REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 102 OF 2019

IN THE MATTER OF THE ESTATE OF JMK (DECEASED)

SWN.....APPLICANT/1st OBJECTOR

VERSUS

BWM.....1ST RESPONDENT/PETITIONER

JKM.....…2ND RESPONDENT/PETITIONER

DWM.....3RD RESPONDENT/PETITIONER

EN.....4TH RESPONDENT/2ND OBJECTOR

LWG.....5TH RESPONDENT/3RD OBJECTOR

SWW.....6TH RESPONDENT/4TH OBJECTOR

RULING

1. On the 11th November, 2019 the 1st Objector hereinafter referred to as the applicant filed a Notice of Motion brought under **Section 3(2), (4) & (5), Sections 26, 27 29 and 47** of the Law of Succession Act, **Article 28, 35, 47, 48 and 53(2)** of the Constitution of Kenya and all other enabling provisions of the Law. The applicant sought the following orders;

i. That the deceased's grave situate in Olkalau Sub- County, Nyandarua County be unsealed and opened to exhume his remains with a view of harvesting samples therefrom for purposes of Deoxyribonucleic Acid (D.N.A) tests.

ii. That officers of the Kenya Medical Research Institute do undertake/oversee the disinterment and do harvest the necessary samples for D.N.A testing.

iii. That the Police Officer Commanding Olkalau Sub- County station and/or proximate to the late JMK burial site and the medical officer of Health of Olkalau Hospital or any other proximate to the subject deceased burial site do oversee the implementation of determent/exhumation orders herein.

iv. That the applicant's children namely; JHNM (minor) and VENM (minor) to present themselves to Kenya Institute of Medical Research within 7 days or earlier after exhumation and harvesting of the DNA sample of the deceased for sample testing and comparison.

v. That the children of BWM the 1st respondent herein, EN the 2nd objector herein and LW the 3rd objector and any claimants' children to the estate of the deceased be subjected for DNA testing for purposes of determining paternity or claim that the deceased is their biological father.

vi. That the DNA examination results/findings on the subject children be filed in Court by the respective examining institute within thirty (30) days after the DNA examination.

vii. The O.C.S commanding Olkalau Sub-County and or his designated Police Officers within Olkalau Sub- County do oversee the implementation of the subject court order in offering security during the exhumation exercise.

viii. That the costs of the application to be in the cause.

2. The application was supported by the affidavit of the applicant dated 11th November, 2019 together with grounds on the face of the application. The applicant averred that she was married to the deceased in 2007 with whom they cohabited in Westlands until his death on 26th December, 2018. That their marriage was blessed with two children namely JHNM and VENM, both minors. She claimed that the deceased is their biological father whom they fully depended on during his lifetime.

3. The applicant further stated that in December 2018, the 1st Petitioner in conjunction with other third parties blocked her access to the deceased during his brief period of illness. That her efforts to reach out to the Petitioners for an amicable solution of any matrimonial dispute was fruitless. That consequently, she was excluded from the affairs of her husband during his illness and death. The applicant further stated that after the deceased's burial, she learnt that the Petitioners herein purported to harvest DNA samples from the deceased. This she claimed was an attempt to put her children's paternity into disrepute.

4. It was the applicant's case that in light of the serious paternity dispute involving the four households claiming in this succession cause, it is prudent that all the biological children of the deceased be ascertained to avoid waste and fraudulent claims by persons alleging to be children of the deceased. She asserted that the deceased's body which was unilaterally buried by the Petitioners in Olkalau in December 2018 is accessible and prayed for exhumation for sample harvesting in the interests of justice.

5. In an affidavit dated 22nd December, 2020 EN described herself as a wife to the deceased and the 2nd Objector in the cause. She averred that her affidavit is sworn on her own behalf and on behalf of AJGM who is her son with the deceased. She claimed that it is imperative for the expeditious disposal of the suit, that the Court grants the order of exhumation. Further that the samples from the deceased will ensure that there is integrity in the quest to determine the paternity of the deceased's children. She asserted that no party will be prejudiced if the orders sought are granted.

6. In a replying affidavit dated 22nd January 2021 BWM, JKM and DWM opposed the application for exhumation. They stated that there are preserved body tissues of the deceased that can be used to carry out DNA tests. Further, that the sibling DNA testing is an available option and that they have never refused to submit themselves to it. They averred that the request to exhume the deceased's remains is unwarranted and is only intended to traumatize the family.

