



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION CAUSE NO. 2 OF 2019

IN THE MATTR OF THE ESTATE OF NKM (DECEASED)

NNK.....PETITIONER

VERSUS

SMS.....OBJECTOR

RULING

1. The deceased herein NKM died testate on 16th August, 2019. He executed a written will dated 23rd February, 2017 but never appointed an executor. On 23rd January, 2019, his wife (hereinafter the petitioner) petitioned for a grant of letters of administration with written will annexed. A grant of probate was issued on 7th June, 2019 to NNK.
2. On 5th March, 2019, SMS claiming to be the second wife to the deceased filed objection to making of the grant and petition by way of cross petition for a grant. She claimed that she got married to the deceased on 15th September, 2011 and she and the deceased were blessed with two children namely; MF, and JNK. That the first family being the house of the petitioner had three children namely; MNK1, MNK2, and MNK3.
3. The the objector sought to be appointed as an administrator and a beneficiary to the estate together with her children.
4. The matter was then fixed for hearing of the objection. During the hearing, the objector maintained that she was a lawful wife to the deceased and that all her children were sired by the deceased. She was however amenable to DNA examination of her children to determine the disputed paternity considering the allegation by the petitioner that her marriage certificate produced as her evidence is suspect.
5. On the other hand, the petitioner testified that the objector was married to another man by the time she alleged to have been married to the deceased. She demanded for DNA to be done and if it was positive, she will accept the objector's children as beneficiaries to the estate. During the pendency of the hearing of the objection proceedings, parties filed their respective applications demanding for DNA examination to determine paternity of the objector's children.
6. Vide a Notice of Motion dated 1st February, 2021, the petitioner herein moved this court for orders that the objector's children MF and JNK to submit to DNA test through matching of samples to be extracted from their bodies and samples to be extracted from the bodies of the children of the deceased MNK1 and MNK2; that the test be done by Kemri or Path care Kenya Ltd or Lancet Kenya or any other body as the court may deem fit.
7. The application is supported by an affidavit sworn by the petitioner /applicant in which she averred that justice demands that paternity of the deceased children be determined through DNA taking into account that the document examiner who examined the marriage certificate produced by the objector had found the same to be suspect or not genuine.
8. The objector also filed a Chamber Summons dated 4th March, 2021 seeking that; the grave of the late NKM be opened to exhume the body with a view of taking samples therefrom for purposes of DNA and that the officers of the KEMRI do undertake the DNA samples and examination.
9. The application is based on grounds stated on the face of it and averments contained in the affidavit in support. She averred that the document examiner's report casting doubt on her marriage certificate will be disproved by DNA examination. She objected extraction of DNA samples from any another person other than the deceased.
10. In reply to the application of 1st February, 2021, SMS filed a replying affidavit sworn on 4th March, 2021 stating that, the petitioner's application is an afterthought as she (petitioner) has never raised the issue of paternity of the children of the objector in her pleadings hence

the application at hand is a fishing expedition. She insisted that to achieve accurate results, the DNA samples must be taken from the body of the deceased.

11. In her response to the objector's application dated 4th March, 2021, the petitioner filed a replying affidavit sworn on 19th May, 2021 in which she averred that prior to the year 2011, the objector was married to a man called SM and that the marriage is still subsisting. That the marriage certificate produced by the objector was fake.

12. After the close of the hearing of the objection, parties agreed to canvass the two consolidated applications through written submissions. The firm of Kagwima Karanja appearing for the petitioner filed their submissions on 21st May, 2021. Counsel submitted on two issues. Firstly, whether DNA should be conducted; secondly, whether the source of DNA samples should be from the deceased's body or the objector's and petitioner's children.

13. On the first issue, counsel contended that DNA was the only effective way of determining paternity. In support of this proposition, counsel relied on the holding in the case of M.W and 3 others Vs D.N (2008) e KLR and In re Estate of S.S.M'I (2019) e KLR.

14. Regarding the second issue on whether samples should be taken from children from the petitioner's side, it was submitted that a deceased person's body should not be disturbed except for good reason and under exceptional conditions. To fortify this submission, counsel made reference to holding in the case of Hellen Cherono Kimugor Vs Esther Chelagat Kosgei (2008) e KLR, R N C and 2 others Vs S M G (2007) and in the re Estate of SMM' I (Supra).

15. Counsel contended that it is the practice and teaching of Islamic faith and African beliefs, that a deceased person's body should not be disturbed. Counsel further contended that exhumation of the body should be a last resort. That since the paternity of the petitioner's children is not contested, then, it is the best available option. As to who is to conduct the DNA test, it was recommended that KEMRI does undertake the examination.

16. The objector did not file any submissions in support or in opposition to the two applications.

Analysis and determination.

