REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 856 OF 2014

IN THE MATTER OF THE ESTATE OF CHRISTOPHER NJOMO KAMAU (DECEASED)

GERELDINE NDUTA NJOMO.....1ST APPLICANT

RICHARD NG'ETHE WAMBUI.....2ND APPLICANT

VERSUS

MARION WAKANYI KAMAU.....1ST PETITONER/RESPONDENT

MARY WANJIRU KAMAU.....2ND PETITIONER/RESPONDENT

PAULINE MUGURE NGENGA...3RD PETITIONER/RESPONDENT

RULING

1. The background to this matter is that the Applicants filed an Application dated 4th April, 2017 to have the Grant of the Letters of Administration issued to the Respondents herein revoked, on grounds interalia that they were children of the deceased who had been left out of the list of beneficiaries. The application was opposed and is yet to be determined.

2. On the 25th February, 2019 the Applicants filed a chamber summons under Articles 2(5), 10, 11, 53 (2), 159 (2) of the Constitution of Kenya 2010, Section 1A, 1B, 3A, 3B of the Civil Procedure Act Cap 21, Section 146 of the Public Health Act Cap 242, Section 5(2), 12 of Anatomy Act cap 249, Sections 47, 82 and 83 of the Law of Succession Act Cap 160, Rule 49 and 73 of the Probate and Administration Rules , the Succession Act Cap 160 Laws of Kenya. The applicants sought the following orders;

i. That the children of the deceased namely; Mary Wanjiru Kamau and Pauline Mugure Ngenga, the 2nd and 3rd Respondents herein and Geraldine Nduta Njomo and Richard Nge'the Wambui, do appear at Lancet laboratories for extraction of Deoxyribonucleic Acid (DNA) samples for testing.

ii. That in the alternative, the late Christopher Njomo Kamau's grave situated at Langata Cemetry within NairobI County be opened to disinter his body with a view to take samples therefrom for the purpose of Deoxyribonucleic Acid test.

iii. That the Director of Lancet laboratories or his/her appointed officers do undertake the disinterment and do obtain the necessary samples for the purpose of carrying out the Deoxyribonucleic Acid test.

iv. That the Officer Commanding Langata Police Station do provide security during the exhumation exercise.

v. That the Court may grant any other order that it deems fit

vi. That cost of the application be provided for.

3. The application was supported by the annexed affidavit of Geraldine Nduta Nzomo dated 22nd February, 2019. She averred that the applicants herein were children of the deceased but the Respondents obtained the letters of administration dated 29th September, 2014 without their knowledge or participation. She stated that the Respondents have disputed their paternity and the only way to prove that they are the children of the deceased is to have a DNA test performed on them and their two step sisters, the 2nd and 3rd Respondents herein.

4. She urged the Court to select Mary Wanjiru Kamau, Pauline Mugure Ngenga, Richard Ng'ethe Wambui and herself for extraction of DNA samples. It was her prayer in the alternative, that if the 2nd and 3rd Respondents were unwilling to submit themselves for the test, the grave of

the deceased be opened to disinter his body with a view of taking samples for the purpose of DNA testing. She asserted that unless the said prayers are granted, their rights as children of the deceased will be infringed and the 2nd and 3rd Respondents may not know the truth.

5. In response to the Chamber summons, the 1st Petitioner filed a replying affidavit dated 14th March, 2019. She deposed that she had been authorised be her Co-administrators the 2nd and 3rd Petitioners' to swear the affidavit on their behalf. She refuted claims by the Applicant that she was not aware of the existence of this cause until 10th April, 2017 when the application for revocation of grant was filed. She asserted that the procedure for obtaining the grant was followed which resulted in this court confirming the grant of administration intestate on 29th September, 2014 and a certificate issued on 10th November, 2014, while the application for revocation of grant was filed on 10th April, 2017, three years after the confirmation of grant.

6. The 1st Respondent emphasized that the Applicants have no relationship/linkages whatsoever with the Respondents or the deceased. She asserted that the delay in filing the application was because the Applicants were strangers to the deceased. It was her disposition that despite the applicants' claim of having a biological relationship with the Petitioners and the deceased, they failed to demonstrate any linkage or to identify their mother to disclose the nature of their relationship with the Petitioners as either sisters of half-sisters.

7. She questioned why the applicants had refused to pursue the issue of their paternity during the lifetime of the deceased and waited three years after his death to do so. The respondents read malice on the part of the Applicants and were apprehensive that the application was intended to delay the distribution of the deceased's estate and threatened the Petitioners' legitimate and lawful rights of ownership of property guaranteed by the constitution.

8. The 1st Respondent asserted that the prayer for exhumation of the deceased will further cause the Petitioners unnecessary mental suffering and anguish. She maintained that the applicants had failed to establish a factual basis to show the relationship with the Petitioners and the deceased thus ousting the need for exhumation of the deceased's body or to compel them to give samples for DNA testing. He prayed for the application to be dismissed with cost.

