REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 710 OF 2002

IN THE MATTER OF THE ESTATE OF CNG (DECEASED)

SNG.....4TH OBJECTOR/APPLICANT

VERSUS

PMG.....PETITIONER

RULING

1. The deceased CNG died on 1st November 2001 at the Kenyatta National Hospital. On 21st March 2002 PMG petitioned for probate of written Will. The deceased had left a written Will made and witnessed on 17th May 2000. In the Will, the deceased had indicated that he had already provided for his wives MWN (1st objector) and EN (2nd objector) and therefore his real estate should devolve to his children PG, JT, SM, GN, PW and WJ. He stated that he had divorced MM, and therefore had not bequeathed anything to her.

2. The deceased's estate comprised Kajiado/Kitengela/****, Dagoretti/Riruta/****, Dagoretti/Rirura/****, Ngong/Ngong/ ****, Kajiado/Ewaso-Kedong/***, Kajiado/Ewaso-Kedong/***, Ngong/Ngong/****, Kajiado/Ewaso-Kedong/***, a share in Dagoretti/Riruta/***, vehicle KPQ *** and A/C No. [particulars withheld] at Barclays Bank at Hurlingham.

3. The grant was issued to the petitioner on 21st March 2002 and confirmed on 28th May 2003.

4. On 21st June 2018 the objectors MWW (1st objector), ENN (2nd objector), LWW (3rd objector), SGN (4th objector/applicant) and MWN (5th objector) filed amended application under **section 26** of the **Law of Succession Act (Cap 160)** seeking that the deceased's Will be varied to adequately provide for them. The 1st and 2nd objectors were widows of the deceased who were acknowledged in the Will but had only been given personal effects which they stated was inadequate. They stated that the 3rd objector and 4th objector/applicant were the children of the deceased by the 1st objector, and the 5th objector was the daughter of the deceased by the 2nd objector. They had not been provided for in the Will. It was stated that the deceased knew the children had no income, had no differences with him and therefore there was no reason to exclude them from the Will.

5. The amended application was opposed. One of the grounds was that the 3rd objector and 4th objector/applicant were not the children of the deceased, and therefore were not beneficiaries of his estate. It was this challenge to paternity that made the 4th object/applicant to file the present application dated 9th July 2019 against the petitioner in which he sought that he be subjected to D.N.A. (Deoxyribonucleic Acid Test) to establish that he was a son to the deceased. It was only after such establishment that he could legitimately lay a claim to the estate of the deceased. He asked that his tissue and that of SMNN(who was the undisputed son of the deceased) be extracted by the Kenya Medical Research Institute (KEMRI) for the purpose of DNA.

6. The petitioner opposed the application by filing grounds of opposition that:-

a. the application was incompetent, improper and irregular as he (the petitioner) had no capacity, authority, or right to obligation to force Stephen Mureithi to the DNA test; and

b. the issue of DNA of any beneficiary was not germaine to the testate disposition.

7. Mr Malinzi for the 4th objector/applicant and Mr Nyairo for the petitioner filed written submissions to the application. I have considered them.

8. I agree with the petitioner that he has no capacity, as the executor of the Will of the deceased, to cause SM, a beneficiary, to be subjected to the extraction of his body tissue for the purposes of DNA to establish whether the 4th objector/applicant was the son of the deceased. The application was not addressed on SM. It was not served on him. He was not heard in the matter. The extraction of material and tissue from SM would be an intrusion of his right to bodily security and integrity, and also the right to privacy and the basic minimum would be that he be heard before an order against him is made.

9. Secondly, the deceased had other children (who were named in the Will), and there has been no explanation why SM was the only one picked on to provide the body tissue for DNA.

10. Thirdly, is DNA testing the only way it can be proved that the 4th objector/applicant was the son of the deceased? I ask the question because his mother (the 1st objector) was acknowledged by the deceased in his Will to have been his wife. The 1st objector swore in her affidavit that she was married to the deceased between 1987 and 2001. The question would be, when were the children (including the 4th objector/applicant) born? Were they born during the marriage, for instance? Is it not possible that parties can file affidavit evidence, and be cross-examined on them, and that it is only when the issue of paternity cannot be determined on such evidence that this scientific approach can be resorted to?

11. For these reasons, I do not allow DNA as sought in the application. I do not order costs at this stage.

12. However, I ask that the 1st objector and her children do file and serve on the petitioner and all beneficiaries in the Will affidavits on the issue of paternity within 21 days from today for them to respond within 21 days. Following that, the court will set down the matter for oral hearing to determine the issue of paternity of the 3rd objector and 4th objector/applicant together with the issue whether, under **section 26** of the **Act**, provision shall be made to them and the other objectors. This matter shall be mentioned on **28th June 2020** to take a date for hearing.

DATED and DELIVERED electronically, following consent of the parties, at NAIROBI this 8TH day of APRIL 2020.

A.O. MUCHELULE

JUDGE