REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 123 OF 2017

IN THE MATTER OF THE ESTATE OF J. K DECEASED

M.W.....1ST EXECUTOR/RESPONDENT

H.J.I.L.....2ND EXECUTOR/RESPONDENT

R.S.N.....3RD EXECUTOR/RESPONDENT

P.S.K.....4TH EXECUTOR/RESPONDENT

AND

D.N.....OBJECTOR/APPLICANT

RULING

1. D. N. [Particulars Withheld] has laid claim that the deceased herein **J. K.** [Particulars Withheld] is her father, a fact that the deceased denied during his lifetime and more specifically in **Petition Number 133 of 2015. D. N. M. vs J. K.** In the said case she had sought for a declaration that she was the biological daughter of J. K. and for an order requiring him to submit himself to Deoxyribonucleic Acid test (DNA test) to prove paternity. The case will be referred from time to time in this ruling.

2. The deceased J. K. a prominent personality in Kenya died testate on the 25th of December 2016. His Executors petitioned for grant probate on the 1st of February 2017. The same was issued on the 4th of April 2017. Subsequently on 18th October, 2017 the Executors sought to have the said grant confirmed for purposes of executing the will in accordance with the wishes of the deceased.

3. The Executors were met with D. N.'s objection, that was filed on the 8th of November 2017, based on a claim that she is a biological daughter of the deceased, whom, he had left out of his Will and who, ought to benefit from the estate like the other children of the deceased

4. D.N also filed a Notice of Motion on the 22nd of January 2018, seeking for an order that;

> 1. **That the honourable court be pleased to order that the Applicant D. N. on the one hand and P.S.K., V. N. K and A.S.K. do submit to (DNA test) to determine paternity.**
>
> **2. 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 this order.**
>
> **3. That the costs of the DNA to be provided for.**

The application was predicated on several grounds that include the following;

> - the DNA test is necessary in order to conclusively determine the paternity of the Applicant for purposes of succession in respect of the estate of J. K. (deceased).
>
> - The DNA test will establish whether the Applicant share common paternity with the three acknowledged daughters and son of the deceased.

- Since the Applicant alleges common paternity with the said children but the Executors/Respondents deny, DNA test is the best mechanism to conclusively determine the issue.

- The court has a duty to ensure that the acknowledged children and heirs are not unjustly enriched through deprivation of a biological daughter who is disadvantaged as the deceased had for whatever reason denied her.

5. In an affidavit in support of the application D. N. deposed *inter alia* that she earnestly believes that the deceased J. K. was her biological father and has always been ready to confirm her connection through a DNA test and that in **High Court Petition No. 133 of 2015** she had sought determination of her paternity but the deceased died before the Petition was heard and determined. That the court in the said suit had declined to subject J. K. (deceased) to a DNA test at an interlocutory stage following the applicants request. She further deposed that the deceased did not provide for her in his will and therefore as she seeks for inclusion in the distribution of the estate on account of being a biological child of the deceased, and since the executors have equally deny her paternity, the question of her paternity has to be resolved by the best scientific method available, which is DNA test alongside known children of the deceased. She stated that no prejudice would be suffered by the Executors or the acknowledged beneficiaries, in the event the orders are granted for purposes of attaining substantive justice.

6. The Executors of the Will opposed the application by way of an affidavit sworn by one of the Executors of the Will wherein reference was made to the earlier suit **High Court Petition No. 133 of 2015** where an application seeking for DNA test was dismissed on 7th September 2016 and subsequently the Petition was withdrawn on 27th February 2017. It was deposed further that the deceased had catered for all the beneficiaries known to him in the Will dated 2nd December 2015 and the application subject herein is another way of D. N. reintroducing a cause of action in which she prematurely withdrew and which was resolved by a court of competent jurisdiction. The application is a continued attempt by the Objector to delay the confirmation of the Grant. Further the applicant had held an opportunity to fully prosecute the petition during the lifetime of the deceased or appeal the court's decision refusing the DNA test at an interlocutory stage but she did not pursue either of the two options available to her and her attempt now is to circumvent the earlier ruling. That the deceased had denied D. N. being his biological daughter, hence she is not a beneficiary of his estate. The orders being sought if granted will prejudice the beneficiaries of J.K.'s estate and will be an intrusion by a stranger. It was also stated that the Applicant has denied and frustrated the beneficiaries from realizing their rightful gifts under the Will, the application amounts to a coercion and infringement of the Constitutional rights to personal privacy, bodily security and integrity which are protected under the Bill of Rights. And she has failed to demonstrate the rights she seeks to assert or vindicate, for the court's consideration, which rights would override the rights of the known beneficiaries whom she has named for purposes of the DNA test, further no beneficiary of the Will has sought to leave the Applicant out of the Will. And if orders are given as prayed the said orders will contradict the earlier orders of this court. Lastly that D. N. should bear the cost of proving her paternity.

