



**REPUBLIC OF KENYA**  
**THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**SUCCESSION CAUSE 2967 OF 2012**

**IN THE MATTER OF DAVID GITHIOMI KOINANGE (DECEASED)**

**WILFRED KOINANGE GATHIOMI.....APPLICANT**

**VERSUS**

**JOYCE WAMBUI MUTURA.....1<sup>ST</sup> RESPONDENT**

**FLORENCE NJERI NJOROGE KAMAU.....2<sup>ND</sup> RESPONDENT**

**RULING**

**PLEADINGS AND ORAL SUBMISSIONS**

By an application filed on 16<sup>th</sup> June 2015 brought under **Order 42 Rule 6 of the Civil Procedure Act**; the Applicant sought stay of execution of the Court's Ruling dated 15<sup>th</sup> December 2014 pending hearing and determination of the appeal as evidenced by annexure **WKG-CC** that shows memorandum of appeal in **Civil Appeal 137 of 2015**.

The Applicant takes issue with the specific order of this Court;

1. The Respondent and Applicant to submit to DNA testing determine paternity
2. The test to be conducted at Government Laboratories within 60 days from today

The Applicant stated that he has an arguable appeal with high possibility of success. If this order is not stayed the Applicant will be prejudiced and the appeal rendered nugatory.

If DNA is carried out and the appeal is successful then it will be rendered nugatory. The matter is not a succession matter as the suit property is registered in the Respondent's name and he is not deceased. Therefore this is not a succession matter.

The Applicant relied on the following cases on the issue of DNA testing;

1. **RMK versus AKG & AG PETITION NO 18 of 2013**

The Applicant an adult wanted confirmation that the Respondent was the father. He relied

on Articles 27 (5) against discrimination; 28, which protects dignity; 45, which protects family, and 35, which entitles Petitioner to information.

The Court held;

***“Apart from the Petitioner’s own bland assertions, there is nothing to connect the Petitioner and the 1<sup>st</sup> Respondent that would discharge the burden of the Court to permit an intrusion of the 1<sup>st</sup> Respondent’s rights.”***

1. **SWM versus GMK 2012 eKLR**

A similar case to determine paternity

The Court held;

***“Ordering the Respondent to provide DNA for whatever reason is an intrusion of his right to bodily security and integrity and also the right to privacy which rights are protected under the Bill of Rights. The petitioner bears the burden of demonstrating to the Court the right she seeks to assert or vindicate and which the Court would consider overriding the Respondent’s rights.”***

On the basis of the above cited case law the Applicant objects to DNA testing and seeks stay of execution of the said order.

The Respondents position is that the Court gave orders that the Applicant failed to comply with and has come back to the same Court seeking further orders.

The Respondents are entitled to the fruits of the judgment. The Respondents relied on the following cases;

2. **HIGH COURT CIVIL CASE 231 of 2000 (MSA)**
3. **HIGH COURT CIVIL APPEAL 372 of 2012 (NBI)**

Both authorities on the issue of stay of execution applications cited the case of

**3) MACHIRA T/A MACHIRA & CO ADVOCATES VS EAST AFRICAN STANDARD (NO2) [2002] KLR 63;**

***“to be obsessed with the protection of an appellant or intending appellant in total disregard of fleeting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of execution, pending appeal are handled. In the application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court.”***

The Respondents are opposed to the application for stay of execution.

**EVALUATION**

The Application is brought under **Order 42 Rule 6 of CPR 2010**, which prescribes;

***“That substantial loss may result to the Applicant unless stay is granted***

***That the Application for stay of execution was made without unreasonable delay***

***That the Applicant shall provide security as the Court may order for the due performance of the decree.’’***

This matter is the subject of controversy with regard to 2 pertinent issues;

The background to this matter is that the Respondents filed Petition for grant of letters of administration on 7<sup>th</sup> November 2012. They obtained a grant and confirmed grant on 1<sup>st</sup> February 2012. The Applicant filed an affidavit on 23<sup>rd</sup> October 2012 and contested grant and confirmed grant on the grounds; he was not consulted and he did not consent to issuance of grant. However, there is no application for revocation of grant. The Applicant objected to the Succession Cause as his late father died in 1950 and he had no land and he did not leave a Will. His paternal grandmother bequeathed him the suit properties as sole owner for him to hold in trust for trust for anyone else. He has been the registered owner of the said properties since 1983 and his siblings did not demand property until 2010 when the Constitution of Kenya was passed that this matter was lodged.

On the other hand; The Proceedings of **Civil Case 66 of 1984** attached to the Respondents affidavits, the mediation proceedings conducted by the then Chief of Kiambaa Location in 1991, the Court Order by Honorable Justice Amin adopting the Chief’s decision as the Court order and the order and decree of 1992 and 1993, all depict the parties lineage and dispute to properties culminating with property divided and held by one person from each house. The Applicant was the one who got the land from his grandmother and later registered in his name.

