REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY AND PROBATE DIVISION

MISC. CIVIL CAUSE NO. 15 OF 2015

IN THE MATTER OF: SECTIONS 26, 27 AND 28 OF THE MENTAL

ACT CHAPTER 248 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: CAPTAIN PGM

(PERSON SUFFERING FROM MENTAL

DIORDER)

AND

IN THE MATTER OF: Selection of Guardian of Captain P G M & Manager of his Estate

RULING

1. This matter first came to court by way of a Petition dated 5th February 2015 where the Petitioners/ Applicants **ANG and LWG** moved the court pursuant to **Sections 26, 27** and **28** of the **Mental Health Act Chapter 248** of the Laws of Kenya seeking orders;

a. **That the Subject Captain PGM be adjudged to be a person suffering from mental disorder.**

b. **For the Petitioners to be appointed as the managers of the Subject's estate and**

c. **For the Petitioners to be appointed as the Subjects guardians.**

2. With the Petition they also filed an interlocutory application seeking various order including the appointment of interim guardians of the Subject pending hearing of the Petition, and for the guardians so appointed to be managers of the estate of the subject pending final orders.

3. The Petition was supported by the Petitioners affidavit and that of one SWG the mother to the Petitioners who avered that the Subject is the father to the Petitioners. She explained in the same at length her relationship, life and times with the Subject.

4. On the 13th of March 2015 the court appointed the three ladies, namely; **SWG, ANG and LWG** as joint guardians of the Subject and managers of the Subject's estate. The court further directed that the Subject be provided with medical attention by Dr. Aluoch, Dr. Okonji and Dr. Luse.

5. Pursuant to the said order the Subject was admitted to hospital. By turn of events Counsel on record for the subject came into the picture. What would ordinarily be a simple application aimed at ensuring the wellbeing of a sick person and administration of such a person's estate has turned out to be protracted with accusation and counter accusations between the Petitioners, the Subject and unfortunately the Subject's counsel on record. Notable is that the interim orders were stayed as doubt arose on the relationship between the subject and the Petitioners.

6. The current situation has elicited three applications, two by the Petitioner dated 3rd July, 2017 and the third by subject dated 24th August, 2017. The applications have been disposed of simultaneously by way of submissions.

7. In the 1st application the Petitioners sought for the following orders:

a. …….

b. That Mr. Cyprian M. Wekesa of M/s Wekesa & Simiyu Advocates and all advocates being in the said firm be disqualified from acting and representing Captain PGM in this cause and in all matters concerning the Subject.

c. Mr. Kiragu Kimani of M/s. Hamilton Harrison and Mathews Advocates and all advocates being in the said firm be disqualified from 'leading' Mr. Wekesa on behalf of Captain PGM in this cause and in all matters.

d. All the pleadings/Affidavits/averments by the firm of Wekesa & Simiyu Advocates in this matter to date be struck off from the record.

e. Costs.

8. The application is predicated on grounds that; Mr. Wekesa Advocate has a personal interest in the matter; has interfered; indoctrinated the Subject; is a potential witness in tracing the assets of the Subject; acted without the authority in appointing Mr. Kiragu Advocate to act in the matter; has filed several affidavits purportedly signed by the Subject and has unfairly and unprofessionally labelled the Applicants as being malevolent, capricious, evil and deceitful.

9. The application is supported by the affidavit of the 2nd Petitioner, where she has set out particulars of the alleged interference by Mr. Wekesa in paragraphs 6, 7, 8, 9, 10, and 11 of the same. Further she deposed that since the Subject is suffering from mental disorder, he is not capable of giving instructions as purported by counsel on record. Further, she states that Mr. Wekesa is a potential witness in tracing the Subject's estate and therefore ought not to represent the Subject in this cause.

10. In the 2nd application, the Petitioners sought for a DNA test to determine the relation between them and the Subject whom they claim is their biological father and for reinstatement of the orders of 13th March 2015 which orders were stayed and as stated above on grounds that a dispute had arisen as to the applicant's paternity and the need to settle the same first.

11. The averments in the affidavit in support of the 2nd application are similar to the averments in the 1st application with the addition that counsel for the Subject has raised the issue of the Applicant's paternity and the matter needs to be resolved.

12. In response to the two applications two notices of Preliminary Objection and a replying affidavit of the Subject, **PGM** were filed all dated 23rd August, 2018.

13. The first Preliminary objection raised is to the effect that the court has no jurisdiction to make orders sought in the pending matter as the Petitioners are neither biological nor adopted children of the subject and the Petitioners are not concerned with the Subject's health but his properties.

14. The second Preliminary Objection elaborates on grounds raised in the first as regards the Petitioners *locus standi* in this matter and further states that an application for a DNA examination cannot be heard and determined as the same does not form part of the issues raised in the main petition.

