In re Estate of Joseph M'Eruri M'Imunya (Deceased) (Family Appeal E007 of 2023) [2025] KEHC 10641 (KLR) (16 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10641 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

FAMILY APPEAL E007 OF 2023

SM GITHINJI, J

JULY 16, 2025

IN THE MATTER OF THE ESTATE OF JOSEPH M'ERURI M'IMUNYA - DECEASED

BETWEEN

JOYCE MUTHENYA ..... APPELLANT

AND

ROSE NKATHA M'ERURI ..... RESPONDENT

(An appeal from the Ruling of Hon. Tito Gesora (C.M) in Maua Succession Cause No. 73 of 2018 delivered on 23/2/2023)

JUDGMENT

1. This Appeal arises from the Ruling of the learned Senior Principal Magistrate Hon. Tito Gesora (C.M) delivered on 23.2.2023 in Maua Succession Cause No. 73 of 2018, wherein the trial court allowed the application dated 13/10/2022.
2. Aggrieved by the said Ruling, the Appellant set forth the following grounds in the Memorandum of appeal dated 16th March, 2023;
    1. The Learned Magistrate erred in law and fact in finding that the parentage of Florence Nkirote, Judy Mukokinya and Eric Muthamia can be determined by sibling DNA testing using samples from Paul Muriithi.
    2. The Learned Magistrate erred in law and fact in failing to find that DNA testing to determine parentage can only be done in comparison with the principal (main person).
    3. The Respondent herein, the Objector in the trial court filed an application dated 13/10/2022 seeking a DNA test to be conducted between samples taken from Paul Muriithi and Domiano Mtuma, the undisputed children of the deceased and Florence Nkirote, Judy Mukokinya and Eric Muthamia, to determine their paternity.

4. The Appellant herein, the Petitioner in the trial court, vehemently opposed the application, lamenting that there was sufficient evidence to determine the matter and paternity was not an issue. In any event, it was practically impossible to procure DNA samples from the deceased herein for purposes of comparative analysis with those of the children in question.

Submissions

5. The Appellant through the firm of Mutembei & Kimathi Advocates filed submissions dated 26/5/2025. Counsel submitted that sibling DNA testing is not superior to the actual samples of the deceased, and relied on *Estate of Peter Muraya Chege alias Muraya Chege (deceased)* [2019] eKLR. Counsel contended that sibling sample DNA was not foolproof owing to the fact that there was no scientific backing that the said Paul Murithi is a son to the deceased. Counsel submitted that a proper scientific process would entail exhumation of the remains of the deceased for purposes of extracting DNA samples, and cited *Hellen Cherono Kimurgor v Esther Jelagat Kosgei* (2008) eKLR, *Re Estate of Jacob Mwalekwa Mwambewa (Deceased)* [2018] eKLR and *DNM v JK* (2016) eKLR.

6. The Respondent through the firm of Nkunja & Co. Advocates filed submissions dated 9/6/2025 citing *M.W and 3 others v DN* (2018) eKLR and *Estate of JMK (Deceased)* [2021] eKLR, on the standard of proof in an application for an order for DNA. Counsel contended that the Appellant at some point deserted the deceased, and thus a DNA testing would confirm the paternity of the contested children and establish true dependency of the estate of the deceased. Counsel argued that allowing the DNA testing of the contested children of the Appellant was a fact finding mission which transcended the right to privacy and bodily security, and cited *Re Estate of Ruiru Muchohi Gikonyo* (2022) eKLR. Counsel submitted that justice shall still be served if samples are extracted from Paul Muriithi and Domiano Mutuma, the known children of the deceased and compared to those of Florence Nkirote, Judy Mukokinya and Eric Muthamia by DNA sibling testing.

Analysis and Determination

7. This being a first appeal, the court is obligated to reconsider and re-evaluate the evidence adduced in the trial court and draw its own conclusions.

8. In *Selle & another v Associated Motor Boat Co. Ltd* [1968] EA, the court held as follows: "This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

9. I have considered the appeal herein, the trial court's ruling which is the subject of this appeal as well as the submissions by counsel.

10. From the grounds of appeal, the issue for determination is whether the trial court fell into error when it ordered sibling DNA testing.

11. The Appellant testified that; "Rose has 3 children. One from Gitonga called Muriithi and 2 from M'Eruri. I don't know Domiano. I know Kaka. I know Mureithi and Eric Munene. Kaka is elder followed by Munene sons of M'Eruri."

12. Whereas the Appellant in her oral testimony acknowledges that Paul Muriithi is her son, she denies knowing Domiano.

13. *In Re Estate of JMK (Deceased)* [2021] eKLR, the court (L. A. Achode J, as she then was) opined that; "34. In this regard, it is a natural wish of a person, regardless of religion, that his or her body be not just properly buried after death or whatever cultural practice is applicable, but should remain undisturbed thereafter. I am therefore of the view that there is no need to disturb the deceased while there are other available options to the applicant. Indeed exhumation is a drastic measure that may be prejudicial to the family and community at large, since it is considered a cultural affront. The Court should therefore exercise caution before issuing such orders. However, when certain circumstances arise and make it desirable and imperative that a body be disinterred, the court will not unnecessarily fetter its discretion but will order such disinterment to meet the ends of justice."

14. There is no gainsaying that DNA sampling directly from the deceased herein would yield the most conclusive and reliable results as opposed to those of siblings, particularly where the paternity of the purported biological children of the deceased is highly contested.

15. The trial herein had just kick started when the issue of paternity arose. I am minded that paternity may be inferred from how the deceased treated and/or related with the children in question during his lifetime. Suffice to state, the definition of dependants under section 29 of the *Law of Succession Act* encompasses children who the deceased had taken into his family as his own or maintained during his lifetime. They need not have been genetically related to him to qualify as his dependants.

16. In defining a child or children, Section 3 (2) of *Law of Succession Act* provides as follows; "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 of 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."

17. I am satisfied that alternative avenues for determining paternity are available, and should, in the first instance, be exhausted prior to invoking the more intrusive measure of DNA testing. I find that conducting an unwarranted DNA test would be against the best interest of the children in question because it would subject them to psychological trauma and may ultimately disintegrate the family unity.

18. *In Re Estate of Benard Njeru Kamau (Deceased)* (Succession Cause 13 of 2022) [2025] KEHC 7457 (KLR) (28 May 2025) (Ruling), the court (R. Mwongo J) espoused that; "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. Through DNA testing, it would be easy for the court to determine who should be given priority, without going into much argument...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."

19. For the foregoing reasons, I find that the appeal is merited and it is allowed in the following terms:

    1. The trial court's ruling dated 23/2/2023 is hereby set aside.

    2. The trial shall continue from where it had reached.

    3. If DNA test will be found ultimately deserved, it be done using samples from the interred body of Joseph M'Eruri M'Imunya (Deceased).

    4. Costs be in the cause.

DATED AND DELIVERED AT MERU THIS 16TH JULY, 2025

S.M. GITHINJI

JUDGE

Appearances:-

Ms. Gacheri for the Respondent.

Mr. Mutembei for the Appellant (absent).