REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1379 OF 2006

IN THE MATTER OF THE ESTATE OF S C W ALIAS C W G (DECEASED)

R N C

Z W C

F N C…………………..PETITIONERS

VERSUS

S M G

ALIAS S G C……………….OBJECTOR

RULING

1. On the 20th of July 2015 S M G alias S G the Objector hereinafter referred to as the applicant filed a chamber summons brought under Article 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 applicant seeks the following orders;

i. That the children of the deceased namely; **C N C, J W C, P M C, M M C, P M C, J M C** do appear at Kenya Medical Research Institute for extraction of Deoxyribonucleic Acid samples for testing.

ii. That in the alternative, the late S C W alias C W G grave situated at Kanjai, Githunguri in Kiambu County in the homestead of R N C be opened to disinter his body with the view to take samples therefrom for the purpose of Deoxyribonucleic Acid test.

iii. That the Director of Kenya Medical Research Institute or his 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 Githunguri 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.

The petitioners shall hereinafter be referred to as the Respondents.

2. The application is supported by the affidavit of the applicant together with grounds on the face of the application. The applicant avers the following; the 3 respondents have a grant of letters of administration dated the 25th September 2006. On the 27th of November 2006 he filed an application to revoke the said grant. The ground for making the said application is that he is one of the beneficiaries of the deceased's estate by virtue of being his biological son. The respondents are disputing the said fact and that the only way to conclusive prove that he is the deceased's son is to have the Deoxyribonucleic Acid test performed on him and his step sister and step brothers. That from the house of R N he selects C N C, J W C and P M C, from the house of Z W he selects M M C and S M C and from the house of F N C he selects J W C, P M C and J M C. That he believes that his rights as a child of the deceased will be infringed and he may not know the truth. That he has filed an application to revoke the grant and he would like the issue determined before the said application is heard. That on the 8.4.2008 Justice Gacheche delivered a ruling to his application ordering the respondents to undergo a Deoxyribonucleic Acid test to conclusively determine his paternity issue. He sought also to rely on copies of photos attached to his affidavit. He averred that his late father entrusted him with sensitive matters and deployed him to handle his personal business, which he has narrated. That he has been informed by Mr. Kinyanjui a scientist and a managing director of Crime Scene Investigations who runs a private clinic dealing with Deoxyribonucleic Acid testing that is advisable and less costly to conduct the Deoxyribonucleic Acid test on his step brothers and sister as opposed to exhumation.

3. The applicant's application is supported further by the affidavit of Kunyanjui Murigi the Director and Head of Humanitarian Services at DNA Testing Services/ Crime Scene Investigations. He avers that he is dully qualified to undertake the task of Deoxyribonucleic (DNA) or investigate or establish by scientific method or DNA Testing the biological relationship of siblings. That he believes obtaining samples from the siblings is a non-intrusive exercise with highly reliable test results as opposed to exhumation. That the mirth mysteries, taboos, fears are continuous debunked, unravels, disapproved and or allayed by science to the extent that DNA kits are available from sources found in the internet. Paternity testing take home kits are readily available for purchase in the United States of America. That such samples are obtained from toothbrush, hair, nails or through swab of the inside of the mouth. That exhumation although providing accurate results is tedious, cumbersome and maybe taboo or adhorent to the party's culture and is only undertaken as the last result.

4. The application was opposed. The respondents filed a joint affidavit on the 13/10/2015. They state as follows that the application has no useful purpose because it is intended to aid the outcome of the application for revocation of the grant which has been disposed off. That the court should reject the application as the application is the applicants delaying tactics. That the application for DNA tests on persons who are not petitioners or actively involved in the proceedings and are not necessarily beneficiaries is indeed intrusive and undesirable as there are other methods of proving dependence. That it is objectionable and untenable to ask for the exhumation of the deceased's remains 9 years down the line when the objector and his mother had all the time to seek appropriate orders when the deceased lived. That they have received objections and the protestations from the targeted children from DNA tests.

5. The application was canvassed by way of oral submissions. Mr. Mwaniki for the applicant reiterated what is deposed in the applicant's affidavit. Mr. Ndauti too reiterated what is deposed in the respondents' affidavit adding that whereas the court has discretionary powers in granting the said orders the court should consider the following;

i. Is the test desirable?

ii. Can the objector's dependence be proved through other methods?

iii. Are the persons targeted for DNA ready and willing to submit themselves for the test?

iv. Would the DNA test involve primary samples or be restricted to sibling testing and

v. Whether it is viable to exhume the remains of the deceased for DNA testing.

