REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 974 OF 2013

IN THE MATTER OF THE ESTATE OF PWM (DECEASED)

RULING

[1] The Objector/Applicant who has also filed an application for Revocation of Grant of Probate herein filed an application by Summons dated 30th January 2015 seeking for orders that:

i. **The late PWM's grave situated in Barazani, Mutyambua location within Makueni district be opened to exhume his body with the view to take samples therefrom for purposes of Deoxyribonucleic Acid (DNA) tests.**
ii. **The officers of Kenya Medical Research Institute do undertake the disinterment and do obtain the necessary samples for DNA test.**
iii. **The child, one SMW do also be presented at Kenya Medical Research Institute for extraction of DNA Samples for testing.**

[2] The principal grounds of application were as follows:

i. By an application dated 22nd July 2014 SMW sought for a declaration that she was a biological daughter of the deceased, PWM.
ii. In response thereto, the petitioners filed a replying affidavit on 6th October, 2014 denying that SMW was a biological child of the deceased or his dependant.
iii. On 9th October 2014 the court directed that SMW be subjected to a DNA test with children of the deceased to confirm paternity and the advocate for the petitioners were to obtain the instructions thereto.
iv. On 28th November 2014 the advocate for the petitioners informed court that the children of the deceased were uncomfortable undergoing a DNA testing and the court had suggested that the DNA can be conducted with other relatives.
v. The mother of the child E M has however been unsuccessful in getting any close relatives of the deceased to agree for blood samples to be extracted from their bodies.
vi. Although there was an existing Certificate of Birth dated 21st September 2012 and evidence that she was being maintained by the deceased during his lifetime, the petitioners herein have in their affidavit said that there was no genetic or cogent evidence that the deceased was the biological father of the child.
vii. It was necessary for the exhumation of the remains of the deceased for the purpose of getting samples for DNA testing so settle the issue of paternity for purposes of inheritance of the estate of the deceased.
viii. Unless the application is allowed, the minor's rights and entitlements under the Children Act, Law of Succession Act and the Constitution of Kenya were likely to be compromised and denied.

[3] The applicant EMN additionally filed a supporting sworn on 30th January 2015 and deponed that:

i. In the year 2009 she met and fell in love with the deceased PWM. That they started cohabiting together and eventually stopped working as a saleslady at Uchumi Supermarket upon the request of the deceased who was supporting all her needs.
ii. They had gone to her home in the village where they had stated their intention to be husband and wife and her mother had given them her blessings.
iii. Later the deceased had officially made a maiden visit at their home accompanied by Mr. Anthony Masila where he had informed her dad in her presence that he was ready to pay dowry.
iv. The deceased had delayed paying dowry due to other financial commitments however he had financially supported her parents by educating their younger sister P M, putting up a fence and gate around their home at a cost of Kshs. 50,000/=.
v. Her parents had attended the deceased's mother's burial.
vi. She had a baby with deceased who was born on 1.03.2012 at Mater Hospital. The deceased had paid the maternity fees. The deceased had insisted that the baby is born in the hospital where his other children had been born. (She attached the interim invoice from the hospital bearing the deceased name.)
vii. The deceased was the biological father of her child and she had obtained a Certificate of Birth with his knowledge long before he had fallen ill. She annexed the birth certificate and letter dated 23rd January 2015 and a certified copy of the register in respect of entry of SMW.
viii. Her husband used to support her morally and financially. She attached an Mpesa statement showing funds received from the deceased. She equally attached affidavits in support of the claims sworn by Anthony Mulwa, Peter Ndungu, Dancan Mulinge, Irene Nzuvi and Josphine Kalondu. All these affidavits confirmed that the deceased and the applicant had been living together as husband and wife from 2010 and prior to his death.
ix. On or about August 2013, her husband fell sick and was admitted at Mater Hospital where she used to visit him. That he was discharged on 9th September 2013 only to be readmitted at Avenue hospital where he passed on 27th September 2013.
x. She was aware that the deceased had also married LKW with whom they had six children.
xi. They had been excluded her from the deceased's funeral arrangements despite her advocate writing a letter dated 2ndOctober 2013 to her co-wife. She had attended the burial on 5th October 2013.
xii. After the burial she had tried to reach out to the said LKW and her children with no success through letters written by her advocate and also through emails.
xiii. She instructed her advocates on record to proceed and issue citation to her co-wife as she was the one with the burial permit and death certificate so that they would commence succession proceedings.
xiv. She visited Nairobi and Machakos High Court to find out whether any Succession Cause had been instituted in respect of the deceased's estate. Upon perusal of the court file on 9th June 2014 she discovered that on 9th December 2013 a Petition for Letters of Administration with a will dated 21.9.2013 annexed was filed; the grant of Probate of written will was issued by the court on 19. 03.2014; and summons for confirmation of grant was filled on 4th June, 2014 under certificate of urgency.
xv. The Succession Cause had been filed without her knowledge despite having written to LKW through her advocates vide a letter dated 7th January 2014 requesting to be informed of the Succession Cause.
xvi. She wrote a letter to the advocates on record for the estate requesting for copies of the pleadings filed in court and the said advocates wrote a letter dated 17th June 2014 informing her advocates that they had sought for instructions from their clients on whether to release the pleadings to her.
xvii. The deceased did not make any will prior to his death and the last will and testament produced in court was procured through fraud for reasons that:
    a. She had visited her husband in hospital on several occasions and on the date he is alleged to have made the will, the deceased was very sickly and incapable of making a valid will.
    b. If the will was done by the deceased, the same must have been under undue influence by the petitioners.
    c. The way the deceased distributed his assets was not in accordance with his wishes during his lifetime taking into account his relationship towards each of his children.
    d. The deceased would not have excluded her from the will.

