

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**SUCCESSION CAUSE NO. E34 OF 2018**  
**IN THE MATTER OF THE ESTATE OF MARY NG'ONDU**  
**MWANUNGA alias MARY NG'ONDU MWANUNGA**  
**(DECEASED)**

**JOHN BOSCO MULI ..... 1<sup>ST</sup>**  
**APPLICANT/OBJECTOR**

**CHRISTOPHER MUSEMBI ..... 2<sup>ND</sup>**  
**APPLICANT/OBJECTOR**

**VERSUS**

**MIRIAM NDUNGE**

**NG'ONDU..... 1<sup>ST</sup>**  
**ADMINISTRATOR/RESPONDENT**

**BRIGIT KAMENE ..... 2<sup>ND</sup>**  
**ADMINISTRATOR/RESPONDENT**

**RULING**

1. Before this court for determination are two applications. The first is an application dated 27<sup>th</sup> November 2024 filed by the 1<sup>st</sup> and 2<sup>nd</sup> Applicants/Objectors seeking;
  - a. Spent
  - b. That this Honourable court be pleased to issue an order for the police and Director of Criminal Investigations (DCI) to conduct forensic investigations of the National identification Cards and Birth

Certificates of the 1<sup>st</sup> and 2<sup>nd</sup> Administrators/Respondent.

- c. That in the interim, an order of status quo be issued in relation to all the properties of the deceased pending the hearing and determination of this application and the summons for revocation of grant dated 30<sup>th</sup> May 2024.
  - d. That upon the completion of their investigations, the police file their investigations report with this Honourable court within seven days.
  - e. That the OCS KBC Police Station shall ensure compliance with the orders above.
  - f. That such further or other orders as are appropriate for the effective administration of justice be issued.
  - g. That the costs of this application be provided for.
2. The application dated 27<sup>th</sup> November 2024 is premised on the grounds set out on its face and is supported by the affidavit sworn by the 1st Applicant. The crux of the application is that, contrary to the Administrators' evidence, specifically the national identity cards and birth certificates produced in support of their claim, the deceased never had any biological children of her own. It is the Objectors' belief that the said birth certificates and identity cards were obtained through fraud, forgery, or false misrepresentation of material facts. They further aver that the Administrators have not annexed any adoption

documents to demonstrate that the deceased had legally adopted them as her children, which raises the question of how they managed to procure the said identification documents after the death of the deceased a circumstance that, in their view, heightens suspicion.

3. The Applicants further depose that they reported the alleged fraudulent acquisition of the 1<sup>st</sup> and 2<sup>nd</sup> Administrators' birth certificates and identity cards to KBC Police Station, where they were issued with an OB number. However, upon following up with the said station, they were informed that the matter was already before court and that the police were therefore unable to proceed with investigations. They urge that the status quo be maintained in respect of all the deceased's properties pending the hearing and determination of the summons for revocation of grant dated 30<sup>th</sup> May 2024, contending that the Administrators are likely to dispose of the estate properties in anticipation of the outcome of the applications. They argue that such disposal would occasion them prejudice as beneficiaries of the estate and would defeat the substratum of the case.
4. In further support, they state that, in the interest of justice, investigations should be conducted and a police report filed before the hearing of the substantive summons, as the authenticity of the identification documents goes to the

very root of the succession dispute. They also assert that the Chief's letter relied upon in the petition may have been procured by presenting false information to the Chief through collusion.

5. In opposition to the said application, the Administrators filed a Replying Affidavit sworn on 17<sup>th</sup> March 2025 by the 1st Administrator, Miriam Ndunge Ngundu. She deposes that she is a daughter of the deceased and one of the duly appointed Administrators of the estate. She contends that the application dated 27<sup>th</sup> November 2024 is misconceived and fundamentally flawed, arguing that throughout the succession proceedings, they have consistently maintained and demonstrated that they are the legal children of the deceased, and not her biological offspring. She avers that following their adoption and upon due application, they were issued with national identity cards and birth certificates bearing the name of their adoptive parent, the deceased, and that the said birth certificates lawfully recognise them as the deceased's legal children.
6. She further deposes that the birth certificates of adopted children are not required to contain any reference indicating that the parents are "adopters" or that the child is "adopted," and therefore the impugned certificates are regular and valid. The deponent asserts that adopted children have the same inheritance rights as biological

