REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

FAMILY DIVISION

MISC APPLICATION NO E029 OF 2021

FNT..................................1ST APPLICANT

FRT.................................2ND APPLICANT

VERSUS

CM on behalf of CSNT.....RESPONDENT

RULING

Introduction

The Applicants herein filed Succession Cause No. 9 of 2019 in the Chief Magistrate's Court in Kajiado. That matter is pending. They have come to this court through their Summons dated 2nd July 2021 brought under various provisions of the law claiming that they desire to confirm the beneficiaries of the estate of the deceased. The Applicants are sisters and daughters of the deceased. The Respondent is the mother of CSNT a minor. The Applicants are claiming that the minor is not a child of the deceased and therefore not a beneficiary of the estate of the deceased. The matter was argued orally.

The Case for the Applicants

The Summons dated 2nd July, 2021 is brought under sections 4, 6 and 22 of the Children Act, 2001, sections 1A, 1B, 3A, 3B of the Civil Procedure Act, sections 47, 82 and 83 of the Law of Succession Act, Rule 49 and 73 of the Probate and Administration Rules. It seeks the following orders:

1. That FNT and FRT the Applicants herein on the one hand and the Respondent's Minor CSNT do submit to (DNA Test) to determine paternity.

2. That the DNA test be ordered at Kenya Medical Research Institute at a date to be agreed upon them in any event within 14 days of this order.

3. That the court directs how the costs of the DNA test are to be borne.

The Application is supported by an affidavit sworn by the Applicants on 2nd July 2021 in which they state that they are the administrators of the estate of the NST who died on 22nd June, 2018. That they applied for letters of administration vide Succession Cause No. 9 of 2019 at the Chief Magistrate's Court in Kajiado. That they included CSN as a beneficiary of the estate on the basis of the birth certificate found in the deceased's documents which indicated that the deceased was the father to the minor. That the issuance of the birth certificate is not a certainty that the deceased gave any consent and there was no proof of the same. That a birth certificate is not conclusive evidence of paternity. That the deceased never introduced the minor or put it on record that he had another child and that the family genuinely believed he had no other children.

They further state that the Respondent filed Chamber Summons dated 27th December, 2019 seeking to be included as a co-administrator yet she was not a spouse. That the issues raised by the Respondent made the Applicants realize that she had a hidden agenda and was taking advantage of the fact that she was the mother to the minor to propagate her own cause. That none of the pictures attached by the Respondent in her application marked "CM-2" show the minor with the deceased. That the letter from the school and copies of minor's diary marked,"CM-3" are not conclusive evidence of paternity. That there is no proof provided showing the deceased paid school fees for the

minor. They also contest the Mpesa statements marked “CM-4” provided by the Respondent claiming that they are not consistent or regular and are meagre amounts which cannot be purported to maintain a child. That the grounds sited in her application makes them question her sincerity and hence the need to verify paternity. That the administrators who are children of the deceased have agreed to submit to a DNA test and exhumation of the deceased body is not necessary.

The Case for the Respondent

The application is opposed. The Respondent swore a Replying Affidavit dated 1st October, 2021 in which she stated that she is the mother of the minor CSNT aged 14 years and that the minor is the daughter of the deceased Naphtali Sironet Tande. She has given a background of her life with the deceased and the birth of the minor. She stated that they lived with the deceased at his Ngong Matasia home for 8 years. That she separated with the deceased in 2009 and that even after the separation the deceased continued being involved in his daughter’s welfare catering for her needs, education and often communicating with the minor. She further states that they were involved in the preparation and arrangements for the deceased burial as a family. That during the burial the Applicants failed to recognize CN as a daughter of the deceased despite acknowledging her as such in the newspaper obituary.

She stated that a meeting was held on 31st October, 2019 and the same brought out the fact that the Applicants were keen on discriminating the minor. Further that the Applicants had approached the Honorable court without her knowledge and petitioned for letters of administration intestate. That they had also made an application to access the deceased’s bank accounts ignoring the fact that the minor was still in school and needed support. That for these reasons she made an application in court to be included as an administrator to protect the interest of the minor. That the Applicants are keen on discriminating the minor in respect to the distribution of the estate and the current application is aimed at frustrating the Respondent’s efforts to fight for the minor.

She further stated that upon hearing of her application the Honorable court held that the Minor was the deceased’s daughter as was acknowledged in chief’s letter dated 20th July, 2018, the copy of birth certificate dated 30th May, 2007 and as acknowledged in the petition by the Applicants as step sister. She claims that the refusal by the Applicant’s family to have the minor pay tribute to her father during the 2nd and 3rd anniversary celebration has caused the minor to be traumatized. That the minor is now a pre-candidate and the ill- treatment, rejection by the Applicants and now the DNA will affect her more psychologically and may affect her schooling.

The Respondent filed Grounds of Opposition dated 1st October, 2021 where she urged the Honorable court to strike out the application dated 2nd July, 2021 on the grounds that the Applicants are clearly forum shopping having failed to file the current application in the succession proceedings they have filed in the lower court Chief Magistrates Court Kajiado Succession No. 9 of 2019 state Of NST (Deceased) and that the Application is an afterthought, misconceived, frivolous and vexatious made to vex the Respondent and restrain her from pursuing the Minors interests.

She further states that the Applicants have approached the Honorable Court by way of Miscellaneous Application yet they are seeking final orders and the same ought not to be entertained and or allowed. That the Applicants have not shown sufficient cause for seeking for the orders for the minor to undergo the DNA test as the minor was born while the deceased lived with the Respondent. That the Application as drawn is made for purposes of violating the minor’s dignity, her right to privacy and her body security and that the Applicants herein and the minor herein all bear the Sir name of the deceased T a clear indication that the deceased had recognized and accepted the three as his children.