7. Respective counsels buttressed their cases by way of written and oral submission, supported by a host of authorities. I will summarise the submissions as follows;

8. D. N.'s counsel gave a brief background to the case to wit; the deceased left out D. N. who is his biological child out of his will. That the issue of paternity between D.N. and J. K. which was the subject of **High Court Petition No. 133 of 2015** was unresolved at the time. J. K. died and as expected the Executors and beneficiaries of the Will of J. K. maintain that D.N is not a biological daughter of the deceased hence this application to ascertains whether she is a biological daughter of J. K. and whether she has made a case for an order of DNA test.

9. Counsel laid out Three issues for determination:

i. Whether a DNA test is legitimate and justifiable mechanism to determine whether the Objector is a biological daughter of J. K.

ii. Whether in the circumstances of this case, it is justifiable to order P.S.K, V. N. K and A.S.K. to submit for sibling DNA test alongside D.N in order to determine whether they share common paternity.

iii. Whether the issue of the Objector's paternity is res judicata on account of the ruling of the late Hon. Mr. Justice Louis Onguto in High Court Petition No. 133 of 2015; D. N. M, V. J. K. decided on 7th September 2016.

10. In advancing the 1st and 2nd issues counsel submitted that, DNA test was legitimate and justifiable to determine the paternity of D. N. Counsel relied on **Section 5** and **26** of the **Law of Succession Act (Cap 160)** of the Laws of Kenya and submitted that D. N. seeks to be acknowledged and recognised as the deceased's daughter and therefore a dependant in terms of **Section 26** of the **Law of Succession Act,** having not been provided for in the Will of the deceased. In resolving this issue the court must begin by tackling a pending issue of paternity and since the Executors and beneficiaries have not suggested a method of determining this issue D. N. has proposed and applied for a sibling DNA test as the best and most conclusive way of resolving the issue. And in this kind of dispute it is not open to those objecting to state that a prima facie case has not been made or DNA test will violate rights to privacy or cause unwarranted inconveniences.

11. D.N.'s counsel also asserted that though the known beneficiaries enjoy the right to privacy under Article **37** of the **Constitution**, this right he says is not absolute and ought to be balanced against D.N.'s rights under **Article 27, 40** and **50** of the **Constitution**, that is; right to protection of law, right to property and to a fair hearing. Succession suits are about property and if proved that D.N. is a biological daughter of the deceased the share of named beneficiaries would be affected.

In support of the above counsel referred to the following cases **1. Ngengi Muigai & Another vs Peter Nyoike Muigai & Others Civil Appeal No. 13 of 2007. 2. Wilfred Karenge Gathiomi vs Joyce Wambui Mutura & Another (2016) e KLR. 3. E. M.M. vs L. G. M & Another (2014) eKLR.**

12. On whether or not the issue of paternity is *res judicata* or not, counsel submitted that the parties in **High Court Petition No. 133 of 2015** are not the same as those in this case, secondly in Petition No. 133 of 2015 the issue of paternity was not conclusively decided, thirdly there has been no previous legal proceedings concerning the estate of J. K. and lastly D.N. has not previously sought for a sibling DNA test to

determine her paternity. Counsel relied on.1. **Karia & Another vs the Attorney General and Other (2005) 1 EA 83. 2. Henderson v Henderson (1843) 67 ER 313. 3. Kamunye & Others v Pioneer General Assurance Society Ltd [1971] E.A. 263. 4. R. M. K. vs A. K. G. & Another (2013) e KLR.**

13. The Executors/Respondent's counsel in submissions proposed issues for determination as follows;

> **1. What is the test to be met before the court can exercise its jurisdiction and grant an order for DNA test?**
>
> **2. Whether or not the prayer for an order of DNA is Res judicata.**

14. The Executor's counsel submitted that, for a court to issue an order for Sibling DNA, the applicant must prove a connection between the person applying and the person against whom it is sought. Reference was made to **Hellen Cherono Kimurgor vs Esther Jelagat Kosgei H.C.S.C. No. 1129 of 2016.**

15. It was also submitted that in **Petition No. 133 of 2015** the court found that the applicant had not met the threshold necessary. Further reference was made to **S. W. M.** and **G.M.K 235(2011).**

16. Counsel further submitted that the issue for DNA test is res judicata as the issue was determined in **High Court Petition No. 133 of 2015 Doris Njambi Mwangi vs John Keen**. It was also submitted that late Ongutu J found that there was no nexus biologically connecting either the applicant or her mother to J. K. and therefore no connection can exist in this case.

17. Further the Objector of her own will opted to withdraw the Petition and has not brought any new evidence to show a connection or anything linking her to the deceased and therefore there is no basis for the court to make an order for DNA. Reference was made in this regard to: 1. **E.T. vs Attorney General G and Another (2012) Eklr 2. Omondi vs National Bank of Kenya & Others (2001) EA 177. 3. Njangu vs Wambugu and Another Nairobi HCCC No. 2340 of 1991 (unreported).**

18. Lastly it was submitted that the application is an abuse of the court process, since the applicant had failed to prosecute the case against the deceased to conclusion, neither did she appeal against the order dismissing the request for DNA testing. Further the application seeking for the said test is an intrusion against the children of the deceased and no basis has been laid for the court to override the protection accorded to the children of the deceased for their bodily security and integrity.