children under Kenyan law, meaning they are entitled to inherit from their adoptive parents' estates without discrimination. She further avers that apart from the bare allegation that the Respondents are not the deceased's biological children, the Objectors have not produced a single shred of evidence to substantiate their claims that the national identity cards and birth certificates were obtained illegally, fraudulently, or through false misrepresentation of material facts. The absence of such evidence, she contends, demonstrates that the Objectors are merely opportunists bent on frustrating the lawful distribution of the deceased's estate and unnecessarily protracting these proceedings.

7. In response to the Administrators' assertions, the Objectors filed a Further Affidavit sworn on 28<sup>th</sup> March 2025. They contend that this is the first instance in which the Administrators have disclosed to the Court that they are not biological, but adopted children of the deceased, an allegation which the Objectors expressly deny. They further aver that the Administrators' failure to disclose this information at the time of filing the petition and during the hearing of the earlier summons amounts to material non-disclosure and misrepresentation of facts, which constitute valid grounds for revocation of the grant under Section 76 of the Law of Succession Act. The Objectors maintain that the identification documents relied upon by the

Administrators were obtained illegally, fraudulently, and through false misrepresentation, and urge the Court to so find.

8. The second application is dated 28<sup>th</sup> February 2025, and filed by the Objectors/Applicants herein. It is premised on Section 47 of the Law of Succession Act, Rule 73 & 41 (3) of the Probate and Administration Rules, Sections 107-109 of the Evidence Act seeking;

- a. The court directs the Administrators with any of the immediate or close relatives of the deceased to undergo DNA testing to ascertain whether they are the biological children of the deceased.
- b. That the DNA test be conducted at the Government Chemist or any other accredited medical facility which all the parties shall agree or as shall be directed by the court.
- c. That the costs of the DNA testing be borne equally by the parties or as the court may deem fit.
- d. That the results of the DNA test be filed in court within a period of 7 days from the date of collection of samples.
- e. That in the event that the 1<sup>st</sup> and 2<sup>nd</sup> Administrators/Respondents refuse to undergo DNA testing, this court be pleased to infer adverse presumption against them under Section 112 of the Evidence Act and consequently revoke and suspend

their letters of administration until the true beneficiaries of the estate are ascertained.

- f. That the court be pleased to issue any further or other orders it deems just and necessary in the circumstances.
9. The application is supported by the grounds set out on its face and the supporting affidavit sworn by the 1<sup>st</sup> Objector/Applicant. He avers that the birth certificates relied upon by the Administrators/Respondents are forgeries, obtained fraudulently and that therefore it is just and in the interest of fairness that a DNA test be conducted for the court to establish the truth in order to fairly and lawfully distribute the estate of the rightful heirs. The Applicant avers that should the 1<sup>st</sup> and 2<sup>nd</sup> Administrators/Respondents decline to undergo DNA testing, the court to infer that they may not be the biological children of the deceased and that their letters of Administration be revoked or suspended.
10. In opposition to the Applicants application, the 1<sup>st</sup> Administrator filed a Replying Affidavit sworn on 17<sup>th</sup> March 2025 on behalf of herself and the 2<sup>nd</sup> Administrator. She averred that the application dated 28<sup>th</sup> February 2025 is fatally misguided because throughout the succession proceedings, they have always maintained they were the legal children, not biological children of the deceased. She further averred that the deceased legally adopted them,

educated them, cared for them and provided for them until her demise. That after adoption and upon application, they were issued with identification documents and birth certificates with their adoptive parent's name and which documents made them to be recognized as the legal children of the deceased. She stated that being legally adopted children, it follows that they are not biologically related to the deceased thus a DNA test to confirm an undisputed logical fact would be a waste of time and resources. Therefore, the Applicant's application is an abuse of the court process and should be dismissed with costs.

11. On 6<sup>th</sup> May 2025, the Court directed that both applications be canvassed together through written submissions. The 1<sup>st</sup> and 2<sup>nd</sup> Objectors/Applicants' submissions are dated 10<sup>th</sup> May 2025 and the Administrators/Respondents' submissions are dated 4<sup>th</sup> June 2025.

