



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 123 OF 2017**

**IN THE MATTER OF THE ESTATE OF JK DECEASED**

**RULING**

1. In a ruling dated 28<sup>th</sup> November, 2018 this court ordered that one DN on one hand, PSK, VNK and ASK do undergo a DNA test to determine the paternity of DN, the said ruling triggered the application dated the 6<sup>th</sup> December, 2018 by, PSK, VNK and ASK subject of this ruling
2. The singular substantive prayer being sought is for setting aside the ruling aforesaid of 28<sup>th</sup> September, 2018 for the reasons; that the said order was issued against the applicants without the said applicants being heard; the application was been served upon the executors as opposed to the applicant's personally; the ruling violated the rules of natural justice, the order violates personal integrity and privacy of the applicants, is invasive and a nullity. Further the objector would not suffer any prejudice should the applicants be heard.
3. The application was supported by the affidavit of ASK, wherein he stated that though the prayers sought for by the objector affected him and two others the objector did not served the same upon them and therefore they did not participate in proceedings whose orders have affected them, and they owe no duty whatsoever to the Respondent in the determination of her paternity. Further, the respondent had the opportunity to establish her paternity during the life time of the deceased which she failed to do, she equally had an opportunity to obtain DNA sample before the deceased was interred, which opportunity she did not cease, and therefore her negligence should not be a reason for violation of their fundamental rights.
4. PSK one of the applicants herein is one of the executors of the will of the deceased and was therefore represented by counsel at every stage of the proceedings leading up to the impugned ruling. Secondly one of the executors MW in his replying affidavit dated 15<sup>th</sup> May, 2018 responding to the objector's application, in particular paragraph 2 thereof stated that he was authorised by his co-administrator who include PSK. It is therefore erroneous to state that all the named beneficiaries were not served and/or had no representations made on their behalf in court.
5. The current application raises two cardinal points; firstly, that the court violated cardinal principle of natural justice by failure to accord the applicants a chance to be heard, secondly the order violates the fundamental rights of the applicants.

In the affidavit in opposition to the application by the objector subject of this discourse the executors raised the issue of privacy and infringement of the constitutional rights of the current applicants. WM the executor who swore the affidavit in opposition in his paragraph 19 deposed;

**” That I am informed by our advocate on record, which information I verily accept to be correct, that the application made by the objector/Applicant is a coercion into infringing on the constitutional right to personal privacy and also right to bodily security and integrity which rights are protected under the Bill of Rights. The Objector/Applicant has not demonstrated to the honourable court the right she seeks to assert or vindicate and which the court would consider overriding the rights of PSK,VNK and ASK.”**

The said executor as well, like the applicants did raise the issue of Petition No. 133 of 2015.

The executors clearly raised concerns which touched on the applicants.

6. The executors, PSK being one of them were aggrieved by the impugned ruling and have since appealed against the same.

7. In the said ruling this court stated in part;

**“33. At the centre of this dispute is the issue of paternity and I am convinced on my part that justice will only prevail in the circumstances of this case, if the court takes the path of discovering the truth against the idea that the right to privacy and bodily integrity ought to be respected. This therefore demands that the court employs the best available and most accurate method to arrive at a fair decision.**

**34. 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.....”**

8. The extracts referred to above are evidence of the fact that the issues being raised by the applicants were ably raised, canvassed on their behalf by their co beneficiary and executors and the same duly considered.

9. It is a fallacy in my considered opinion therefore, for the applicants to argue that they were not aware of the application in court and their concerns not raised. I find and hold the view that the applicants were aware of the application as beneficiaries. One of them was a party who fully participated through counsel. I am also of the view that by implication all participated through the executors who ably defended their interest, in addition having knowledge of the matters in court nothing stopped them from directly participating.

10. I find this application to be an afterthought, an attempt to have a second bite at the cherry, and see no error, mistake or any compelling reason therefore to set aside the orders of the 28<sup>th</sup> of September, 2018. The application is dismissed.

11. Costs to the Respondent.

**DATED, SIGNED and DELIVERED at NAIROBI this 13<sup>th</sup> DAY OF FEBRUARY, 2020.**

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**ALI-ARONI**

**JUDGE**