REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO. 57 OF 2018

IN THE MATTER OF THE ESTATE OF PETER MURAYA CHEGE Alias MURAYA CHEGE (DECEASED)

JOHN MUTHEE NGUNJIRI

JAMES MACHARIA CHEGE

JAMES MUGO MURAYA.....APPLICANTS

VERSUS

MARGARET WAIRIMU MURAYA ……..…… 1ST RESPONDENT

SUSAN WANJA MURAYA ……..…… 2ND RESPONDENT

JANE NYAMBURA ……. 3RD RESPONDENT

SAMUEL GITHINJI MURAYA ……..…… 4TH RESPONDENT

HANNAH NYOKABI ……..……..…… 5TH RESPONDENT

MIRRIAM MUTHONI MURAYA ……..……..…… 6TH RESPONDENT

SIMON CHEGE MURAYA ……..……. 7TH RESPONDENT

RULING

1. This ruling relates to the application dated 27/5/2019. Vide that application, John Muthee Ngunjiri, James Macharia Chege and James Mugo Muraya (hereinafter administrators) seek orders:

1. Spent

2. That the Honourable Court be pleased to order that the known children of the deceased herein on the one hand and the 2nd, 3rd, 4th, 5th, 6th and 7th Respondents, on the other hand, do submit to (DNA test) to determine paternity.

3. That the DNA test be ordered at the Government Chemist laboratories at a date to be agreed upon them in any event within 14 days of the ruling of the Court.

4. That the results for the above DNA test in regard to the paternity be forwarded to this Honourable Court by the Government Chemist laboratories.

5. That the costs of the DNA and this application to be provided for.

2. The application is grounded on the grounds listed on the face thereof viz:

1. The DNA test in necessary in order to conclusively determine the paternity of the objector's children for purposes of Succession in respect of the estate of Peter Muraya Chege alias Muraya Chege (deceased).

2. The DNA test will establish whether the objector's children share common paternity with the known and undisputed children of the deceased.

3. Since the objector alleges common paternity with the said children but the administrator and known children of the deceased deny, DNA test is the best mechanism to conclusively determine the issue.

4. The administrators and known children of the deceased earnestly believe that the deceased herein did not father the objector's children and hence they are not beneficiaries of the estate.

5. The objector and her children claim to be beneficiaries of the estate on account of being biological children of the deceased, and since their paternity has to be resolved by the best scientific method available, which is DNA test alongside known children of the deceased.

6. No prejudice would be suffered by the acknowledged beneficiaries and the respondents, in the event the orders are granted for purposes of attaining substantive justice.

3. It is further supported by the affidavit sworn by the administrators on the 27/5/2019.

4. In a nutshell, it is the administrators' case that a DNA test is necessary to conclusively determine paternity of the objector's children for purposes of succession in respect of the estate of Peter Muraya Chege Alias Muraya Chege.

5. The test, it is averred, will establish whether the objector's children share common paternity with the known and undisputed children of the deceased.

6. It is urged that the known children of the deceased believe that the deceased did not father the 2nd, 3rd, 4th, 5th, 6th and 7th respondents and the named persons are not deceased's biological children and are not beneficiaries of the estate and are not entitled to benefit from the deceased's estate.

7. The application is opposed. Margaret Wairimu Muraya (objector) has sworn a replying affidavit in which she readily admits that the 2nd, 3rd, 4th, 5th and 6th respondents are not the biological children of the deceased but had been taken in together with her by the deceased since 1983 and were provided for by the deceased.

8. It is the objector's case that she cohabited as man and wife with the deceased sometime in 1983 and later entered into a marriage with the deceased under Kikuyu Customary Law.

9. It is urged for the respondents that the 7th respondent is a biological child of the deceased. His birth certificate is exhibited.

10. The objector further depones that in Nakuru CMCC Case No. 118 of 2018, the applicants had earlier on in their petition for letters of administration **ad Litem** acknowledged that the 7th respondent is a biological son of the deceased and thus a dependant entitled to provision from the deceased's estate. An affidavit and a chief's letter are exhibited.

