



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

CIVIL SUIT NO. 61 OF 2018 (O.S)

IN THE MATTER OF AN APPLICATION BY KMW FOR THE DNA TEST

TO DETERMINE THE PATERNITY OF THE RESPONDENTS

KMW.....PLAINTIFF

VERSUS

MK ALIAS MW.....1ST DEFENDANT

KK ALIAS KW.....2ND DEFENDANT

MK ALIAS MW.....3RD DEFENDANT

JUDGMENT

1. Before the Court is the Originating Summons dated 5th **October 2018** by which the Plaintiff **KMW** seeks determination by the court of the following questions:-

- a) **Whether the Plaintiff is the biological father to the 1st, 2nd and 3rd Defendant.**
- b) **Whether in determining question (a) above, the Plaintiff and the defendants need to undergo a DNA test and the report from such test filed through the Deputy Registrar of the court.**
- c) **Whether if it turns out that the defendants are not biological children of the plaintiff, then what fate befalls the records of the defendants at the Registrar of Persons and Registrar of General of Birth that they be accordingly amended, deleted, erased and/or rectified.**
- d) **What order should be made on the costs of the originating summons.”**

2. The Application was supported by the Affidavit of even date sworn by the Plaintiff.

3. The Defendants **MK alias MW** (1st Defendants), **KK alias KW** (2nd Defendants) and **MK alias MW** (3rd Defendants) opposed the summons through their Replying Affidavit dated 22nd **October 2018** sworn by the 3rd Defendant. The summons was canvassed by way of oral evidence.

3. The Plaintiff told the court that the Respondents are persons who are strangers to him. That they are not his children yet they persist in using his name ‘K’ as a surname. He complains that the Respondents have used his name in their **National Identity Cards** without his knowledge and/or consent. He denies categorically the claims of the Respondents that he was once married to their mother ‘**SWK**’.

4. The Plaintiff challenges the records of the Defendants held at the office of the Registrar General naming him as their father as inaccurate, illegal and fictitious.

5. The Plaintiff stated that in the year **1988** the dispute was presented before their local chief in **Gatamaiyu** and the chief told the

Defendants to return to their mothers home in **Kandara Division, Muranga County**.

6. The Plaintiff states that he is now advance in age – over **90 years** old and wishes to have this matter conclusively resolved as he does not want the Defendants to one day claim any part of his estate. Therefore, the Plaintiff requests that a DNA test be ordered to determine paternity.

7. As stated earlier the Defendants oppose the summons. The Defendants assert that the Plaintiff was married to their mother named **SWK**. That when she passed away the Plaintiffs mother one **ZN** took them in and raised them to maturity. That it was their grandmother who bestowed on them the name '**K**' which name they have been using since childhood.

8. The Defendants state that they do not know who their biological father is but they are averse to submitting to a DNA test as they believe this will prejudice them. The Defendants state that they have no interest in the property of the Plaintiff as their grandmother **ZN** made provisions for them in her Will. They assert that there is no need for a DNA test and urge the court to dismiss the application.

ANALYSIS AND DETERMINATION

9. I have considered this Originating Summons, the Affidavit in Reply, the evidence adduced in court as well as the written submissions filed by both parties. The questions which arise for determination are:-

(i) Whether a DNA test should be ordered.

(ii) Whether the Respondents should be ordered to stop using the

name '**K**'

(i) **DNA test**

10. The Plaintiff asks that a DNA test be conducted to exclude him as the father of the Defendants. He indicates that his is ready and willing to shoulder the cost of the DNA test.

11. The Defendants claim that the Plaintiff married their mother **SW** and later chased her away. **PW1** who testified for the Defendants admitted that he does not know if the Plaintiff is their father, however he states that a DNA test is not necessary, as they are not claiming any of the Plaintiff's property. However, **DW1** admits that in the Succession Cause of **ZN** the Plaintiff is named as their father.

12. It is clear that the issue of paternity is central to this matter. Though the Defendants claim that the Plaintiff married their mother, they have not adduced any evidence of the existence of a statutory or customary marriage between the Plaintiff and their mother.

13. In the present time a court does not need to engage in guesswork to establish paternity. We live in modern times where it is possible to establish within **99.9%** accuracy the question of paternity.

13. In the matter of the **ESTATE OF PETER MURAYA CHEGE alias MURAYA CHEGE [2019] eKLR Hon Justice A.K Ndungu** held that:-

“11. In this time and age of considerable scientific discovery, development and achievement, where a dispute arises as to the paternity of an individual, there is no better way to settle that issue with finality than through a dependable DNA test.

12. Where a proper basis is laid such a test should be ordered.”

14. In this case it is conceded that the Plaintiff's mother took in the Defendants after their mother died and she raised them to maturity. The Plaintiffs mother even apparently included the Defendants in her Will. In my view, this amounts to "**Sufficient basis**" to warrant a DNA test.

15. The fear that a DNA test would prejudice the Defendants is in my mind unfounded. The test is not intrusive in any way. In the case of **M.W & 3 others v D.N. [2018] eKLR** the court held as follows:-

“.....The beneficiaries named in the application may suffer some inconvenience and intrusion to their privacy. This has to be weighed against the need to resolve 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.A...”

16. The Defendants do not deny the fact that they are using the Plaintiffs name. The Plaintiff is aggrieved by this. It is desirable that this question of paternity be settled conclusively. Therefore, I do direct that the Plaintiff and the Defendants submit themselves for a DNA test. The cost of the DNA test to be met by the Plaintiff.

17. The question of whether or not the Defendants should be ordered to stop using the name '**K**' and/or the question of whether the Registrar General should be directed to rectify his records is one that will have to abide the results of the DNA test.

DATED IN NAIROBI THIS 3RD DAY OF DECEMBER 2021.

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MAUREEN A. ODERO

JUDGE