



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**SUCCESSION CAUSE NO. 283 OF 2013**

**IN THE MATTER OF THE ESTATE OF SKC-DECEASED.**

**EJK.....1<sup>ST</sup> PETITIONER**

**MKC.....2<sup>ND</sup> PETITIONER**

**FKM.....3<sup>RD</sup> PETITIONER**

**VERSUS**

**MJM.....OBJECTOR/APPLICANT**

**RULING**

**1.** The applicant filed this application under the notice of motion seeking for orders:-

- i. That the court be pleased to order that the Applicant's son MCK on the one hand and WKK, K, GKK, RSK and TBK do submit to (DNA test) to determine paternity.
- ii. That the DNA be ordered at the Government Chemist laboratories at the date to be agreed upon them and in any event within 14 days of this order.
- iii. The court do condemn the Respondents to meet the cost on the mandatory DNA incidental thereto.

**2.** The application is based on the grounds that the DNA is necessary in order to conclusively determine whether the applicant's son share common paternity to the four acknowledged sons of the deceased for purposes of succession in respect of the estate of SKC.

**3.** A determination in paternity will pave way for expeditious disposal of this matter, be it referral to court annexed mediation or parties agreed mode of distribution over the estate.

**4.** The applicant's son being only 7 years old and the youngest of the deceased's beneficiaries needs this court's protection as his rights have been infringed by the respondent's acts and omissions.

**5.** The application is opposed through a replying affidavit sworn by EJK on the grounds that the applicant filed summons for annulment of grant way back on 29/4/2014 but took no steps in prosecuting it.

**6.** That upon the demise of the deceased, a eulogy was prepared which the applicant never objected to and neither did she attend the burial.

**7.** That the police records do not recognize the applicant nor her son. Initially the objector alleged marriage but she is now alleging a casual union.

**8.** The M-pesa statements annexed is untenable since the applicant received and transferred substantial amounts to other men.

**9.** Further, the applicant has not laid the basis for the DNA test and that the same is eminently needed.

**10.** MKC and FKM reiterated the contents of the replying affidavit sworn by EJK.

**11.** The applicant submitted that pursuant to the provision of Section 3, 26, 29 and 40 of the Law of Succession Act, the applicant's son one

MCK seeks to be recognized as the deceased son and therefore a dependant under *Section 26, 29 and 40 of the Law of Succession Act*, having been not provided for by the petitioners in the letters of administration.

12. As far as matters of DNA relates on matters involving adults, some of whom are non-consenting, there is yet no consensus. Further, that the respondents have failed to discharge the burden of proof as no documentary evidence has been tendered to show that two of the subjects requested to undergo examination are adults.

13. For an order of DNA test to be made, a basis must be laid, a nexus or connection between the applicant and the person the order is being sought against must be established. The applicant annexed a copy of the birth certificate, a letter from the Chief Changamwe Location and photographs of the applicant with the deceased father.

14. Further, that it is not in dispute that the petitioners deliberately locked out the applicant's son from the list of the dependants when they petitioned for grant of letters of Administration intestate over the Estate of SKC.

15. The minor MKC is thus entitled to know if the deceased is his father and refusal to take a DNA test by the Respondents herein is unreasonable and denies the child herein the possible enjoyment of his rights to benefit from the estate of the deceased.

16. Lastly, that it is also in the best interest of the aforementioned minor that a paternity test be undertaken since there is no other means of determining paternity with the 4 acknowledged sons of the deceased.

17. The Respondents on the other hand submitted that initially the applicant had alleged marriage under Section 3 of the Law of Succession Act which defines a wife to include a wife who is separated from her husband and the term "husband" and "spouse" "widow" and "widower" shall have corresponding meaning.

18. The objector has not demonstrated to the court that she was a wife to the deceased nor that there was any sexual relationship that could lead to the minor being born.

19. The applicant has not established facts linking the child to the deceased and that the applicant has not placed before court evidence to warrant issuance of the DNA test order.

20. The applicant ought to be first cross examined before resorting to scientific proof as the first line of evidence. In this case, there is no special circumstances raised by the applicant to warrant the orders sought.

21. Among the four subjects requested to undergo DNA, two of them are adults aged between 18 and 21 years but the applicant has not sought their consents and thus will violate their right to bodily integrity and privacy.

22. The main issue for determination is whether the applicant should be granted the orders for the DNA test.

23. DNA is intrusive and interferes with the right to privacy. However, paternity is central to the dispute at hand, and DNA is justifiable in determining the truth on whether the applicant is a child and dependent of the deceased and therefore beneficiary of deceased's estate. It is the only way to resolve the paternity issue.

24. In her evidence, the applicant, produced 'Mpesa' statements as proof of transactions made between her and the deceased together with photographs of the deceased father with the Applicant during alleged visit to his place.

25. The respondents in their replying affidavit challenged this evidence alluding that the applicant received the similar amount which she also transferred back to the deceased and thus the transaction was more of a debt payment.

26. 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 the best available way to establish the truth and do justice, over the right to privacy and bodily integrity which ought be respected.

27. This therefore demands that the court employs, the best known and most accurate method to arrive at a just decision. The beneficiaries named in the application may suffer some inconvenience and intrusion to their privacy, which has to be weighed against the need for a lasting justice in the matter.

28. Quite obvious the issue of inheritance is at stake. If the results favor the applicant, they stand to benefit, if not, status quo of the estate shall be maintained and these proceedings will automatically end.

29. The court should as well consider the child's best interest as being of paramount importance in this matter, as commanded by Article 53 of the Constitution, and balance this requirement with the constitutional protection of privacy for the deceased's family members, under *Article 31 of the Constitution* and the need to do justice in the matter.

30. Article 31 of the Constitution provides for the right to privacy as follows:

“31. Every person has the right to privacy, which includes the right not to have—

**(a) their person, home or property searched;**

***(b) their possessions seized;***

***(c) information relating to their family or private affairs unnecessarily required or revealed; or***

***(d) the privacy of their communications infringed.”***

**31.** The Article protects the unnecessarily requisition or revelation of private information. The interests of the minor herein make it necessary to call for the information on his paternity to be revealed by the DNA testing.

**32.** It is clear that the DNA testing will not cause substantial loss of privacy to the Respondents except to inconvenience them briefly, which is necessary to finding a lasting solution to the issue raised in this matter. From the foregoing, it is explicit that the application has merit, it is therefore allowed.

Costs of the DNA tests be met by the applicant.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 29<sup>th</sup> day of October, 2019.**

In the presence of:-

Mr. Oduor holding brief for Mr. Magare for Petitioner

Mr. Juma holding brie for Mr. Mitei for objector

Ms Abigael - Court clerk