6. Mr. Nduati submitted that this is not a proper case to make such orders. He argued that the applicant calls himself S G G yet the deceased was S C W. That the applicant has not told this court who G is therefore it can be presumed that the applicant has another father elsewhere which fact has been conceded to as the applicant has sought to show the court that he has a foster father and putative father. That a DNA test should be done on the other father. That there is no birth certificate or an ID card attached. That since his mother was married elsewhere then his legitimate father is the man his mother married. That it is his mother who knows who his father is and she did not institute the proceedings. That the affidavit filed by his mother was not owned by his mother nor did she appear in court nor do they have her known signatures to examine the same. That the co-issue is inheritance and dependence can be proved through other means and that shortcuts should not be used to get orders which a party cannot effect. That the court should not be used to assist the applicant in fishing evidence. On the prayer to exhume it was submitted that there are exceptional grounds to such an order due to the natural and cultural considerations. That it was held in the case of Hellen Cherono Kimurgor vs Esther Jelagat Kosgei Succession Cause no. 1129 of 2006, that bodies interred should be allowed to remain in the grave undisturbed. That in this case it has been over ten years since the burial and it would not be in order to make such an order. Counsel distinguished this case with the case of the estate of PWM succession cause no. 974 of 2013 where a link was established by the applicant the mother of a minor based on the evidence of relationship between the applicant and the respondent.

7. Mr. Mwaniki in reply argued that they have come under the Constitution 2010 and that it has been held that it is the child's right to know the parent. That the DNA process is not intrusive as alleged as the process has been explained by the DNA expert. That the applicant has through his affidavit established the relationship he had with the deceased and that the affidavit of A was not challenged. That she stated that the deceased was the applicant's father and that there was no need to attach the identification card or the birth certificate. That if the persons named do not appear they can be held in contempt as they are part and parcel of the deceased's estate and that they cannot choose what side they want. That if that cannot happen then the deceased's body can be exhumed.

DETERMINATION

8. The applicant seeks that a DNA test be carried out on the persons named in his application and that in the alternative the deceased's body be exhumed. The respondents are the mothers of the said persons who are named in the application. The said persons are beneficiaries of the deceased and are adults. They are not parties to the said application. The orders sought are to have them present themselves for DNA testing. They are adults and have a right to respond to the application in their individual capacities. They need to heard on the orders the applicant seeks in this matter. The respondents have mentioned that they are not agreeable to the DNA, if they refuse to present themselves for DNA testing would the court hold them in contempt? Certainty not as they are not parties to this application. In the cases relied on by the applicant it is the mothers of the children who made the application and the courts considered each case on the evidence adduced. I do agree that a DNA test can help an individual know who their parent is, however each case has to be determined on its merit. I note that the applicant would want to establish if the deceased was his father however he cannot seek the administrators to compel their children to go for the DNA testing. His prayer for the DNA testing cannot stand as sought. This court declines to grant the said orders.

9. The next issue is the alternative prayer whether the court should grant an order for exhumation of the deceased's body. The deceased died about 10 years ago. In the case of **Hellen Cherono Kimurgor vs Esther Jelagat Kosgei (2008) eKLR** Justice Onyancha held as follows;

> "***From time immemorial it has been the natural desire of most men that after their death, their bodies should not only be decently and reverently interred, but should also remain in the grave undisturbed. This view should and is indeed respected by societal institutions including the***

> ***courts of law. Occasions, however arise when unforeseeable circumstances make it desirable or imperative that a body should be disinterred for good reasons. While the court would usually be slow to make orders for disinterment, it nevertheless will not hesitate to do so in suitable cases. The court will, on the other hand, avoid placing any fetters on its discretionary power to do so. That is to say, the court will without fear make orders for disinterment whenever the circumstances of the case make it desirable or imperative to do so. This, in my view, is the tenor of the case of Re Matheson (deceased) [1958]1 AII E.R, 202." [Emphasis add***ed]

Justice Muriithi, **In the Matter of the Estate of PMW**, observed that "**The Courts agrees with the sentiments expressed in various decisions of the Court that to order to exhumation a deceased person in order to have DNA testing carried out to establish paternity or maternity of a child is a drastic order which must be made only in exceptional and compelling circumstances**.' The court further noted that in the case ***Hellen Cherono Kimurgor v. Esther Jelagat Kosgei, (supra) Onyancha, J.*** declined to make an order for the reason that he was **–**

> "**On a balance of probability satisfied on the facts and the circumstances of this case, that the applicant failed to establish a sufficient link between herself and the late Charles Kimurgor during his lifetime to persuade this court to find it desirable or imperative to make the drastic order of exhumation of the deceased's body for purposes of a DNA test.**"

10. This court too is in agreement that an order of exhumation of a deceased person in order to have a DNA testing to carry out a paternity or maternity test of a child is a drastic order which must only be made in exceptional and compelling circumstances. The deceased was buried some 10 years ago but make an order now after the said years in my view would be a drastic order. His body should be left in the grave undisturbed. The applicant is at liberty to adduce other evidence to prove his case. I therefore decline to grant the order for exhumation as sought. Costs shall be in the cause.

Dated signed and delivered this **13th** day of **December 2017.**

R. E. OUGO

JUDGE

In the presence of;

Mr. Mwaniki **For the Applicant**

Respondents **Absent**

Ms. Charity **Court Clerk**