11. It is the objector's case that if the court is inclined to allow orders of DNA test, then the only sure test would be of samples of the deceased's remains and the 7th respondent. An order for exhumation of the remains of the deceased would be necessary to establish with finality the paternity of the 7th respondent. Using samples from purported known children of the deceased would be inappropriate as there is no scientific proof that they are children of the deceased.

12. The application was canvassed through written submissions.

13. The following issues emerge for determination:

1. Whether the applicants have laid out a proper basis for an order for a DNA test on the 2nd, 3rd, 4th, 5th, 6th and 7th respondents.

2. If in the affirmative which samples shall be used.

3. Who shall conduct the test.

4. Who bears the costs of this application.

14. As regards the 2nd, 3rd, 4th, 5th and 6th respondents, paragraph 6 of the replying affidavit of Margaret Wairimu Muraya lays the issue to rest. In her averment, Margaret depones that the 2nd to 6th respondents are not biological children of the deceased.

15. By dint of paragraph 6 of the replying affidavit the whole substratum of the application in so far as it relates to the 2nd to 6th respondents is lost.

16. Paragraph 6 of the replying affidavit compromises the question as to whether the 2nd to 6th respondents are biological children of the

deceased and any further delving into that issue would amount to a useless academic exercise.

17. Any claim of entitlement to a share of the estate by the 2nd to the 6th respondents is better left in abeyance to await further necessary canvassing within other parameters of Law as laid out in the Law of Succession Act. That in my view ought (in so far as the 2nd to 6th respondents are concerned) to have been the trajectory towards which the energy now expended on this application ought to have been directed.

18. As regards the 7th respondent, the issues for determination above are alive.

19. In this time and age of considerable scientific discovery, development and achievement, where a dispute arises as to the paternity of an individual, there is no better way to settle that issue with finality than through a **dependable** (emphasis mine) DNA test.

20. Where a proper basis is laid, such a test should be ordered.

21. The respondents have proffered evidence of a birth certificate of the 7th respondent to show he is a child of the deceased. A funeral program has also been exhibited where the 7th respondent is named as a son in the deceased's eulogy read at his burial.

22. The exhibits at paragraph 21 above are not conclusive evidence of paternity of the 7th respondent. To that extent, an order for a DNA test looks quite inviting to resolve the issue of paternity.

23. The power of the court to make an order for a DNA test is not in doubt. In **EWG –VS- JMN & Another [2017]eKLR**, it was held that a court may exercise its inherent jurisdiction and direct that a party submit to a DNA test in order to determine the truth of the paternity where such determination will serve the interests of justice.

24. In that decision (EWG VS JMN Supra), Odero J stated;

> "*In the South African case of **BOTHA Vs DREYER (now MULLER) (4421/08)[2008] ZAGPHC 395**, the court held that the correct approach was that as a general rule the discovery of the truth should prevail over any protection to the rights of privacy and bodily integrity. Many times the best interests of the child dictate that any doubts regarding paternity be resolved and put beyond doubt using the best available evidence which would be a DNA test. This is not however to denigrate the rights of an adult to privacy and dignity nor must these rights be sacrificed to the needs of the administration of justice. The principle is that such rights must yield to the needs of the proper administration of justice when it is reasonable and justifiable for them to do so. The importance of the purpose and necessity in getting to the truth must be taken into account."*

25. The Judge quoted from the Botha case thus;

> "*The court is clothed inherently and constitutionally with jurisdiction to order parties to have blood tests where it finds that the competing rights and interests of the parties require the truthful verification by scientific methods. Truth is the primary value in the administration of justice and should be pursued if not for its own sake then at least because it invariably is the best means of doing justice in most controversies."*

26. Compelling a non consenting adult to a DNA test is certainly, to some extent, an infringement of some of his or her rights and therefore such an order cannot be granted as a matter of right. Each case must be established on its own merits and according to its own peculiar circumstances.

27. In my considered view 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.

28. I have alluded above to the evidence of the 7th respondent's birth certificate and his naming in the eulogy of the deceased. I re-affirm that, that evidence would be insufficient at this stage as it is based on untested affidavit evidence.