### **Objectors/Applicants submissions**

12. The Applicants have identified five issues for determination that is; a) Whether it constitutes fraudulent misrepresentation to designate individuals as "legal children" and submit birth certificates implying biological relationships when such representations are true b) whether the term "legal children" is synonymous with



“adopted children” and whether such a misrepresentation may mislead the court and affect the distribution of the estate c) whether the 1<sup>st</sup> and 2<sup>nd</sup> Administrators misled the court in not disclosing that they are adopted children and not the biological children of the deceased d) whether the Respondents’ subsequent admission that they are not biological children, coming only after being challenged with a DNA test, entitles the Applicants to judgment on admission under Order 13 Rule 2 of the Civil procedure Rules and consequently allows the prayer for forensic investigation into the authenticity of the National Identification Cards and Birth Certificates produced by the Respondents e) Whether a court order for forensic investigation of how the 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Administrators acquired their birth certificates and national IDs is necessary.

13. Regarding the first issue, the Applicants made reference to Section 76 of the Law of Succession Act, which empowers the Court to revoke or annul a grant obtained fraudulently or through concealment of material facts. They submitted that the Administrators, conceded that they are not biologically related to the deceased. The Applicants further submitted that the court record shows that at no stage of the succession proceedings have the Administrators produced proof of their adoption by the deceased as alleged. They maintained that the

Administrators never disclosed that they were adopted children at the time of applying for and securing the grant. Therefore, they contend that the foregoing amounts to willful concealment of material facts within the meaning of Section 76 of the Act.

14. Relying on Sections 105 and 194 of the Children Act, the Applicants submitted that adoption is a legal process that must strictly comply with the procedures prescribed in law, and no person can validly claim to be adopted without documentary proof of such adoption. They contended that the burden of establishing the fact of adoption squarely rested upon the Administrators. The Applicants thus urged that they have proved, on a balance of probabilities, that the Administrators were not adopted children of the deceased, and their inclusion as such constituted a misrepresentation warranting revocation of the grant.
15. They further submitted that the birth certificates presented by the Administrators were obtained after the death of the deceased, thereby casting serious doubt on their validity. They argued that the certificates were procured during the pendency of this dispute to support the Administrators' subsequent claim of adoption which has not been substantiated by any adoption orders. It was their position that the birth certificates and national identity cards presented by the Administrators were fraudulently obtained.

16. On the second issue for determination, the Applicants made reference to Section 3 (3) of the Law of Succession Act, the case of **In the matter of the estate of Veronica Njoki Wakagoto (Deceased) [2013] KEHC 1930 (KLR), the case of In Re Estate of Tom Maisiba (deceased) [2021] eklr** and the case of **In Re Estate of Margaret Karungari Kamau (Deceased) [2025] KEHC 2939 (KLR)** in submitting that in the context of intestate succession, the term “children” as contemplated under Section 29 of the Law of Succession Act refers to biological or legally adopted children and that the use of the term “legal children” without documentation establishing adoption is ambiguous and misleading.
17. On the third issue, the Applicants submitted that in their sworn affidavit the Respondents admitted that they were not the biological children of the deceased and that admission eliminates the need for a DNA test and further proof on the issue and entitled the Applicants to seek judgment on admission.
18. Regarding the fourth issue, the Applicants submitted that there exists probable cause to believe that the identification documents relied upon by the Administrators were falsified or are otherwise misleading. They argued that the only credible means by which the Court can ascertain the authenticity of those documents is through a forensic examination and report by the relevant

investigative authorities. The Applicants noted that the Administrators have not produced any adoption orders or certificates evidencing that they were legally adopted by the deceased, and that in the absence of such formal proof, their claim to be the deceased's legal children collapses both factually and legally.

19. In conclusion, the Applicants submitted that the identification documents in issue lie at the very heart of their main application for revocation of grant dated 30<sup>th</sup> May 2024, and therefore urged the Court to exercise its inherent jurisdiction under Section 76 of the Law of Succession Act, read together with the right of access to information under Article 35(1)(b) of the Constitution of Kenya, to safeguard the integrity of the estate. They accordingly prayed that the reliefs sought in the present application be granted.