e. The will was drafted by Muhangani Wycliffe Jorongo who was not licensed to practice law in the year 2013 and therefore the will was fraudulent.

xviii. The children and all the relatives of the deceased have refused to submit to a DNA test and she has been left with no alternative than to make the application for exhumation of the deceased's remains to settle the issue of paternity.

xix. The minor has started schooling at ***[particulars withheld]*** Academy after she had failed to raise fees at P.C.E.A Kitengella Township Primary School.

xx. The issue as to whether SMW is a child of the deceased and therefore a dependant under section 29(1) of the Law of Succession Act is an issue arising in these succession proceedings and the court had jurisdiction under section 47 of Cap 160.

[4] In response the respondent filed a replying affidavit sworn by LKW dated 6th March 2015 where she averred that:

i. The application was in bad faith as she was the lawful wife of the deceased having been married in 1979 under Kamba Customary Law.

ii. They had 7 children with the deceased and his family did not recognize the said EMN and her minor daughter SMW. That she had not been known to any of her children prior to the death of her late husband as alleged in her affidavit.

iii. During his lifetime the deceased never introduced her or put it on record that he had another wife and child and it was for that reason that her family genuinely believed that he had lived and died monogamous.

iv. The applicant had stated that the deceased did not pay dowry to her parents and that she has further not attached any evidence to prove that her sister's fees were paid by the deceased. That there were also no official records by Kamba elders indicating that that would be taken as payment of bride price.

v. In addition the affidavit by the applicant's mother J K M had confirmed that no customary rituals had been performed on the alleged visit in February 2010.

vi. She denied that the deceased had cohabited with the applicant as no dowry had been paid.

vii. If the deceased truly cared for the applicant then he would have demonstrated openly that she was his wife and the minor child his daughter.

viii. The applicants application should not be granted for reasons that: the applicant was a stranger; the orders being sought were drastic and draconian; the orders if granted will cause her family embarrassment, excessive emotional anguish and pain relieving the loss of the deceased; the deceased was an innocent person who should not be subjected to the DNA test without his free will and without certainty that he was the putative father of the minor; the deceased faith did not allow for such practice; Kamba traditions did not condone exhumation; and the application was a fishing expedition.

ix. An order for exhumation was only given in special and unique circumstances.

x. The applicant's reliance on section 22 of the Children's Act did not apply to this instant as the applicant had not proven that the child was a dependant of the deceased.

xi. The applicant ought to establish cohabitation/marriage with the deceased together with paternity of the deceased as regard the minor.

xii. On the issuance of the birth certificate there was no certainty that the deceased gave any consent and there was no proof of the same as per section 12 of Cap 149.

xiii. The purported picture of her minor showing resemblance to her late husband was a façade.

xiv. The Mpesa statements produced as exhibit showed a variety of remittances made to the applicant by other unexplained persons of male gender over a period of 8 months between February and October 2013.