29. The respondents' case has also been anchored on an affidavit sworn in support of a petition for a temporary grant in respect of the estate of the deceased where the 7th respondent is named as a son of the deceased. That affidavit is sworn by Lydia Muthoni, Francis Ngumi Muraya and Joseph Gaturo Muraya**.**

30. The respondents have not sought to seek verification of that evidence either through affidavits from the three or through seeking their cross-examination**.**

31. That therefore leaves the issue of paternity undetermined by any other means so far provided.

32. The discovery of the truth in this matter as regards the paternity of the 7th respondent is central in articulating his claim to the estate.

33. I share the view of Aroni J in **M.W & 3 Others –Vs- D.N [2018]eKLR** where she stated;

> "*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. Secondly quite obvious the issue of inheritance is at stake. If the results favour the applicant she stands to benefit, if not the deceased will stand vindicated and the estate's status quo maintained. I therefore find that the most efficacious and justifiable way to resolve the issue is to order that the applicant D.N and the beneficiaries named in the application P.S.K, V.N.K and A.S.K do submit to sibling DNA test to determine paternity at the Government Chemist at a time to be agreed upon but not later than 14 days of the date hereof. "

34. Am sufficiently persuaded that a DNA test should be undertaken.

35. As to which samples to be used, the applicants' position is that samples should be extracted from known children of the deceased or from the deceased's siblings.

36. The respondents' position in the matter is that there is no scientific proof that the purported known children of the deceased are children of the deceased.

37. As acknowledged by the applicants at paragraph 11 of the submissions by their counsel, the best sample extracts would be those extracted from the deceased's remains. Certainly that would mean exhumation of the body. The applicants are however averse to this route based on an assertion that exhumation is taboo in Kikuyu culture and the dead should be let lie and not disturbed.

38. On the other hand, the applicants are of the view that there is no scientific proof that the purported 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.

39. Proof of paternity through known children or siblings is in my view a subjective test. To begin with one would have to resort to the primary test that such a child or sibling DNA sample matches the deceased's.

40. Therefore, when doubts arise about the propriety of samples from such persons, the court must resort to best sample that would establish the truth.

41. As indicated above, the best sample would be the one extracted from the deceased's remains and exhumation becomes necessary.

42. On exhumation, I find refuge in the decision of Thande J in Re Estate of Jacob Mwalekwa Mwambewa (Deceased) 2018 eKLR at Page 5 where the learned judge stated;

> "*The court would wish to keep faith with the deceased herein and not disturb his remains, nevertheless, the pursuit of the truth overrides the supposed wishes of the Deceased. Further family as well as cultural discomfort and outrage must give way to establishing the truth rergarding the paternity of the Objector/Respondent which as stated earlier is central to the succession dispute herein. The DNA testing will not prejudice the Objector/Respondent if anything it will reaffirm his claim as in the result I am satisfied that the application dated 29.3.17 has merit and the same is allowed as prayed. The cost of exhumation and the DNA test shall however be borne by the Petitioners/Applicants while the costs of this application will abide the final determination of the matter."*

43. Am satisfied that the best sample is the one extracted from the deceased and this will be achieved through exhumation.

44. As to who or what body is to conduct the test, though in the application the applicants sought a test at the Government Chemist, I note that at submissions stage the applicants are not averse to a test being done at the Kenya Medical Research Institute (KEMRI). That position agrees with the respondents' wish to have the test done at KEMRI and the issue is thus compromised.

45. On costs, I would in the circumstances of this case order that costs to abide the outcome of the DNA test.

46. With the result that the summons dated 27/5/2019 is allowed and I make the following orders:

1. The 7th respondent is to submit to a DNA test through the matching of a sample extracted from him with a sample to be extracted from the remains of the deceased.

2. The body of the deceased shall be exhumed for purposes of extraction of a sample to be used for paternity testing of the 7th respondent.

3. The Officer Commanding the Police Station within the jurisdiction of the deceased's burial site to be notified of the exhumation date for purposes of maintaining Law and Order.

4. The extracted samples be presented to Kenya Medical Research Institute for paternity testing.

5. That the results of the test be forwarded under confidential cover to the Deputy Registrar of this court by KEMRI.

6. Costs of the application to abide the outcome of the DNA result.

Dated and Signed at Kisii this 20th day of November 2019.

A.K NDUNG'U

JUDGE

Delivered this 27th day of November 2019.

R. NGETICH

JUDGE