19. After considering the application the response and submission, I am of the view that there are two issues for consideration:

> **i. Whether the issue of DNA test is res judicata.**
>
> **ii. If (i) above is negative, whether the court, ought in the circumstances of the case, order for sibling DNA test.**

20. The court will first consider whether the issue of the DNA test is res judicata or not. Both parties in their submission have alluded to the principle of res judicata and seem to agree on the ingredients of the said principle. The point of departure is whether or not the issue of paternity was conclusively determined in **High Court Petition NO. 133 of 2015 D.N.M Vs J.K.**

21. The principle of res judicata is captured by **Section 7** of the Civil Procedure Act as follows; -

> **"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit which such issue has been subsequently raised, and has been heard and finally decided by such court."(*emphasize added*)**

22. The principle of res judicata is no longer moot in our courts. **In E. T. v Attorney General & Another (2012) eKLR** the court stated in paragraph 51 as follows;

> **"The rationale behind the doctrine of res judicata and issue of estoppel is that if the controversy in issue is finally settled or determined or decided by the court, it cannot be re-opened. The rule of res-judicata is based on two principles; there must be an end to litigation and the party should not be vexed twice over the same cause." (emphasize added)**

23. In **Njangu v Wambugu & Another Nairobi HCCC No. 2340 of 1991** (unreported) the court said:

> **"If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata"**

24. Having set the position of the law as above it is time to consider what the late Ongutu J said in what has now become a "contentious" ruling. From the onset he said

> **"…The sole purpose for determination is whether the Petitioner has made out a case to enable me order the respondent to undergo a DNA test at this interlocutory stage"**

The Judge further said

> **"unfortunately, much of the Petitioner's affidavit evidence, in my view, ought to be subjected to appropriate challenge and testing through cross examination prior to any final orders being issued. I state so because an order for DNA test made at an interlocutory is basically final. Once undertaken, it cannot be undone though it could be ignored."**

The Judge in concluding 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"**

25. In my view the above abstracts from the judgment it is so clear that the late Onguto J declined to give the orders sought for at an interlocutory stage for the reason that in his opinion the evidence before him was untested and had failed to establish the requisite nexus. The matter was to await a time when the 'affidavit evidence would be subjected to appropriate challenge through cross examination before final orders are issued'

26. I therefore do concur with the Objector's counsel that there was no final determination on the issue of DNA in **High Court Petition No. 133 of 2015** and therefore the principal of res judicata does not apply in this case.

27. Is this an appropriate case for the court to make an order for sibling DNA test?

From local decisions it appears that courts have somewhat developed consensus on matters of children and the quest to establish paternity often citing the best interest of the child. However as relates to whether DNA test on matters involving adults some of whom are non-consenting, the issue remains moot, there is yet no consensus.

One school of thought is that for an order for 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 other school of thought is that DNA test is to be allowed in fact finding, to establish the truth and reach a just conclusion even where no nexus or connection has been established, if the need is eminent.

In **S.W.W. vs G.M.K. (2012) eKLR** where the Petitioner sought as one of her prayers, for the Petitioner 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 **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 as 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. Yet in **Wilfred Karenge Gathiomi vs Joyce Wambui Mutura & Another (2016) eKLR,** the court stated

> **"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……**
>
> **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."

29. Looking beyond our Jurisdiction In a south African case **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"**

30. Reference to the Constitution 2010 was made with each side applying the Articles of the Constitution that suits their side of the case. **Articles 24, 27, 40 & 50** were alluded to bringing to fore competing interests of the parties.

31. After considering the facts surrounding this case and studying case law cited by respective counsel and others referred to herein I must say each of the parties were justified in referring to the Articles of the Constitution as they did. 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.

32. With the evidence on record including the pleadings and the Ruling in **Petition NO.133 of 2015** (which is a persuasive authority) the applicant/Objector, may not have proved to the required threshold a nexus or connection with the deceased, she may not have made a prima facie case. Her allegations are untested. For now, her affidavit evidence against the late J.K. and his denials remain unchallenged. Indeed, the children of J.K. may not be well placed to challenge or rebut the affidavit evidence from either of them. It is noteworthy that, the executors solely relied on the deceased averments in his response in **High Court Petition 133 of 2015** in opposing the application.

33. At the centre of this dispute is the issue of paternity and I am convinced on my part that justice will only prevail 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.

34. The beneficiaries named in the application may suffer some inconvenience and intrusion to their privacy. This has to be weighed against the need to resolved 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 & 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.

35. The applicant D.N. will meet the cost of the DNA test.

36. Costs to abide the outcome of the case

DATED, SIGNED and **DELIVERED** at **NAIROBI this 28th DAY OF September, 2018.**

ALI-ARONI

JUDGE