During the hearing of the matter the Court could not determine the pertinent issues at the Preliminary stage and ordered an *interpartes* hearing on the following issues;

1. Whether the properties listed as assets that comprise of the deceased’s estate but registered in the Respondent’s name belong to the Respondent as registered owner and therefore this not a Succession matter or belonged to the deceased through lineage and in spite of his death in 1950 the properties held by his mother who died in 2010 but registered in his eldest son’s name in trust for himself and the other siblings. Therefore the matter is properly before court as a succession matter.
2. Whether, if the matter is confirmed as a succession matter, the Respondent is solely entitled to the suit properties as gifts from his paternal grandmother or the 5 siblings are entitled to the properties, as they are all children of the deceased.

These among other issues are subject to *interpartes* hearing and determination of the matter. In the meantime the hearing culminated to the Ruling of 15<sup>th</sup> December 2014 which ordered sibling DNA testing for the Applicant and Respondent to determine paternity and eventually inform if the 1<sup>st</sup> Respondent is a child of the deceased for purposes of succession pending hearing and determination of the matter.

The Applicant vide his affidavit of 23<sup>rd</sup> October 2013 at paragraph 9 he alluded to the fact that the 1<sup>st</sup> Respondent is not a biological child of the deceased. He referred to her ID card that shows she was born in 1952.

The 1<sup>st</sup> Respondent’s affidavit of 13<sup>th</sup> March 2013, she explains that she was born in 1950 although the ID card reads 1952. It is also not possible she and her brother were born 3 months apart.

The Applicant first raised the issue of the 1st Respondent; he relied on the ID card, which shows her birth date as 1952. The 1<sup>st</sup> Respondent offered an explanation. This is accusation and counter accusation, one’s word against the other and it is difficult to decipher the truth if she is a child of the deceased or not.

The Applicant insists on production of a birth certificate. This Court has taken judicial notice that before

Kenya's independence in 1963 we did not have formal registration processes, as we know them today. It will be a tall order to obtain one if one was born in 1950.

Therefore, since under our law **Sections 107 108 & 109 of the Evidence Act Cap 80** mandates that he who alleges must prove.; the Applicant is the one who raised the issue of paternity against 1<sup>st</sup> Respondent. He did not prove. The 1st Respondent claimed in spite of the date contained in her ID card she was born in 1950. She did not prove the same. Therefore the only option is to result to scientific method for conclusive results. Both parties should undergo a sibling DNA testing to confirm if they are of the same father or not.

This Court finds that the DNA testing will not cause substantial loss to the Applicant, except inconvenience that is less important to finding a lasting solution to the issue he raised in the first place. The 1<sup>st</sup> Respondent offered to foot the DNA testing bills. So the Applicant will face no hardship. All other issues shall be determined at the hearing. The DNA result is crucial to determining the beneficiaries and/or dependents of the deceased's estate.

In light of the above-cited authorities that DNA is intrusive and interferes with the right to privacy, this Court finds basis for the DNA testing. The paternity question is central to the dispute at hand, whether the 1<sup>st</sup> Respondent is one of the beneficiaries of the deceased's estate. It is the only way to resolve the paternity issue, which the Applicant raised and is now reluctant to pursue the matter to its logical conclusion. The DNA testing will not prejudice the Applicant's case pending appeal, as he has not advanced any proposal on how to resolve the paternity issue it is his word against hers.

This Court is persuaded by the following cases on DNA testing;

1. **PKM VERSUS JW PETITION 138 OF 2012 (NBI)**

The Court held;

*“I agree and while I would be averse to classifying rights in order of priority; there is no doubt in my mind that between the Petitioner's inconvenience at being subjected to DNA testing and the need to conclusively determine the paternity of the child, in the child's interest and certainly in the Petitioner's interest the child's interest must prevail.*  
“

Similarly, in the instant case; between the Applicant's inconvenience and both parties' interest to conclusively determine whether they are siblings or not for purposes of distribution of the deceased's estate; the pursuit for truth trumps over inconvenience.

2. **EMM VERSUS IGM & RMM COURT OF APPEAL CIVIL APPEAL 114 OF 2012**

In this case, the Appellant contested the decision of the Trial Court that he was not the biological son to the deceased but one who enjoyed financial support from the deceased. The Appellant and 3 children of the deceased were subjected to DNA sibling testing and it was found that the deceased did sire the Appellant.

Whereas it is not possible to conduct parental testing as in the instant case as the deceased died in 1950, then sibling DNA testing is possible.

**FINAL ORDERS**

1. **The Court finds that the appeal was filed without unreasonable delay;**
2. **The Applicant has not demonstrated that he will suffer substantial loss if stay of execution is not granted.**
3. **The lack of stay of execution does not prejudice the Applicant**
4. **The right to conclusively resolve the paternity and or sibling issue and whether the**

Applicant and 1<sup>st</sup> Respondent are of the same father and therefore beneficiaries of the deceased's estate overrides the Applicant's inconvenience.

5. The Applicant and 1<sup>st</sup> Respondent to be subjected to sibling DNA testing at Government Laboratories.
6. The stay for execution application pending appeal application is dismissed.
7. All other issues shall be canvassed on a date obtained by the parties from the Registry for *interpartes* hearing
8. Each party to bear its own costs.

**DELIVERED AND SIGNED IN OPEN COURT AT NAIROBI THIS 8TH DAY OF FEBRUARY 2016**

**M.W. MUIGAI**

**JUDGE**