xv. The applicant could not challenge the free and valid will made by the deceased in the presence of his family.

xvi. The applicant was not a member of her family and cannot be expected to have known of the will and hence had no locus to challenge it.

xvii. Anybody can write a will as long as they have capacity of age mind and free from undue influence, duress or mistake. That having a current practicing certificate was not a requirement to write a will as an advocate of the High Court of Kenya.

xviii. Her family and she were the sole beneficiaries of the estate of his late husband and had every right to apply for the issuance of grant of Letters of Administration.
xix. The application was delaying the application for confirmation of grant and her family was at risk of having its property sold to repay a debt due Kenya Commercial Bank.
xx. She prayed that the application be dismissed with costs to the estate.

Submissions

For the applicant

[5] The applicant further filed written submissions dated 10.04.2015 where she argued that the issue as to whether the child was born by the deceased and hence a dependant was a dispute that arose in the cause of the proceedings instituted under the Law of Succession and the court should determine the issue pursuant to section 47 of the Law of Successions Act. They relied on J. Onyancha case in ***Hellen Cherono Kimurgor V Esther Jelagat Kosgei*** (2008) eKLR where he held that a court will order for a DNA test in a Succession Cause in circumstances where there is sufficient linking between the respondent to the child. It was submitted there existed sufficient facts linking the deceased to SMW highlighted in that she had proved through affidavits, birth certificate, postnatal clinic receipts, registration of birth and the actual birth of her daughter that she had lived with the deceased as husband and wife. It was argued that they had proved being dependants through Mpesa statements which further linked the deceased to the applicant. In addition it was noted that the applicant tried to contact the petitioner five days after the death of the deceased through a letter for purposes of burial preparations.

[6] It was further stated that there was no explanation for concealment of the P & A proceedings herein and that the court's proposal for DNA test was unjustifiably turned down. It was submitted that under Kamba Customary Law a man is not obligated to seek consent from the 1st wife and children before entering into a subsequent customary marriage. It was also stated that bride price was irrelevant under marriage by repute and the child was still the biological child of the deceased. They relied on the case in **M.W.G v EWK (2010) eKLR** where the Court of Appeal held that –

> "***the deceased according to Kikuyu Customary Law is the one who was obliged to pay dowry for the petitioner. As at the date of his death he had not done so. Cohabitation is one of the essentials of a Kikuyu marriage. Likewise providing residence and maintenance for a wife are among the other essentials of a Kikuyu marriage. The main component lacking here is dowry. There is no fixed time for paying dowry. Cotran, in his works, The Restatement of African Law (Kenya) Vol. 1, (The Law of Marriage and Divorce) states that dowry may be paid by instalments and may even be paid after cohabitation has taken place. It would appear that if other essentials are satisfied but dowry is not paid, it may be paid even after one of the parties to the relationship is dead. It is clear from Cotran's works that elopement is a common feature among the Kikuyu, and such relationship in most cases matures into an acceptable Kikuyu marriage upon payment of dowry. In the foregoing circumstances it cannot be said that the relationship the deceased had with the petitioner is bigamous. So contrary to submissions by Mr.Gicheru for the objector it is in circumstances as existed between the deceased and the petitioner in which a presumption of marriage may be raised."***

[7] It was further argued that since the deceased was not present to give consent for DNA testing the Court could order the same to be done on the body. They relied on the decision of G.B. M. Kariuki, J. (as he then was) in **MW v KC (2005) KLR 246** where the judge held that the High Court has jurisdiction under the Children's Act to compel the respondent to take DNA test and proceed to order there respondent therein to undergo the same. It was stated that the petitioner had the burden to prove that the applicant had sexual relationship with the alleged other persons listed in their affidavit. It was concluded that the applicant had demonstrated on a balance of probability that SMW was a child of the deceased and it was in the interest of the minor if the DNA is ordered because, if positive, SMW will be declared a

dependant under section 29 of the Act.

