



**In re Estate of SMG (Deceased) (Succession Cause E002 of 2023)
[2024] KEHC 1536 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1536 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE E002 OF 2023
G MUTAI, J
FEBRUARY 9, 2024
IN THE MATTER OF THE ESTATE OF SMG (DECEASED)**

BETWEEN

**LWM 1ST PETITIONER
JWM 2ND PETITIONER
SMM 3RD PETITIONER
PKM 4TH PETITIONER**

AND

**LWI 1ST OBJECTOR
SN 2ND OBJECTOR
ENM 3RD OBJECTOR**

RULING

1. ENM (hereafter “E”) avers that he is the son of SMG (hereafter “the deceased”) on the ground that the deceased cohabitated as husband and wife with his mother and that he was the issue of the said union. During his lifetime the deceased denied paternity and at the time of his demise there was a pending appeal in Nyeri High Court to wit Civil Appeal No. 81 of 2021 between the deceased, as the appelland, and the E, as the respondent.
2. Vide summons dated 24th May 2023 E, through his counsels, Gori Ombongi & Co Advocates sought the following orders:-
 1. That the 1st petitioners sons and daughters, namely JWM, SMM, PKM and AWM and the 3rd objector/applicant do undergo DNA test to determine the paternity of the 3rd objector/ applicant in relation to the 1st Petitioner’s said children;



2. That the 1st petitioner's children do present themselves at Kenya Medical Research Institute for extraction of DNA samples for testing;
 3. The results for the above DNA test in regard to the paternity of the 3rd objector be forwarded to this honourable Court by the Kenya Medical Research Institute; and
 4. That the costs of this application and process be provided for.
3. E averred that he is the biological child of the deceased. His paternity is, however, denied by the 1st petitioner/respondent and her children, who are also her co-petitioners. He further averred that the deceased's remains were cremated by the petitioners/respondents, making it scientifically difficult to obtain extracts of his DNA samples for evaluation. He urged in his affidavit that I should look at the special circumstances of this case and allow the prayers sought as subjecting the quoted beneficiaries to a DNA test will not occasion loss or inconvenience to the family.
 4. The application is opposed. The children of the 1st petitioner/respondent, AWM, JWM and SMM, jointly filed a replying affidavit sworn on 8th June 2023. In the said affidavit, they deposed that the 3rd Objector/Applicant has a pending application in Nyeri High Court, being Nyeri High Court Civil Appeal No. 81 of 2021. In the said appeal, the applicant seeks to subject the deceased's ashes to DNA testing. The deponents aver that the said matter is live before the Nyeri High Court. They accuse E of playing cat-and-mouse games with a view to wearing them out. They stated that if this application were allowed, when the Nyeri appeal is still pending, there was a possibility that two Courts of concurrent jurisdiction could come to different conclusions, which occurrence would expose the Court to embarrassment.
 5. The respondents deposed that procurement of DNA samples of any person is a matter of autonomy

“and an invasion of privacy rights which are guaranteed under the Constitution of Kenya, 2010”.

Before that is done, the Court should be persuaded that the applicant has established to a sufficient degree that his rights override those of the Respondents.
 6. The Court notes that the matter pending in Nyeri, High Court is an appeal filed by the deceased against the decision of the lower Court that compelled him to undergo a DNA test.
 7. The parties made oral submissions on 30th November 2023.
 8. The 3rd objector/application relied on Article 27 (1), 28, 35 (1)(b) and (2) and 45 of the Constitution of Kenya. It was urged that this Court has jurisdiction under Article 23 of the Constitution of Kenya, 2010, to issue the orders sought. I was referred to the decision of the Court in *DKM versus SPM & Another* [2015] eKLR and *DNN versus JK* [2016] eKLR. In the said cases, the respective courts allowed the application for DNA tests to be carried over the objections of the respondents. Counsel submitted that the issue of paternity was essential in this matter.
 9. Ms Nanjala, learned counsel for the 3rd objectors/applicant's counsel, submitted that the application wasn't subjudice.
 10. Mr wa Njeri, learned counsel for the petitioners/respondents, opposed the application. He submitted that the applicant had the onus of laying the basis for his application. In his opinion, the applicant had failed to do so. Although he claimed that his mother was married to the deceased, he hadn't provided cogent evidence. He stated that the deceased had disowned the applicant. The Court was invited to



look at the application filed in Nyeri High Court. Counsel submitted that this application was sub-judice to the Nyeri High Court appeal.

