or locus standi as an eligible dependent.
22. The respondents contended that whereas the applicant claims to be a dependent under Section 29 of the *Law of Succession Act*, she has not provided sufficient evidence to support this claim. Section 29 of the *Law of Succession Act* defines a dependent as: (a) A spouse, child, or parent of the deceased; or (b) Any person who was being maintained by the deceased immediately prior to his death. The respondents cited *In Re Estate of the Late Veronica Njoki Wakagoto (Deceased)* [2013] eKLR, the court held that dependency must be proven by demonstrating financial or material support provided by the deceased during their lifetime. The respondents reiterated that the applicant has not demonstrated any financial or material support from the deceased, therefore, her claim is speculative.
23. The respondents submitted on the finality of a confirmed grant and reiterated that a grant is final unless it is shown that the proceedings were defective or that fraud, mistake, or concealment of material facts occurred. Thus a court becomes functus officio upon confirmation of a grant. In *Re Estate of G.K.K (Deceased)* [2020] eKLR, the court emphasized that a confirmed grant can only be interfered with upon clear evidence of fraud, illegality, or omission of critical facts. The respondents argued that the applicant has not demonstrated any defect in the original proceedings or omission of material facts to



justify review. The respondents reiterated that the applicant has failed to meet the threshold for review or setting aside the confirmed grant.

24. The respondents contended that the claim of dependency is unsupported by evidence and legally untenable and that the request for a DNA test is unwarranted and speculative. The respondent cited the case of *MWK v A.M.W* [2015] eKLR, where the court held that DNA testing should only be ordered when supported by credible evidence of a potential relationship. The respondents were adamant that the application is frivolous, vexatious, and an abuse of the court process.
25. I have considered the pleadings and submissions by the parties and I find that the issue (s) for this court's determination is whether review the distribution of the estate of the deceased and provide the applicant with a reasonable portion of the deceased's estate, whether this court can order DNA Testing for purposes of establishing the applicant's paternity before the court can determine her entitlement to the estate of the deceased and whether the preliminary objection has merit.
26. On whether to review the distribution of the estate of the deceased and provide the applicant with a reasonable portion of the deceased's estate, review is anchored on section 80 of the *Civil Procedure Act* and order 45 of the Civil Procedure Rules. In the case of *John M. Njoroge & Others Vs. Cecilia M. Njoroge & Others* (2016) eKLR, the court held:- "As stated above, the only provisions of the Civil Procedure Rules imported to the *Law of Succession Act* are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time. Clearly, Order 45 relating to review is one of the Civil Procedure Rules imported into succession practice by Rule 63 of the Probate & Administration Rules. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in order 45 of the Civil Procedure Rules." The substantive requirements of Order 45 of the Civil Procedure Rules, which deals with review are firstly, the discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant and could not be produced at the time when the decree was passed. Secondly, an applicant must demonstrate that there has been some mistake or error apparent on the face of the record. Thirdly, review can be possible for any other sufficient reason. It is the finding of this court that the instant application does not meet the substantive requirements for review.
27. On whether this court can order DNA Testing for purposes of establishing the applicant's paternity, it is this court's finding that the applicant has not laid a strong and cogent factual basis in support of her claim to paternity. The applicant did not provide evidential proof of being a biological child of the deceased such as a birth certificate and/or prove that she was a dependent of the deceased in his lifetime. The applicant did not adduce any evidence demonstrating financial or material support provided by the deceased during his lifetime. The court in Constitutional & Human Rights Division petition No 133 of 2015 D N M v J K [2016] eKLR observed as follows: "Even though the court's core role is to determine disputes, the courts often deploy methods of compulsion not necessarily to get to the truth but to help determine disputes fairly. It is thus common to see witnesses being summoned and also being compelled at the risk of jail, to answer questions. In all instances though, the party seeking the court's assistance must lay a firm legal and factual foundation for his case. It is not different where DNA testing is sought. In the case of DNA testing the basis must be laid even where a child is involved, as ordering DNA testing is not a mere procedural matter but is substantive enough given that an individual's constitutional rights may be limited through such testing."
28. On whether the preliminary objection has merit, the applicant having not substantiated her claim as a beneficiary and/or dependent of the deceased therefore she is a stranger to these proceedings and



hence she lacks the locus to file an application for review. It is this court's finding that the preliminary objection filed by the respondents is merited. It is upheld.

29. Consequently, the summons dated September 14, 2024 is found to be without merit. The same is dismissed. A fair order on costs is that each party should bear their own costs.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 27TH DAY OF FEBRUARY 2025.

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J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Rutoh

Miss Akinyi holding brief for Kuloba for Applicant