<u>For the Respondents</u>

[8] The respondents/petitioners filed submissions dated 21.07.15. Therein it was submitted that this was a succession matter and not a child maintenance cause and the alleged putative father of the infant was dead and burial and could not respond to the application. It was questioned why the applicant did not apply for DNA testing prior to the deceased's burial. It was further argued that she had not established any proof of eminent need for exhumation and has proved a link between the minor and the deceased for the orders to be granted. They cited the case in ***Benjamin Kibiwott Chesulut v. Mary Chelagat & Another*** (2015) eKLR where it was held that the defendant always had the right to seek intervention of the DNA test, but she slept on those rights until too late in the day. It was also submitted that it has always been the wishes of a dead person throughout all cultures and religions to let the dead rest in peace relying on ***Hellen Cherono Kimurgor V Esther Jelagat Kosgei*** (2008) eKLR where Onyancha, J. citing ***Re Matheson (deceased)*** [1958]1 AII E.R, 202 stated that:

> ***"The cited case emphasizes the basis of burial or interment of the bodies of the dead. It states that it has always been accepted that after death there should be a decent and reverend burial of the body of the dead. Thereafter the dead should remain undisturbed for all purposes except when otherwise directed by a court of law. This was best expressed in the <u>Re Matheson</u> case at page 204 thus:***
>
> > ***"As I have said, the primary function of the court is to keep faith with the dead. When a man nears his end and contemplates Christian burial, he may reasonably hope that his remains will be undisturbed, and the court should ensure that, if reasonably possible, this assumed wish will be respected. In all these cases the court must and will have regard to the supposed wishes of the deceased. I say supposed wishes, because it can rarely, if ever, happen that the circumstances giving rise to the application can have been contemplated, still less, discussed, in the lifetime of the deceased."***

[9] It was contended that the deceased died testate and his will mentioned his wife LKW, his children and grandchildren in the will. It was also stated that the applicant had not proven there existed a marriage or cohabitation between herself and the deceased.

[10] In that regard the following cases were cited:

a. ***Hortensiah Wanjiku Yawe v. The Public Trustee,*** Civil Appeal No. 13 of 1976, where it was held that long cohabitation as a man and a wife may give rise to a presumption of marriage in favour of the party asserting it.
b. ***In the matter of the estate of Samuel Kiarie Kirimire (deceased)*** 1999 eKLR E.M Githinji, J. (as he then was) held that "***Such evidence of reputation is essential when court is being asked to presume a marriage from long cohabitation and repute, Monica's case is different. She claims to have been married by deceased under Kikuyu Customary Law. She is not asking the court to presume a marriage from long cohabitation and reputation. Even if that was the case, there is no sufficient evidence of long cohabitation. The fact that she was included as wife of the deceased in the Eulogy and the fact that she laid a wreath as wife of the deceased or was photographed with the family of the deceased, do not, on their own prove a customary marriage."***
c. ***Re Estate of Stephen Kimuyu Ngeki*** (1998) eKLR where J.W Mwera, J. (as he then was) stated that AKamba customary marriage follows an elaborate course and emphasis seems to lie more with payment by the groom of 3 traditional goats called *Mbui Sya Ntheo.*
d. ***Andrew Manunzyu Musyoka (deceased)*** (2005) eKLR, R. Wendo, J. admitted the evidence of a Kamba expert that a marriage is contracted when goats of "**Ntheo"** are paid to the girl's parents and that even if dowry is not paid **"Ntheo**" has to be paid and concludes a marriage. He said that if a woman leaves the husband's home with children and one dies the body has to be taken back to the

man's home for burial.

[11] It was further submitted that the applicant had not produced in court a copy of a certified birth certificate to prove paternity. In addition it was their contention that DNA testing in the case of a deceased person should only be ordered in cases of sufficient public interest such as murder and rape. In conclusion, it was submitted that the respondent had a right to privacy guaranteed under Article 31 of the Constitution and since this was not a child maintenance case they prayed for the application to be dismissed with costs to the petitioners.

ISSUE FOR DETERMINATION

[12] The question whether the applicant and her child are a wife and child of the deceased for purposes of the Law of Succession and whether the applicant has demonstrates long cohabitation with the deceased and repute as husband and wife to warrant a presumption of marriage are matters for determination during the hearing of the objection proceedings herein and or on application for dependency under section 26 of the Law of Succession Act.

[13] In this application for DNA testing on the deceased, the Court will merely determine whether there exists evidence of relationship and circumstances between the deceased and the applicant and her child the subject of the application as would support a real likelihood of the child being a biological child of the deceased to warrant an order for Exhumation of the deceased and subsequent DNA testing. In so doing the court will determine whether the order for exhumation is necessary or whether less intrusive means of establishing the child paternity by the deceased, or otherwise, exist.