### **Administrators/Respondents submissions**

20. The Administrators identified two issues for determination, that is, whether the application dated 28<sup>th</sup> February 2025 is unreasonable, irrational and unnecessary and whether the 1<sup>st</sup> and 2<sup>nd</sup> Administrators Identification Cards and Birth Certificates are valid.

21. On the first issue, the Administrators relied upon Articles 28 and 31 of the Constitution of Kenya, the case of **S.W.M v G.M.K [2012] KEHC 5512 (KLR)**, the case of

**M.V v K.C Kakamega HC Misc Application No. 105 of 2004, case of FKK v DKC [2020] KEHC 3386 (KLR)** in submitting that the Applicants have neither laid out any reasonable case nor any special circumstances that would warrant an order for a DNA test. That it is neither necessary nor logical for a DNA test to be conducted on the administrators as they were legal and not biological children of the deceased. The administrators submitted that there is no need to prove a lack of blood relationship between them and the deceased as the same is not disputed. That lack of a blood relationship with the deceased, did not affect their status as beneficiaries and/or administrators of the deceased's estate.

22. On the second issue the Administrators submitted that the Applicants have failed to tender evidence to show that there was any fraud, false misrepresentation of material facts or illegality in the process of obtaining their birth certificates and identification cards. They made reference to the case of **Miller versus Minister of Pensions [1947]** on the threshold of proof and submitted that the burden of proof rested squarely on the Applicants who have not produced any evidence on their allegations.

23. The administrators submitted that according to the current legal jurisprudence, duly issued birth certificates of adopted children should not contain any reference to the adoptive parents as "adopters" or the child as "adopted".

They referred to the case of **Organisation for National Empowerment versus Principal Registrar of Birth and Deaths & Another [2013] eKLR (Petition 289 of 2012)**. They therefore submitted that the lack of mention of their adopted status in the birth certificates is regular and not indicative of any illegality.

24. In conclusion, the Administrators urged the court to find that their Identification cards and birth certificates are legal and valid and that the Applicants have not proven on a balance of probability any grounds to warrant forensic investigation into the same. The Respondents urged the court to dismiss the instant applications with costs.

### **Analysis and Determination**

25. I have carefully considered both applications herein and the affidavits by parties and it is my view that there are four issues for determination;

- a. Whether the Applicants have established a sufficient basis to warrant an order for DNA testing of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.**
- b. Whether the Applicants have made out a prima facie case to warrant an order directing forensic investigations into the authenticity of the Respondents' birth certificates and identity cards.**
- c. Whether the conduct of the Respondents amounts to concealment of material facts or fraud**

**warranting revocation or suspension of the Grant under section 76 of the Law of Succession Act.**

**d. Whether the Respondents' admission that they are not biological children of the deceased amounts to a clear admission sufficient to warrant judgment on admission under Order 13 Rule 2 of the Civil Procedure Rules, or an adverse inference under the Evidence Act.**

**Whether the Applicants have established a sufficient basis to warrant an order for DNA testing of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.**

26. The Applicants allege that the Respondents are not children of the deceased and that their birth certificates were fraudulently procured after the demise of the deceased. The Respondents, on their part, admit they are not biological children but claim to be legally adopted by the deceased, thereby enjoying the same status and rights under the law. They contend that ordering DNA testing would be unnecessary as they accept that they are not biological children of the deceased.

27. In **S.W.M v G.M.K [2012] eKLR**, Majanja J held that a DNA order is highly intrusive and should only issue where there exists compelling and credible evidence demonstrating that such testing is necessary to determine

a live issue before the court, and that less intrusive means would be inadequate.

28. Applying those principles to the present matter, the Respondents, admit and state that they are not biological but legal children of the deceased. It therefore follows that it is unnecessary to order for a DNA test when there is an outright admission that they are not biological children of the deceased.

**Whether the Applicants have made out a prima facie case to warrant an order directing forensic investigation into the authenticity of the Respondents' birth certificates and identity cards.**

29. The Applicants allege that the birth certificates relied upon by the Respondents to prove their relationship with the deceased are fraudulent and should be subjected to a forensic investigation by the DCI. Whereas, they made reference to documents allegedly showing prima facie discrepancies in birth certificates issued posthumously and identity cards allegedly obtained using those certificates they did not exhibit the impugned documents.