Submissions

The matter came up for hearing in court and the parties made their arguments orally. Counsel for the Applicants argued that there was need to determine the issue of paternity and that it is not prejudicial to the Applicants to have DNA conducted. He submitted that it is part of the proceedings to determine paternity under section 89 of the Law of Succession Act to determine the beneficiaries of the Estate. He argued that it was not necessary to exhume the body of the deceased for DNA sample taking. He told court that the Applicants were ready to submit the samples and that the minor will not be affected psychologically.

Counsel for the Respondent argued that the Applicants filed a petition in the lower court seeking letters of administration and excluded the minor. She argued that the Applicants are seeking DNA but the matter is ongoing in the lower court and that they ought to have gone to the lower court. She argued that there is documentary evidence showing that the deceased was the father of the minor including the birth certificate and burial programme recognizing the minor as the Applicants sister. She further argued that should this honorable court be inclined to allow for DNA the minor be allowed to finish her exams in December, 2022 and allow exhuming of the body of the deceased for DNA samples.

Analysis and Determination

Before determining this matter, I wish to point out the issue raised by the counsel for the Respondent that the Applicants chose to come to the High Court to bring this application instead of seeking the orders in the lower court where the Succession Cause is filed. They also chose to come by way of Miscellaneous Application without filing a main suit to anchor their application on. The Respondent is right in doubting the Applicant’s motive. I am also curious where they chose to act in such a manner. That said I will proceed to determine this matter on merit. Turning on the application, I have analyzed it together with the Supporting Affidavit, the Replying Affidavit, the Grounds of Opposition and the attached documents. I have taken into account the arguments made by both parties and it is my view that the singular issue for determination is whether this court should allow for the DNA to be conducted in respect of the minor herein.

I am alive to the fact that the child, subject of these proceedings, is a minor. The law guides the rights of the child jealously. **Article 53(2)** of **the Constitution** commands that in every matter concerning the child, the child’s best interests shall be of paramount importance. The **Children Act, Section 4 (2) also** states that:

> **"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."**

With these provisions of the law in mind, it is the duty of this court to treat this matter with tremendous care to avoid infringing the law are regards the protection of the minor.

I have not seen the proceedings in the lower court. However, from the averments in the application before me, I have noted that the Applicants have recognized the minor as their step-sister. I have seen attached documents which include the birth certificate. I note that the Applicants admit that they found the birth certificate among the documents of the deceased. It bears the name of the deceased as the father of the minor. Even after finding the birth certificate among the documents of the deceased, the Applicants still doubt the paternity of the minor stating that there is no certainty that the deceased gave consent. Perhaps they mean that the deceased did not give consent to have his name included in the birth certificate of the minor. There is no evidence that the deceased complained of his name having been included in the minor's birth certificate.

Further, they seem to downplay the photos, letter from the school, copies of the minor's diary, m-pesa statements showing deceased used to make payments in respect of the minor, attached to the Replying Affidavit to show that the deceased was not the father of the minor. They admit including the minor in the burial programme and the obituary but state that they did so out of respect.

The Law of Succession Act under Section 3 (2) of Law of Succession Act provides as follows:

> **"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 of 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".**

In respect of this application and given that there is documentary evidence to show that the deceased was indicated as the father of the minor and was involved in her school, welfare and upkeep it is my finding that the minor is a child whom the deceased had recognized and accepted as his own child. It seems to me that the deceased had voluntarily assumed responsibility of the minor.

Should DNA be conducted to prove paternity? It seems to me that the Applicants are assuming that they carry the DNA of the deceased. That is why they volunteer to have DNA samples extracted from them. The only way these samples can be 100% accurate is if the samples are taken from the body of the deceased. This way, both the Applicants and the minor can be confirmed to be either his children if the results are matching or not if the results fail to match for either of them. Yet the Applicants are not keen on having the body of the decease exhumed for this purpose.

Is subjecting the minor to DNA sampling and testing under the circumstances of this case in the best interests of the minor?

In the case of S.W.M vs. G.M.K [2012] eKLR, the court stated 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."**

Of course the authority cited above is in respect of infringement of constitutional rights. The matter before me is about a minor whose rights are protected under the law. It is the duty of this court to ensure that her best interests are of paramount importance

In the case of **D N M v J K [2016] eKLR**, the court stated that:

> **"The bid to establish the truth through scientific proof must however not be generalized and should never so lightly prevail over the right to bodily integrity and right to privacy until it is clear that such rights ought to be limited. The clarity is only established where an undoubted nexus is shown as well as a specified quest to protect or enforce specific rights. Untested and controverted affidavit evidence, may not suffice."**

These are persuasive authorities. I have no reason to deviate from the reasoning in these authorities. I have also noted that the lower court, upon hearing the Application by the Respondent, found that it was not in dispute that the minor was the deceased's daughter as was supported by the chief's letter dated 20/7/2018 and copy of the birth certificate dated 30/5/2007 which documents were used by the Applicants to petition for letters of administration. It is therefore my opinion that the Applicants have not satisfied this Court that there exist special circumstances sufficient to warrant the issuance of the orders sought. Their application therefore lacks merit and must fail. I am not about to make orders that will subject the minor to DNA testing just to satisfy the Applicants who seem to go against the fact that the deceased had recognized the minor as his child going by the documents attached.

Consequently, the Summons dated 2nd July 2021 is hereby dismissed. Each party shall bear own costs. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 4TH NOVEMBER, 2021

S. N. MUTUKU

JUDGE