DETERMINATION

Jurisdiction

[14] There is clear and unfettered jurisdiction in the Court to order for DNA testing and this may conceivably occur in Criminal Cases, Children Cases and Succession Causes. See the Children Case of ***MW v KC,*** supra, per G.B. M. Kariuki, J. (as he then was) and the Succession Cause of ***Hellen Cherono Kimurgor V Esther Jelagat Kosgei***, supra, where Onyancha, J. rightly, in my view, observed –

> ***"[F]rom 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 added]

Discretion

[15] The Court agrees with the sentiment expressed in various decisions of the Court that to order exhumation of 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. In ***Hellen Cerono 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." [Emphasis Added]

Best interests of the Child

[16] However, where the applicant or the application is made on behalf of a minor, the Constitution has a general prescription under Article 53 (2) of the Constitution, that –

> **"(2) A child's best interests are of paramount importance in every matter concerning the child."**

Additionally, section 4 (2) of the Children Act commands that in all actions concerning children by public institutions including court of law the best interest of the child must be given paramount consideration –

> "(2). In **all actions** concerning children, whether undertaken by public or private social welfare institutions, **courts of law,** administrative authorities or legislative bodies, **the best interests of the child shall be a primary consideration."**

[17] Accordingly, the supposed wishes of the deceased (see ***Re. Matheson (deceased)*** [1958] 1 ALL ER 202) and the discomfort of the family members or beneficiaries of a deceased person in the exhumation exercise, for which this court must sympathise with the deceased's family, must give way to the paramount consideration of the welfare of the child, the subject of this application.

Best Interests of the Child

[18] I consider that it is in the bests interest of the child the subject of this application to enjoy the rights conferred upon a child under the Constitution, the Children Act and the Law of Succession Act. Under Article 53 (1) (e) of the Constitution, a child has a constitutional right -

> "(*e*) to parental care and protection, which includes equal responsibility of the mother and **father to provide for the child, whether they are married to each other or not**;"

[19] I do not consider that this constitutional duty to provide for the child extinguishes upon the death of the parent. The child is, in my view, entitled to provision from the Estate of the deceased father or mother, as the case may be. In similar terms section 6 of the Children Act provides for right to parental care.

[20] Under the Law of Succession Act, the child as a dependant is entitled to apply to the court for adequate provision if the terms of a Will or rules of intestacy do not make adequate provision for the child, a right she shares with other dependants including the applicant if she can demonstrate that she is a wife of the deceased for purposes of the law of succession.

[21] The effect of sections 26, 27, 29 and 30 of the Law of Succession Act, set out below, is that the Court has a discretion on an application by a dependant which term include a child of a deceased, to make adequate provision for the dependent out of the net estate notwithstanding any will or rule on intestacy, where such an application is made as here before the confirmation of Grant. Sections 26,27,29 and 30 of the law of Succession Act are in the following terms:

> *"**26. Provisions for dependants not adequately provided for by will or on intestacy***
>
> *Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then* ***on the application by or on behalf of a dependant,*** *the court may,* ***if it is of the opinion that the disposition of the deceased's estate effected by his will,*** *or by gift in contemplation*

*of death, or the law relating to intestacy, or the combination of the will, gift and law, **is not such as to make reasonable provision for that dependant**, **order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.***

27. Discretion of court in making order

In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.

29. Meaning of dependant

*For the purposes of this Part, "**dependant**" means—*

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately

prior to his death; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

30. Limitation of time

No application under this Part shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by section 71."

[22] I therefore consider that the best interest of the lie in facilitating her judicial pursuit of the rights conferred upon a child under the constitution and the law. In this regard, the applicant must show that there is *prima facie* evidence that the child would be entitled to these constitutional and legal rights as a child of the deceased.

Dependency

[23] The question whether as regards, the right of applicant and the child the subject of this application to inherit the deceased, further provision is made under Section 3 (2), (3) (4) and (5) of the Law of Succession Act significantly as follows:

"(2) References in this Act to **"child"** or **"children"** shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, ***in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.***

(3) A child born to a female person out of wedlock, and a child as defined by subsection (2) as the child of a male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock.