9. In response the 1st Applicant filed a further affidavit dated 26th April, 2019. She refuted the claims by the 1st Respondent that the grant was obtained legally maintaining that it was obtained by concealing material facts in particular that the Applicants are children of the deceased. She admitted that there was neither a protest nor objection raised during the process of obtaining the grant since they were never made aware of the Succession cause or the fact that they had been sidelined.

10. The 1st Applicant reiterated that the deceased was their biological father who raised them together with their mother Margaret Wambui Nge'the. She attached several photographs. She added that the deceased frequently communicated with herself and her brother. She produced photographs of text messages between the deceased and her brother. Further, she averred that the deceased sent her money for up keep. She attached their Mpesa statements to show that the deceased did not abdicate his parental responsibilities. She reiterated that their rights as children of the deceased will be infringed if the prayers sought are not granted.

11. After a careful consideration of the affidavits on record, the testimonies of witnesses and the submissions of learned counsels, the issue that arises for determination is whether this is an appropriate case for the court to make an order for sibling DNA testing.

12. There are two schools of thoughts on this matter. One school of thought is that for an order for DNA testing to be made, a basis must be laid; a nexus between the applicant and the person the order is being sought against must be established. The other school of thought is that DNA testing is to be allowed in fact finding, to establish the truth and reach a just conclusion even where no nexus has been established, if the need is eminent.

13. In **S.W.W. vs G.M.K. (2012) eKLR** where the Petitioner sought as one of her prayers, for the Petitioner to be subjected to a DNA test to ascertain whether he was her biological father. In declining the prayer the court was of the view that;

> **"Ordering the Respondent to provide DNA for whatever reason is an intrusion of his right to bodily security and integrity and also the right to privacy which rights are protected under the Bill of Rights. The Petitioner bears the burden of demonstrating to the court the right she seeks to assert or vindicate and which the court would consider as overriding the respondent's rights."**

In **Wilfred Karenge Gathiomi vs Joyce Wambui Mutura & Another (2016) eKLR**, the court stated as follows:

> "**Therefore, since under our law Sections 107 108 & 109 of the Evidence Act Cap 80 mandates that he who alleges must prove; the Applicant is the one who raised the issue of paternity against the 1st Respondent. He did not prove. The 1st Respondent claimed in spite of the date contained in her ID card she was born in 1950. She did not prove the same. Therefore, the only option is to result to scientific method for conclusive results. Both parties should undergo a sibling DNA testing to confirm if they are of the same father or not. 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''**

14. The cited authorities provide different perspectives which the Court should consider in reaching a determination. One is that, DNA is intrusive and interferes with the right to privacy, and the second is that paternity is central to the dispute at hand, and DNA is justifiable in determining the truth whether the applicants were children and dependants of the deceased and therefore beneficiaries of the estate of the deceased's estate. It is the only way to resolve the paternity issue.

15. Reference to the Constitution 2010 was made with each side applying the Articles of the Constitution and statutes that suits their side of the case. Articles 27, 37, 40 & 50 of the Constitution and Sections 65(8), 107, 108, 109 of the Evidence Act, were alluded to bringing to the

fore competing interests of the parties. After considering the facts surrounding this case and studying case law cited by the respective counsels, this case is one where the court has to weigh and balance the conflicting rights of the parties in order to arrive at a fair and just determination.

16. In her evidence, the applicant, produced 'Mpesa' statements as proof of transactions made between the Applicants and the deceased together with photographs of the deceased with the Applicants during alleged family events. The respondents in their submission challenged this evidence alluding to the provisions of the Evidence Act Section 65(8) which provides for the framework for production of computer generated statements of printouts as well as messages. In this case, Mpesa statements alluded to have not been verified and a certificate issued.

17. However, the photographs produced of the deceased and the Applicants in my opinion have great probative value as proof of a link and/or relationship between the deceased and the Applicants. I find that they are sufficient evidence to show a nexus.

18. The issue in dispute is that of paternity and this can only be determined in the circumstances of this case, if the court takes the approach of discovering the truth over the idea that the right to privacy and bodily integrity ought to be respected. This therefore demands that the court employs, the best available and most accurate method to arrive at a fair decision. The beneficiaries named in the application may suffer some inconvenience and intrusion to their privacy. This has to be weighed against the need to resolve the outstanding issue.

19. Quite obvious the issue of inheritance is at stake. If the results favour the applicants, they stand to benefit, if not, status quo of the estate shall be maintained and these proceedings will automatically end. This Court finds that the DNA testing will not cause substantial loss to the Respondents except to inconvenience them briefly which is necessary to finding a lasting solution to the issue raised in the first place,

20. I therefore find that the most effective and justifiable way to resolve the issue is to order that:

i. There is merit in the applicants' application dated 25th February, 2019 in the first instance in terms of prayer 1.

ii. Prayers 2, 3 and 4 of the application are also granted but will only take effect in the event that the 2nd and 3rd Respondents fail to comply with (i) above within 30 days from the date hereof.

iii. The applicants will meet the cost of the DNA test.

SIGNED DATED AND DELIVERED IN OPEN COURT THIS 25TH DAY OF JUNE, 2019.

……

L. A. ACHODE

HIGH COURT JUDGE

In the presence of.....Advocate for the Applicants

In the presence of.....Advocate for the Respondents