7. It was their case that the deceased was married in a monogamous union to BWM as shown in the certificate of marriage and was therefore not capable of contracting another union. They also disputed the allegations by the applicant that she was married to the deceased and sired two children with him. They were of the opinion that alternative modes of DNA testing should be used to prove the paternity of the two children. On the allegations that they blocked the applicant from accessing the deceased, they averred that due to Covid – 19 pandemic, the hospital was only allowing family members, and the applicant was not known to be one. They asserted the deceased was buried with great dignity and it was unfortunate that the applicant was seeking to have his remains exhumed despite the existence of alternative methods.

8. The application was canvassed by way of written submissions. George N. Kimani in the submissions dated 10th February, 2021 for the applicant stated that paternity tests through DNA tests is crucial as it forms material evidence to the entire dispute. It was the applicant's case that the sample collection by Dr. Andrew Kanyi Gachii from the body of the deceased was not only biased, illegal, irregular and mischievous but it was an act of undermining the future succession dispute. Further, that the affidavit by the said Dr. Andrew Kanyi bears no proof of his credentials, capacity or authority to harvest, retain and store human tissue in line with health and medical laws and practice in Kenya.

9. Counsel for the applicant further submitted that to enable the Court prove who is a child of the deceased, a proper scientific process is needed without assumptions. On the threshold for exhumation, the case of **Hellen Cherono Kimurgor vs Esther Jelagat Kosgei [2008] eKLR** was cited where the court observed that exhumation would determine the real issue in dispute. The applicant urged the Court to grant the orders sought in the notice of motion.

10. In the written submissions dated 15th July, 2021 through Agimba and Associates Advocates, for the 2nd objector, it was submitted that only a DNA test would settle the issue of the paternity of his son AM whom the objector claimed was her child and the deceased. The reason advanced was that the Petitioners had vehemently and emphatically dismissed claims of his paternity stating that the deceased never had any other children in his lifetime. It was submitted that the Court should in the interest of justice discredit the integrity of the purported stored sample and order the exhumation of the deceased for the purposes of the extraction of a sample.

11. It was further submitted for the 2nd objector that she had, on the balance of probability on the facts and circumstances of this case, established a link between herself, AM and the deceased during his lifetime to persuade the Court to order his exhumation for purposes of DNA test.

12. In the written submissions by Chimera Kamotho Advocates for the 3rd and 4th objectors, it was submitted that the present matter is a suitable case where the Court can order for disinterment. While relying on the case of **Re Estate of Jocob Mwalekwa (Deceased) [2018] eKLR** they submitted that it was important for the Court to consider the plight of the 3rd Objector as compared to the intentions of the Petitioners while considering the extent of intrusion that exhumation has on the deceased's remains.

13. They further submitted that although the petitioners have expressed their willingness to submit sibling DNA testing, it is not superior to the actual samples of the deceased. They cited the case of **Estate of Peter Muraya Chege alias Muraya Chege (deceased) [2019] eKLR** where the Court stated that there was no scientific proof that the purported siblings of the deceased were actually siblings. They asserted that sibling sample DNA is not foolproof owing to the fact that there was no scientific backing of the Petitioner's claims of being biological children of the deceased. They urged the Court to grant the orders sought in the application.

14. M/s Judy Thongori Advocate for the Petitioners submitted that jurisprudence does not favour exhumation based on public policy that the

sanctity of the deceased's remains should be maintained. Reliance was placed in the case of **SCW alias CWG Succession Case No. 1379 of 2006** where Ougo J, stated that exhumation to determine paternity or maternity is a drastic order which must only be made in exceptional and compelling circumstances.

15. Secondly, it was submitted that the tissues from the deceased taken by Dr. Andrew Kanyi Gachii should be utilised for the DNA testing there being no factual challenge proffered against the Doctor's affidavit, the samples, or his credibility as a reputable pathologist in Kenya. It was submitted that the use of the samples by the Doctor is likely to yield a better result than the remains of the deceased which must have decomposed in the grave.