30. The Respondents on their part assert that they are not biological, but legal children of the deceased and the birth certificates were validly issued upon being legally adopted by the deceased.



31. Following this assertion by the Respondent the issue to be established is whether indeed they were the legal children of the deceased through adoption.
32. To this end while a birth certificate is evidence of the entry made by the Registrar of Births and Deaths on re-registration of a child's birth upon adoption it is not the primary document that establishes adoption.
33. Adoption is a formal legal process, verifiable through documented court proceedings which culminate with the issuance of an adoption order and adoption certificate. The adoption order and certificate are fundamental legal documents in proving adoption. To rely only on the birth certificates proof is not sufficient.
34. Accordingly, it is incumbent upon the Respondents to furnish the Court with the requisite adoption documents and record to demonstrate that they were indeed legally adopted by the deceased, as stated in their affidavit.
35. Therefore, this Court finds that while the Applicants have raised serious questions touching on the authenticity of the Respondents' documents for which a forensic investigation may be necessary the issue in dispute, is the Respondent's legal relationship with the deceased, which matter can be effectively resolved through production of evidence on their adoption.

**Whether the conduct of the Respondents amounts to concealment of material facts or fraud warranting revocation or suspension of the Grant under section 76 of the Law of Succession Act.**

36. Section 76 of the Law of Succession Act empowers the Court to revoke a grant if it was obtained fraudulently by making a false statement or by concealment of something material to the case.

37. In the present case, the Respondents sought and obtained a grant on the premise that they were children of the deceased. If sufficient evidence is not produced to show that they are the deceased's legal children as alleged, then the foundation upon which they obtained the grant would be shaken and would justify interference with the grant.

38. Notably, at the time of application of the grant, no documentary proof, was provided to prove that the Administrators were indeed the deceased's legal children. However, since the existence or absence of proof that they are legal children is yet to be established, it would be premature to revoke the grant at this stage. The prudent course is to suspend any dealings with the estate for the Administrators to provide evidence that they were indeed adopted thus are the deceased's legal children.

**Whether the Respondents' admission that they are not biological children of the deceased amounts to a clear**

**admission sufficient to warrant judgment on admission under Order 13 Rule 2 of the Civil Procedure Rules, or an adverse inference under the Evidence Act.**

39. Order 13 Rule 2 of the Civil Procedure Rules permits a court to enter judgment where a party has made a clear and unequivocal admission of facts entitling the other party to relief.

40. It is trite law that judgment on admission should only be entered in plain and obvious cases where the admission leaves no room for doubt. In this matter, the Respondents' admission that they are not biological children does not, in itself, dispose of the issue in controversy, since they claim to be the legal children of the deceased, a status which, if validly established, would entitle them to inherit under the Law of Succession Act. The admission is therefore not dispositive. Until the claim is verified, it cannot be said that the Respondents have admitted facts sufficient to grant a decision against them.

41. Therefore, the ends of justice will be served by the preservation of the deceased's estate, and production of evidence on the adoption of the Respondents by the deceased.

42. Based on the foregoing, I hereby direct that;

- a. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents to within twenty one (21) days from the date hereof provide evidence by way of affidavit on how they became the deceased's legal children. They should produce before this Court certified copies of the adoption orders and certificates evidencing their adoption by the deceased, together with certified entries from the Registrar of Births and Deaths showing re-registration of their births pursuant to the adoption in accordance with Section 170 of the Children Act, 2022.
- b. Pending the filing of the said affidavit and documents an interim order of preservation is hereby issued maintaining the *status quo* in respect of all properties comprising the estate of the deceased.
- c. This matter be mentioned on 25<sup>th</sup> February 2026 to confirm compliance and issuance of further directions.
- d. Costs shall abide the outcome of the substantive Summons for Revocation of Grant.

Orders accordingly.

Signed, dated and delivered at Machakos this 20<sup>th</sup> day of November 2025.

**RHODA RUTTO**

**JUDGE**

**In the presence of;**

.....for Applicants

.....for Respondents

Selina Court Assistant

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