



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Benard Njeru Kamau (Deceased) (Succession Cause
13 of 2022) [2025] KEHC 7457 (KLR) (28 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7457 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 13 OF 2022**

RM MWONGO, J

MAY 28, 2025

IN THE MATTER OF THE ESTATE OF BENARD NJERU KAMAU (DECEASED)

BETWEEN

CAUDESIA WAMBETI NJERU PETITIONER

AND

ROSEMARY KINA NJERU PROTESTOR

RULING

Background

1. The deceased died intestate on 28th July, 2020 and Succession proceedings commenced in the lower Court in Embu. The applicant and the respondents were jointly issued with a grant of letters of administration on 5th June, 2021, in the deceased's estate. The applicant filed summons for confirmation of grant and proposed a mode of distribution of the estate to all the beneficiaries but excluded 3 of the 4 children of the respondent.
2. This became a ground for protest in the respondent's affidavit of protest dated 22nd January 2024. She attached her marriage certificate to the deceased indicating that the marriage was solemnized in October 2017 following fulfilment of customary rites. The protest was scheduled for hearing and the court had started taking viva voce evidence before this application was filed.

The Application

3. The applicant filed a chamber summons application dated 8th November 2024 premised on the grounds set out on its face and in the supporting affidavit thereof, seeking orders that:
 1. The court do order that a sibling DNA test be done for purposes of ascertaining paternity of the protestor/respondent's children;



2. This honourable court do issue such further orders as it may deem necessary for the ends of justice to be met; and
3. The costs of the application be provided for.
4. The applicant stated that she is the wife of the deceased and she disputes the paternity of the respondent's children's paternity. This arises from the fact that the respondent claims that her children were sired by the deceased. She stated that it is necessary that the DNA test be conducted to ascertain whether the respondent's children should be included as beneficiaries of the estate of the deceased before distribution.

Replying Affidavit

5. The respondent filed a replying affidavit deposing that she was married to the deceased in October 2017 under customary law. That their union was blessed with 4 children whom the deceased recognized as his dependants. She contended that the deceased is dead and that there is no one to compare the children's DNA with. That in any event the applicant's children cannot be said to be the deceased's children for sure, hence their DNA cannot be used to compare if the respondent's children are related to the deceased.
6. She produced copies of birth certificates as proof that the deceased was the father of her children because his name is on the said birth certificate. She stated that, in any event, the deceased recognized the respondent's children as his own and voluntarily assumed permanent responsibility. This makes them his children according to section 3(2) of the *Law of Succession Act*. She urged the court to dismiss the application.

Applicant's Further Affidavit

7. The applicant filed a further affidavit through which she challenged the respondent's marriage to the deceased. She stated that in her protest, the respondent produced a copy of a marriage certificate registered as a Christian marriage yet in here, she is referring to a customary marriage. In her view, the respondent's marriage certificate amounts to sham evidence and an effort by her to legitimize a marriage that does not exist.
8. She stated that the respondent's children are all adults now and she only seeks sibling to sibling DNA testing between the children of the beneficiaries from her house and from the respondent's house. That if this is done, the 2 sets of children will share a certain level of DNA, thus proving that they are all children of the deceased. She stated that even though her marriage to the deceased was under customary law, this fact does not void her marriage to the deceased.
9. She asserted that her children were sired by the deceased. It was also her case that by the time she began cohabiting with the deceased, the respondent's children were already adults and it was impossible that the deceased assumed parental responsibility over them to make them his dependants.

Parties' Submissions

10. The application was canvassed by way of written submissions.
11. The applicant submitted that the application is premised on her obligation under section 107 of the *Evidence Act* to prove that the respondent's children were not sired by the deceased. She relied on the cases of *Wilfred Koinange Gathioni v Joyce Wambui Mutura & another* [2016] KEHC 7005 (KLR), *M.W & 3 others v D.N* [2018] KEHC 9472 (KLR) and *In re Estate of NKM (Deceased)* [2021] KEHC



- 2956 (KLR). It was her argument that it is important that the respondent's children's biological link to the deceased be established before they can be included in the list of beneficiaries.
12. On her part, the respondent submitted that the application was vexatious, baseless and an abuse of the court process. She submitted that a DNA test cannot be based on the samples from the applicant's children because it is not clear that they are the deceased's children. This assertion is based on her argument that the applicant was not legally married to the deceased, hence her children's paternity is also questionable. She argued that a paternity test is not the only way of proving paternity and that previously, courts have used birth certificates to prove paternity.
 13. The respondent relied on sections 3(2) and 29 of the *Law of Succession Act*, which provisions refer to children who were under the care of the deceased as dependants. Reliance was placed on the case of *P KM v S PM & another* [2015] KEHC 7661 (KLR) where the court referred to the Supreme Court of India's decision in the case of *Bhabani Prasad Jena v Convener Sec Orissa*, Civil Appeal Nos 6222-6223 of 2010. Further reliance was placed on Articles 28 and 31 of *the Constitution* for the argument that where a DNA test is not warranted but is done, it amounts to discrimination and it causes psychological trauma.
 14. She submitted that if her children are forced to undertake the DNA test, it would amount to an intrusion upon their right to privacy and security. She relied on the cases of *SWM v GM K* [2012] KEHC 2160 (KLR), *RK v HJK* Petition No 143 of 2012; [2013] eKLR, *MAO v JOO & another* [2022] KEHC 3364 (KLR) and *DNM v JK* [2016] KEHC 3180 (KLR).