15. Further in opposition a Replying affidavits dated 23rd August 2017 sworn by the Subject.

16. In his replying affidavit **PGM** confirms that he instructed counsel on record Wekesa & Simiyu Advocates and pleadings filed pursuant to his instructions, including instruction to engage Mr. Kimani Kiragu of Hamilton & Mathews Advocates.

17. On his part C. M. W Wekesa confirms instructions received by the law firm to act in the matter. Further counsel denied allegations levelled against him reiterating that all along he acted upon instructions. Further that he stated that he is neither a potential witness nor does he have any personal interest in the matter and that the Applicants are abusing court process by targeting counsel as legal representative of the Subject.

18. The subjects Application dated 24th August 2017 seeks to strike out offending paragraphs of the Petitioners 1st application for being scandalous, irrelevant and oppressive. The same is opposed by the replying affidavit of the 2nd Petitioner dated 13th March 2018 where the allegations are denied.

19. Having considered the applications, various affidavits, objections and the rival submissions by parties the issues raised by the three applications are: -

i. whether or not the Petitioners have the locus standi to file these proceedings and whether DNA test can be ordered in these proceedings

ii. whether or not offending paragraphs in the Petitioners' affidavits in the 1st application ought to be struck out.

iii. whether Wekesa & Simiyu Advocates & Hamilton Harrison and Mathews should continue representing the Subject.

iv. And whether pleadings filed by the said law firms be struck of the record.

20. There is no doubt that the main issues in this cause are; whether the Subject is mentally incapacitated, whether or not to appoint the proposed guardians for him and for the said guardians to be managers of his estate.

21. Other matter ancillary to the main issues have arisen in the various pleadings filed by the parties namely;

i. The relationship between subject and the Petitioners.

ii. Whether the subject is capable of issuing instructions.

iii. Whether counsel on record have a personal interest in the matter, is a potential witness and ought not to represent the subject

22. In my considered view all the above issues must be considered first in order to pave way for the main Petition.

23. In their Petition the applicants claimed that they are children of the subject with an admission that their parents were never married but stating that the two have remained close. In their pleadings they also state that they depend on the subject for their school and upkeep.

24. In the application filed by the Subject on 25th March 2015 he denies being the father to the petitioners and seems to rely on their birth certificates exhibited in court which do not give details of father. Further this line of though can be traced in subsequent documents filed by the Subject and on his behalf. There exists uncertainty on paternity. And as a result of the uncertainty now existing the Petitioners sought for DNA test stating that such a test would resolve the issue of paternity.

25. In an affidavit dated 5th February 2015 the 1st Petitioner **ANG** annexed school fees, school related receipts and cheques issued by the subject to various schools to show that the Subject had overtime discharged parental responsibility.

26. In an affidavit sworn by the 2nd Petitioner LWG dated 13th April 2015 she alleged that they are the closest relatives of the Subject. Pictures of the Subject and the Petitioners portraying closeness were exhibited as annexures.

27. To be considered is whether this is a typical case where a DNA test ought to be ordered.

In **R.M.K VS A.K.G & ATTORNEY GENERAL Petition No. 18 of 2013** the court had this to say;

> **"The Petitioner stated that the court should order a DNA test nevertheless the facts in the deposition have not been challenged. As I have observed, the burden remains on the petitioner to establish by pleadings and evidence sufficient nexus between him and the respondent in order to persuade the court to grant the orders. In this case there is no evidence to support such a course."**

28. In **D. N. M. Vs J. K. Petition Number 133 of 2015** Onguto J (as he then was) in declining to grant an order for a paternity test at an interlocutory stage said:

> **"In conclusion, I hold the view that where paternity is in dispute then within reasonable limits and in appropriate cases DNA testing of non-consenting adults may be ordered even at an interlocutory stage… The bid to establish the truth through scientific proof must however not be generalised and should never so lightly prevail over the right to integrity and right to privacy until it is clear that such right ought to be clear…"**
>
> **I would therefore in the circumstances of this case not make the orders sought at this stage of the proceedings as the Petitioner on the basis of the untested affidavit evidence failed to do enough to establish requisite nexus"**

29. The receipts for school fees and school related items paid for by the subject creates the picture of one who took up parental responsibility. Or was he just a good Samaritan? On the other hand, the various photographs of the subject, the Applicants and their mother do give the impression that there exists some close relationship either they are close friends or they indeed have some affinity.

30. As they say every right attracts an obligation. The court has a duty to balance the subject's right to privacy, dignity and Association as it considers the obligations these rights attract, alongside the Petitioners right to information, dignity, right to belong to a family, and to have a family name etc.

31. In my view as the subject enjoys his rights, he owes a duty to the Petitioners to explain why he took up parental responsibility over them and why he has had an intimate relationship with them. It is not good enough to point out that he does not appear as their father in their birth certificate.