16. On whether other methods of obtaining the deceased's DNA can be used, the Petitioners submitted that sibling DNA was an alternative method to determine paternity of the persons claiming to be children of the deceased. They averred that sibling DNA is a tested process of obtaining DNA in Kenya and would be most appropriate. It was urged that the objectors had not shown any basis why sibling DNA cannot be used. They prayed that the application be dismissed with costs.

17. I have considered the pleadings and the submissions filed by the learned counsels. The issue that arises for determination in the instant Application is whether the Applicant has laid sufficient basis to warrant the issuance of an order for exhumation of the body of the deceased for purposes of collecting sample tissues to carry out DNA tests on persons named in her application.

18. From the Petition on record, the deceased who died on 26th December, 2018 was survived by one spouse and four children namely BWM- wife, JKM – son, DWM - son, EWM – daughter and MMM – son, all who are adults. Subsequently the applicant filed an objection to the filing of the grant on the grounds that she and her two children were excluded from the Petition as dependents. LWG and SWW also filed an objection to the Petition for letters of administration intestate. They claimed that they too were the widow and daughter of the deceased respectively. Further that they belonged to the 2nd house of the deceased which also included PMM – daughter of the deceased aged 14 years. EN also claimed to be a wife of the deceased with whom they had a son namely AJGM.

19. The standard of proof in the application for an order of DNA is not beyond reasonable doubt. What the applicant must show is that there was on a balance of probability prima facie evidence of a relationship between the applicant as the mother of the children and the deceased that could have borne the children as issues of the relationship. At this stage of the dispute what is in issue is the paternity of the children of the applicant.

20. In the instant Application, the Petitioners allege that the family of the deceased had no prior knowledge of the applicant's purported marriage to the Deceased and are strangers to her averment that their union bore two children. They asserted that the deceased had no other children outside of his marriage to the 1st Petitioner herein. On her part, the applicant produced birth certificates which indicated that the deceased was the father of her two children. She also insisted that they were dependents within the meaning of the succession Act. It was her case that in light of the serious paternity dispute involving the four households claiming in this succession cause, it is prudent that all the biological children of the deceased be ascertained through exhumation of the deceased for purposes of taking tissue samples from the deceased's remains.

21. The Petitioners have not challenged the birth certificates adduced by the applicant which names the deceased as the father of her two minors. Further, there is no indication that the provisions of **Section 12** of the Births and Deaths Registration Act requiring consent of the father or proof of marriage between the mother and the father before the father's entry on the Certificate of Birth were not complied with in the registration of the minor children.

22. It is my view that where sufficient evidence exists which resolves the issue in controversy without necessarily ordering for a DNA test, an order for a DNA test would be inappropriate. However, in this case, there is sufficient evidence to link the children of the applicant and the deceased to warrant the exercise of discretion in favour of an order for DNA testing sought by the applicant.

23. In any case, the Petitioners also agreed that there was need to conduct DNA test on the children of the applicant but alluded to alternative methods such as the use of the tissues taken from the body of the deceased and stored by Dr. Andrew Kanyi Gachii and in the alternative, that sibling DNA specimen was also an option other than the drastic measure of exhumation sought by the applicant.

24. It is imperative therefore that a DNA test should be undertaken. The question that arises is to determine which samples to be used. The applicant and the objectors' positions are that samples should be extracted from the deceased upon exhumation. On the other hand, the Petitioners contend that the deceased's tissues already extracted should be used, or samples should be extracted from known children of the deceased or from the deceased's own siblings.

25. The applicant's position is that there is no scientific proof that the purported known children of the deceased are children of the deceased and I would add that there is, too, no scientific proof that the purported siblings of the deceased are actually siblings. To begin with one would have to resort to the primary test that such a child or sibling DNA sample matches the deceased's. Therefore, when doubts arise about the propriety of samples from such persons, the court must resort to the best sample that would establish the truth.

26. As pointed out, the best sample would be the one extracted from the deceased. On record is an affidavit by Dr. Andrew Kanyi Gachii dated 22nd January, 2021. In his deposition, he described himself as a consultant pathologist and forensic specialist with 24 years' experience. He stated that he currently works at [Particulars Withheld] as the Chief Medical Specialist in Pathology and is a part time lecturer at [Particulars Withheld]. He averred that on 4Th January, 2019 he was approached by the family of the deceased to collect, analyse and store tissues from the deceased for purposes of DNA testing.