Issue for Determination

15. The core issue for determination is whether the court should order that a sibling DNA test be done for purposes of ascertaining paternity of the protestor/respondent's children.

Analysis and Determination

16. Both the applicant and the respondent allege that they were married to the deceased. The respondent produced a marriage certificate indicating that the marriage was formalized after customary rites were completed. On the other hand, the applicant did not produce a marriage certificate but also stated that she married the deceased under customary law, which marriage was not formalized. She stated that the marriage certificate produced by the respondent was sham evidence since it indicated that the marriage was a Christian marriage, despite her having stated that she was married under customary law.
17. The issue of whether the parties are to be held as wives of the deceased is not before this court at this stage. The issue here is that both parties have children whom they both allege were sired by the deceased. This is a matter that is hotly contested by the applicant. In her further affidavit, the applicant stated that by the time she started cohabiting with the deceased, the respondent's children were all adults. Through her supporting affidavit, she stated that it is necessary that the respondent's children have their paternity ascertained through a sibling-to-sibling DNA test with the applicant's children.
18. In essence, the applicant is urging the court to find her children as the legitimate biological children of the deceased, and that their DNA should be the baseline upon which to determine the respondent's children's paternity. The respondent contests a sibling-to-sibling DNA test because the only way to prove paternity through that test is by using the DNA of the father, who in this case, is deceased. The respondent doubts that the applicant's children were sired by the deceased because the applicant was allegedly, merely a concubine to the deceased.



19. The question as to whether the respondent's children are to be held as children of the deceased for purposes of succession, can be determined in different ways. Firstly, it is possible to prove this if the deceased's DNA profile was already available and had been used to determine the applicant's children's paternity. Since this was not done, it is hard to say that the applicant's children are sired by the deceased, a fair contention that has been raised by the respondent.
20. Through DNA testing, it would be easy for the court to determine who should be given priority, without going into much argument. Unfortunately, in this case, the deceased's DNA profile is not available for this kind of testing which would be most accurate. Even if the DNA test is done and the respondent's children fail to turn out as children of the deceased, for purposes of succession, there are other ways to prove that they deserve to inherit from the estate of the deceased, including dependency.
21. Secondly, reference can be made to section 3(2) and (3) of the [Law of Succession Act](#) which provides:
 - “(2) References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.
 - (3) A child born to a female person out of wedlock, and a child as defined by subsection (2) as the child of a male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock.” [Emphasis added]
22. These provisions can very easily inform the court and the parties as to the status of the children of the parties herein for purposes of distribution of the estate. This second approach will demand that the respondent's children prove that the deceased recognized them as his children and took permanent responsibility over them. These are matters of fact that should be proved through evidence.
23. Further, this argument may stretch to demand that the parties argue their positions on their marriages to the deceased and the (il)legitimacy of the marriages first. This argument will then open the door for an even further consideration of whether the deceased was polygamous or not. Once this is determined, the estate can be distributed with reference to the relevant provision of the [Law of Succession Act](#). For instance, if it is established that both the applicant and the respondent were wives of the deceased, then the distribution will be to the 2 houses which include wives and children.
24. Thirdly, the determination of beneficiaries for purposes of distribution of the estate can simply be done through a hearing to prove dependency on the deceased as provided for under section 29(b) of the [Law of Succession Act](#). Here, the respondent's and the applicant's children may need to prove that they depended on the deceased immediately prior to his death. This being the case because both parties are contesting the paternity of each other's children.
25. Looking at the bigger picture speaks to going beyond proving paternity itself through DNA testing. However, if the court should grant the order sought, what is the benefit of doing so? As already stated, the legitimacy or otherwise of the deceased's children lies within the [Law of Succession Act](#). In this case, the DNA of the deceased is unavailable to be used as the yard stick, so to say, for the respondent's children's determination of paternity. It would be unconscionable for this court to be led to assume and believe that the applicant is the mother of the only legitimate biological children of the deceased.



26. The end goal of the applicant's case is to enable fair distribution of the estate to the rightful beneficiaries. If there had been no other measures prescribed under the *Law of Succession Act* to determine who should be a beneficiary in the estate of the deceased, the orders sought would make much sense and it would probably be necessary to grant them. In the case of *DNM v JK* [2016] KEHC 3180 (KLR), the court held;

“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.... 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.” [Emphasis added].

Conclusion and Disposition

27. In the instant case, if the court is to order sibling to sibling DNA testing, it must cut across the parties. As such, it would only be fair that the paternity of the applicant's children be determined too, prior to, or at the same time as, that of the respondent's is determined through a sibling-to-sibling DNA test with the applicant's children. Whilst the application is a strong one, however, it must fail for the foregoing reasons.
28. In light of the discussion herein, it is my view that the application lacks merit and it is hereby dismissed.
29. The court hereby orders that the parties proceed with the hearing of the protest in a timely fashion. In any event, the issues of who may legitimately benefit from the estate of the deceased will come out through the evidence at the hearing of the protest.
30. Orders accordingly

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 28TH DAY OF MAY, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

Ms. Lynn Ng'ang'a holding brief for Githiomi for Petitioner.

Ms. Ngigi for Protestor/Respondent.

Francis Munyao - Court Assistant