17. I have considered the two applications now consolidated. I have considered the affidavits in support and responses against each other. Further, I have considered the petitioner's submissions.

18. The main contention in the two applications is the paternity element of the two children from SMS's side. Both parties are in agreement that DNA test be done to determine paternity of the two children.

19. The only issue that is vehemently contested is the source of the samples to be used in comparison with those of the disputed children. According to the petitioner, samples from her children should be used to match them with those of the contested children. On her part, the objector maintains that, the samples should be drawn from the deceased's body.

20. DNA which is the short version of Deoxyribonucleic acid, is a genetic material which one inherits from a father or mother. It has been proved that science through DNA can only achieve 99.9% accurate results in determining paternity. Can this court order for sample extraction from the deceased's body? The deceased died on 16th August, 2017. The objector wants the body exhumed while the petitioner is opposed. Whereas the law does not expressly provide or prohibit extraction of samples from a deceased person's body, courts should exercise extreme caution not to interfere with the peaceful resting of the departed ones if there is an alternative way or source or method of achieving the intended results.

21. In the case of R N C and 2 others Vs SM G (Supra) the court held as follows;

“ ...an order for exhumation of a deceased person in order to have a DNA testing to carry out a paternity or maternity test of a child is a drastic order which must only be made in exceptional and compelling circumstances . The deceased was buried some 10 years ago and to make an order after the said years in my view would be a drastic order. His body should be left in the grave undisturbed.”

22. I must however take note of the fact that science has proven DNA samples from a deceased person may not necessarily generate DNA profiles from the deceased's body due to degeneration of samples over time. This observation was made and acknowledged in the case of E. M. M Vs I.G.M and Another (2014) e KLR where sibling sample extraction was submitted after the samples extracted from the deceased were found to have degenerated to the extent that it could not produce reliable DNA profiles for testing. It then follows that, besides letting a deceased person rest in peace without unnecessary disturbance, there is the next challenge of costly logistics in disinterring a body, psychological trauma caused to the relatives by reminding them of the death of their loved one hence calling for further counselling expenses or process.

23. Can DNA samples from the petitioner's children whose paternity is not in dispute suffice. From the pleadings of both parties, there is no dispute that the petitioner's children were sired by the deceased. On the other hand, the objector is claiming to have sired her children during the subsistence of her marriage with the deceased. Reliance was placed on the marriage certificate as proof of marriage and registrar(pw3) of marriages' confirmation during the hearing that he presided over the disputed marriage.

24. In essence, there is some nexus established between the alleged marriage of the deceased with the objector and therefore a possibility of children from both houses sharing the DNA from the deceased. See in the estate of Martin Luther Owuor (deceased) (2018) e KLR where the court stated that;

“Having considered the application, affidavit in support, other pleadings on record, submissions by counsel for the parties and in the absence of any affidavit (s) in opposition, I find that the appellant has met the necessary threshold in that she has demonstrate (sic) prima facie that there is indeed a connection or nexus between her and the deceased for the court to order for DNA test”.

25. The court went further to state at paragraph (11) that;

“with the above in mind, I do concur with counsel for the beneficiaries that the dead should remain undisturbed and to exhume should be the last result”

26. It is trite that, a child born of a woman is presumed to be a child of the husband unless the contrary is proved. See Section 118 of the Evidence Act which provides that children born during the substance of a marriage are presumed to be the children of her husband. To that extent, the petitioner’s children are presumed to be the children of the deceased as there is no dispute about it. It therefore follows that those children are possessed of the deceased’s DNA as their father and if the deceased sired the objector’s children as claimed, there can be a match of DNA hence the centrality of their paternity.

27. Having held as above, it is my finding that the body of the deceased person should only be disturbed by exhumation as a last resort if there are no other sources of evidence or samples to establish the claim of paternity. In the instant case; justice will still be served through extraction of samples from the two sons of the petitioner for examination and matching with samples of the objector’s disputed children.

28. Accordingly, I am satisfied that the two consolidated applications are merited and therefore allowed to the extent that;

(a) DNA examination shall be conducted to determine paternity of the objector’s children namely MF and JN.

(b) That the objector’s children named in (a) above shall submit to DNA test through the matching of samples taken from their bodies and those taken from the bodies of the sons of the petitioner namely MNK2 and MNK3.

(c) That the DNA to be done by Kenya Medical Research Institute(KEMRI) after extraction of samples from the said bodies.

(d) That the said samples be submitted within 30 days from the date of delivery of this ruling.

(e) That the Kenya Medical Research Institute to submit their report within 30 days from the date of submission of samples.

(f) Mention on 1st December, 2012 for further directions.

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 30TH DAY OF SEPTEMBER, 2021

J.N. ONYIEGO

JUDGE