27. He stated that since the deceased was unknown to him, his two sons, daughter and a friend identified him physically and he proceeded to collect the material for DNA analysis with the assistance of a Government Chemist. Further, that he proceeded to store the specimen in a secure environment before the same was taken to the Government Chemist Department where it was submitted for DNA analysis to obtain

the deceased's DNA profile. He averred that he retained a set of the specimen which is secured in his laboratory and contended that specimens can be stored for many years as opposed to obtaining them from exhumed remains whose DNA quality could be compromised by the environment in the grave.

28. Dr. Kanyi also attached a consent from those who authorised him to collect, analyse and store tissue from the deceased for DNA testing. They are JKM - son, EWM – daughter and DWM – son.

29. The applicant has questioned the integrity of the samples collected from the deceased. She grounded her opposition to the use of the sample on the fact that firstly, the process was not witnessed by a lawyer to authenticate what Dr. Kanyii allegedly undertook. Secondly, that the samples stored could have been harvested from anyone having been harvested in the absence of all parties in this dispute. Lastly, that the deceased's samples should be stored in Gazetted Labatories and by licensed entities.

30. From the consents filed, only two of the alleged children of the deceased were present during the collection of the samples. The involvement of the other children claiming in this case or their representatives would have been important to ensure the credibility and integrity of the samples collected is not questioned.

31. I however observe from the evidence that the credentials of Dr. Andrew Kanyi Gachii as a consultant pathologist and forensic specialist were not disputed. The process of extraction and storage of the samples for DNA purposes would be in his area of expertise and the normal line of duty. The carcass he worked with belonged to a person unknown to him. This court therefore has no basis to doubt the integrity of the process.

32. In **Re Matheson (deceased) [1958] 1 ALL ER 202 at 204** the court held: -

> *"As I have said, the primary function of the Court is to keep faith with the dead. When a man nears his end and contemplates Christian burial, he may reasonably hope that his remains will be undisturbed, and the court should ensure that, if reasonably possible, this assumed wish will be respected. In all these cases, the court must and will have regard to the supposed wishes of the deceased. I say supposed wishes, because it can rarely, if ever, happen that the circumstances giving rise to the application could have been contemplated still less, discussed, in the lifetime of the deceased."*

33. This position was reiterated by the Court in the case of **Estate of Julius Kiragu Kiara (Deceased) [2018] eKLR**, where it was held that:

> *"My opinion is that, DNA profiling for purposes of proving parentage may be the best option. The court retains discretion to order such profiling in a suitable case. However, from time immemorial, it is a known fact that the place of the dead is to remain in the grave undisturbed. Once the body has been interred, in my view, a court should be slow to order disinterment of a body unless in clear and desirable circumstances."*

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.

35. It is also the duty of the Court to render justice without fear or favour. In so doing, the facts are supposed to be the guiding principles in order to arrive at fairness. Litigation is about seeking the truth, fairness and justice. One of the principles found in **Article 159** of the Constitution is that in seeking justice, there should be no fetter by reason of technicalities and that justice should be dispensed expeditiously.

36. Consequently, the Court will leave the three alternative routes of DNA testing available to the applicant. Afterall, the applicant/objector had all the time to test the children for DNA while the deceased was alive but she did not.

37. I therefore find that the most effective and justifiable way to resolve the issue is to order as I hereby do that:

1. The applicant elects to adopt any of the following methods:

    i. That a sibling Deoxyribonucleic Acid (DNA) test be undertaken with a view of ascertaining the paternity of the children of SWN, EN and LWG, using samples from any known siblings of the deceased within 21 days;

    Or

    ii. Any two known children of the deceased do avail themselves at the Government Chemist together with the children of the objectors to give samples for the sibling DNA test within 21 days from the date of this order.

    Or

    iii. The DNA tests be undertaken using the samples taken by Dr. Andrew Kanyi Gachii.

2. Each party will meet the costs of their DNA test.

3. The costs of the application be in the cause.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT THIS 27TH DAY OF OCTOBER, 2021

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L. A. ACHODE

HIGH COURT JUDGE

In the presence of……..…..…Advocate for the Applicant/1st Objector

In the presence of ……...……Advocate for the Petitioners

In the presence of ……Advocate for the 2nd Objector

In the presence of …….....……Advocate for the 3rd and 4th Objectors