32. In **Wilfred Karenge Gathiomi vs Joyce Wambui Mutura &**

Another (2016) eKLR, the court stated inter alia in considering whether to order for a DNA testing;-

"The 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 raised in the first place……

In light of above-cited authorities that DNA is intrusive and interferes with the right to privacy, this court finds basis for the DNA testing. Paternity is central to the dispute at hand, whether the 1st respondent is one of the beneficiaries of the estate of the deceased's estate. It is the only way to resolve the paternity issue, 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 issue it was his word against his."

33. Looking beyond our Jurisdiction in a South African in **Bother vs Dreyer (now Moller) High Court of South Africa (Trans Vaal Province) Case No.4421/08(unreported)** where in issue was the question of paternity Judge J.R. Murphy stated;

"In short, I agree with those judges and commentators who contend that as a general rule the more correct approach is that the discovery of the truth should prevail over the idea that the rights to privacy and bodily integrity should be respected. - see Kemp. Proof of Consent or Compulsion (1986) 49 THRHR 271 at 279-81. I also take the position, and I will return to this more fully, later, that it will most often be in the best interest of a child to have any doubts about the paternity resolved and put beyond doubt by the best evidence"

34. Enough evidence has been placed before court to draw a nexus between the parties for consideration on what their relationship is and what better way is there to prove the same other than by way of a scientific method which is conclusive? Indeed, if the results show the Petitioners are biological children of the Subject isn't it their business to be concerned with their father's welfare, his property aside? And on the other hand, if the result proves no affinity then clearly the Petitioners are strangers and have no standing in law.

35. Based on the circumstances set above and guided by the quoted authorities I am persuaded that the most efficacious way to resolve the issue of paternity would be by the most efficient scientific method of DNA and that the intrusion if any of the Subject's privacy is a small price to pay in the quest for the truth and it will lay the matter to rest.

36. The next issue to consider is whether or not to strike out sections of the 2nd Petitioner/Applicant's affidavits sworn on 3rd July, 2017 to wit paragraph 7, 10, 12, 13, 15, 17, 18, 19, 20, 22, 23, 24, 25, 27, 27, 31, 33, 34 for being scandalous, irrelevant and oppressive.

37. Ordinarily a court would be slow in striking out any pleading. However, allegations made in pleadings that are scandalous, indecent, offensive and oppressive and which do not serve the ends of justice ought not to be entertained.

In the case of **Musikari N Mazi Kombo vs Moses Wetangula & 2 others (2013) eKLR** the court had this to say on affidavit evidence.

"But it should be understood that, the law still requires such allegations to be made within the law;

That is to say, within the legal thresholds I have stated herein above as a way of preventing prejudice to, unfair charge on or infringement of a person's rights. The allegations or averments in an affidavit should also not be irrelevant; having no probative value; not tending to prove or disapprove a matter in issue. See Black's Law Dictionary, 17th Edition. One more requirement; the averments should be supported by evidence within the affidavit itself or by some other person in the proceedings, in this case, by a witness through an affidavit in court…"

38. **Order 19 rule 1** of the **Civil Procedure Rules** further provide that affidavits will be confined; -

"to such facts as the deponent is able of his own knowledge to prove, provided that in interlocutory proceedings, with leave of the court, an affidavit may contain statements of information and belief showing the source and grounds thereof."

39. Paragraphs 7, 15, 17, 18, 19, 20, 22, 23, 28 are outside the confines of Order 19 rule 1 as quoted above, the said Paragraph are offensive, scandalous and oppressive and are accordingly struck off.

40. Should counsel on record Simiyu Wekesa Advocates and Hamilton and Harrison & Mathews be barred from representing the Subject?

Assuming that the Subject is of sound mind, it is his right to pick a counsel of his own choice having stated so, it is common ground that counsel in representing his client's interest should not throw himself in the arena of a witness and he may only swear affidavits on behalf of his client if need be in non-contentious matters.

41. The contention that Wekesa & Simuyu Advocate have a personal interest in this matter was not been substantiated by the Petitioners. Secondly, the contention that Mr. Wekesa is a potential witness has been denied. Counsel in acting for a client is always privy to his/her client's confidential and crucial information, this cannot certainly be in itself a bar to counsel representing his client in court. The prayer to bar the two firms of advocates form acting herein in my considered opinion is without basis and is therefore denied.

42. Having declined to bar counsel for the subject to act herein, it follows that the pleadings filed on behalf of the subject by his counsel remain as part of this record.

43. Accordingly,

a. The court directs and order that the Petitioners and the Subject to submit themselves for a DNA test at a laboratory to be agreed upon by the parties within the next 7 days. Cost of the DNA will be shared between the parties.

b. The court strikes off the record Paragraphs 7, 15, 17, 18, 19, 20, 22, 23, 28 of the 2nd Petitioner's affidavit in support of the 1st Petitioner's application.

c. The prayer seeking to disqualify counsel on record for the subject to continue acting and to strike off all pleadings drawn and filed by them be and is hereby declined.

d. Costs to abide the outcome of the case.

SIGNED DATED and **DELIVERED** in open court this **31st day** of **JANUARY, 2019**.

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ALI-ARONI

JUDGE