11. Has the 3rd objector/applicant made a case for the DNA testing of the named individuals over their objection?

12. The Court in *SWM versus GMK* [2012] eKLR held as follows:-

“ordering the respondent to provide DNA for whatever reason is 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 right the Court would consider as overriding the respondent’s right.”

13. The 3rd objector/applicant does not dispute that JWM, SMM, PKM and AWM are the children of the deceased. He avers that since the body of the deceased was cremated, he lacks a sample of his tissue, from which DNA can be extracted, for analysis. The best available option is to have the named children of the deceased undergo DNA testing so that it may be determined if they are his siblings and, by dint of that, that he is, therefore, the son of the deceased.

14. Is the 3rd objector/applicant’s application merited? In my view, it is. He filed a case in Karatina, which is now the subject of an appeal. The trial Court was convinced that he had a *prima facie case* and ordered the deceased to undergo a DNA test to establish paternity. The said test was not done as the deceased died. Secondly during the course of the hearing of this matter a number of witnesses supported the 3rd objector/applicant’s contention that he is the son of the deceased. These witnesses are EGG, the deceased brother, AM (the 3rd objector/applicant’s mother) and JWW (his aunt). It is, therefore, evident that the 3rd Objector/Applicant’s claim is not idle.

15. Although courts have noted that mandatory DNA testing is intrusive and could breach a person’s right to privacy, such tests have nevertheless been allowed in the greater interest of justice. In *MW versus KC* [2005] eKLR, the Court, while compelling a putative father to undergo a DNA test, observed that DNA test court be ordered if:-

“that there is a likelihood that the Respondent could be the father of the child, that the Respondent’s refusal to submit to the DNA test has violated the child’s right to know his father; that the Respondent’s refusal to take a DNA test is unreasonable because it deprives the child of the possible enjoyment of the rights and benefits enshrined in section 4 to 19 of Part II of the *Children Act* and that the Court has the jurisdiction to order the tests.”

16. Although the 3rd Objector/Applicant isn’t a child, his putative right to inherit part of the estate of the deceased rides on his paternity. That being the case, the authorities I have referred to have persuasive authority.

17. The court in *MKK versus LGI* [2021] eKLR stated that:-

“In the Indian case of *Bhabani Prasad Jena versus Convener Sec Orissa*, Civil Appeal Nos. 6222-6223 of 2010, the issue of forced DNA was addressed in the following terms: -

“The court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA is eminently needed. DNA in a matter relating to paternity of a child should not be directed by court as a matter of course or in a routine manner, whenever such



request is made. The court has to consider diverse aspects...pros and cons of such order and the test of 'eminent need' whether it is not possible for the court to reach the truth without use of such test."

18. Having laid the above basis, I now come to the question whether the applicant has made out a *prima facie case*, which deserves the court's order against the respondent for a DNA test. The duty to convince the court on the need to order the test remained with the applicant and the standard was that on a balance of probabilities. It was never the duty to prove paternity at this stage. Here what needs proof to the satisfaction of the court is whether there is eminent need to establish paternity so that the claim on behalf of the child can be pursued."
19. E's entire claim rides on his paternity. It would appear to me that he has few options left to establish that the deceased was his father. A DNA test is, therefore, crucial. In my view, the greater interest of justice justifies the inconvenience that JWM, SMM, PKM and AWM might thereby suffer.
20. The Petitioners/Respondent objected to the application on the ground that the same is res subjudice. I have looked at documents filed at the Nyeri High Court. Having done so, I disagree with Mr wa Njeri's submissions on that point. The two matters are distinct. The Nyeri appeal seeks to conduct a DNA test on the ashes of the deceased. This matter, on the other hand, seeks sibling DNA tests.
21. The upshot of the foregoing is that I find that the application has merit. The same is allowed.
22. I therefore order as follows: -
 1. JWM, SMM, PKM, AWM and ENM do undergo a sibling DNA test to determine if they share the same father;
 2. The said JWM, SMM, PKM AWM and ENM do present themselves at the Kenya Medical Research Institute, Nairobi, within 14 days of the date of this ruling for purposes of extraction of their DNA samples;
 3. The results of the DNA test be forwarded to the Court by KEMRI;
 4. The costs of the DNA test be met by the estate of the deceased.
23. This being a family matter, each party shall bear own costs.
24. Orders accordingly.

DATED AND SIGNED THIS 9TH DAY OF FEBRUARY 2024 AT MOMBASA

GREGORY MUTAI

JUDGE

In the presence of: -

Mr wa Njeri, for the Petitioners/Respondents;

Mr. Ombongi, for the 3rd Objector/Applicant;

Mr. Oduor, for the 1st and 2nd Objectors;

Arthur, Court assistant.