(4) Where the date of birth of any person is unknown or cannot be ascertained, that person shall be treated as being of full age for the purposes of this Act if he has apparently attained the age of eighteen years, and shall not otherwise be so treated.

(5) Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act."

Standard of Proof

[24] With respect, the standard of proof in this application for order of DNA is not beyond reasonable doubt as apparently suggested by the respondent in the further replying affidavit of LKW of 6th March 2015 when she opposes the application on the ground that *"the deceased is an innocent person who should not be subjected to a DNA without being certain that he was the putative father of the alleged minor without his free will to do so."* If the Court were certain that the Deceased were the putative or accepted father of the child the subject of these proceedings there would be no need for DNA testing!

[25] What the applicant must show is that there was on a balance of probability *prima facie* evidence of a relationship between the applicant as the mother of the child and the deceased that could have borne the child as an issue of the relationship. At this stage of the dispute what is in issue is the paternity and not dependency, which is the subject of section 26 application under the law of succession. A child may be a dependant of a male deceased under section 3 (2) of the Law of Succession Act (quoted above) without ever being his biological child.

On the merits of the application

[26] The Court has noted the applicant MPESA statement of accounts for the period 1st April 2013 to 24th October 2013 indicating payments for various amounts into her account by the deceased beginning 2nd April 2013 upto 9th September 2013, only 18 days before his death on 27th September 2013. That there were other payments by male persons into the applicant's account does not detract the necessary link between the applicant and the deceased for purposes of this application.

[27] I also note the payment of hospital maternity fees of the applicant by the deceased at Mater Hospital by invoice dated 3rd March 2012. The minor was according born on 1st March 2012 according Certificate of Birth No. 473360 issued on 21 September 2012 and certified by the Civil Registration Department on 29th January 2015 which also indicates the deceased as the father of the minor child. The child was also shown from hospital records to have acquired the surname of the deceased shortly after birth.

[28] There is no indication that the provisions of section 12 of the Births and Deaths Registration Act requiring consent of the father or proof of marriage between the mother and the father before the father's entry on the Certificate of Birth were not complied with in the registration of the minor child herein whose registration was shown to have been done in September 2012 about one year before the death of the deceased.

[29] Accordingly, I consider that there is sufficient evidence to link the applicant and the child to the deceased to warrant the exercise of discretion in favour of an order for DNA testing sought by the applicant. From the relationship between the deceased and the applicant as disclosed in the affidavit in support of the application, there is a real likelihood that the child the subject of this application was an issue of relationship between the applicant and the deceased.

[30] The Court does not take the order for exhumation of the deceased lightly and is in agreement of the principle of eminent necessity of exhumation as urged by the respondents. There was evidence of that the

Children of Deceased the respondents herein declined the suggestion by Court for them to present themselves for DNA testing. In the circumstances, the only other person from whom DNA samples may be taken is the Deceased himself.

Balance of Convenience

[31] In the exercise of the discretion to direct DNA testing herein the court has considered the child's best interest as being of paramount importance as commanded by Article 53 of the Constitution and balanced this requirement with the constitutional protection of privacy for the deceased and his family members, under Article 31 of the Constitution.

[32] 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."

The Article protects the unnecessarily requisition or revelation of private information.

[33] The interests of the minor child herein make it necessary to call for the information to be revealed by the DNA testing. However, the particulars of the parties herein, will be consistently with the nature of matter, be withheld and their names appearing only in initialized format.

Orders

[34] Accordingly, for the reasons set out above, I make orders as prayed in the Prayers 1, 2 and 3 of the Summons dated 30th January 2015.

[35] In accordance with the duty of a party or his Counsel under section 1A (3) of the Civil Procedure Act "to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court", Counsel for the parties herein are directed to make arrangements for the smooth and least disruptive manner of execution of the orders of the Court, above, within the next thirty (30) days from the date of this Order.

[36] In the first instance, any fees or costs payable for the execution of the DNA testing order will be met by the Estate through the administrators until final orders of the Court of upon the objection proceedings and or the applicant for dependency filed herein.

[37] Costs will abide the final determination of the matter.

DATED AND DELIVERED THIS 29TH DAY OF MARCH 2016.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

No appearance for the Objector/Applicant

No appearance for the Petitioners/Respondents

Mr. Mutero. - Court Assistant.