REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

P&A NO. 23 OF 2018

(FORMERLY NYAHURURU SUCC. 72/2018)

IN THE MATTER OF THE ESTATE OF JIG (DECEASED)

RNI.....PETITIONER

-VERSUS-

AGK.....1ST OBJECTOR/APPLICANT

EMI.....2ND OBJECTOR/RESPONDENT

WWI.....3RD OBJECTOR/RESPONDENT

R U L I N G

The summons dated 02/07/2019, was brought by AGK, the 1st Objector/Applicant who seeks the following orders;

1. That the petitioner's children, namely IMI, EGI, FWI, CMI, EMI, and WWI and the 1st Objector's children, namely KMI, FWIand MMI, do undergo Deoxyribonucleic Acid (DNA) tests to determine the paternity of the 1st Objector's said children in relation to the Petitioner's said children;

2. That alternatively, and in the event that the Petitioner's said children or anyone of them decline to undergo Deoxyribonucleic Acid (DNA) tests in terms of prayer 1 above, the honourable court be pleased to make orders that;

a. The late JIG's grave situated in the Lesiriko Sub-Location, Oljoro Orok Location within Nyandarua County be opened to exhume his body with a view to taking samples therefrom for purposes of Deoxyribonucleic Acid (DNA) tests;

b. The officers of Kenya Medical Research Institute do undertake the disinterment and do obtain the necessary samples for DNA tests;

c. The 1st Objector's children namely KMI , FWIandMMI, do present themselves at Kenya Medical Research Institute for extraction of DNA samples for testing;

d. The results for the above DNA test in regard to the paternity of the 1st Objector's said children be forwarded to this honourable court by Kenya Medical Research Institute;

3. That the costs of this application and process be provided for.

The same is supported by grounds found in the body of the application and the applicant's affidavit sworn on 02/07/2019. The applicant deponed that she married the deceased in 1989 till his demise in 2006; that they were blessed with three children; KMI , FWI andMMI. She attached their baptism cards and birth certificates AGK5a,b,c, 6a,b,c and National Identity Cards AGK7a,b,c; that the deceased is the biological father of the three and cared for them during his lifetime (AGK 8 – bundle of school fees receipts; that when the Petitioner/Respondent filed petition for letters of administration, in her affidavit dated 04/11/2018, listed the 1st applicant as the widow of the deceased and listed the children as surviving the deceased; that the introductory letter from the Chief dated 13/02/2018 also included the 1st

applicant as the widow and her three children and her three children. However, in the supplementary affidavit sworn on 07/05/2019, the respondent claimed to be the only widow and her children were the deceased's heirs but that the applicant and her children are strangers. That is why she brought this application; that it is necessary that a DNA be conducted on her children with those of the respondent or that the deceased's body be exhumed for purposes of getting DNA samples for taking in order to settle the issue of paternity of her children.

The respondent, RNI, opposed the application through her replying affidavit dated 17/09/2019 in which she deponed that the applicant lacks the locus standi to bring this application because an order for taking DNA samples cannot be granted against adult person who are not party to this application; that the said persons cannot be compelled to undergo DNA test against their wish as it would amount to infringing of their rights to privacy; on prayer 2, it was deponed that this court sitting as probate and administration court has no jurisdiction to order exhumation of the deceased and that she has no locus to seek such order on behalf of her children who are adults and of sound mind. It is also deponed that the application is an abuse of the court process because the issue of the applicant having cohabited with the deceased and birth of the applicant's children is still pending in the objection proceedings and cross petition and if the court were to grant these prayers, it would be aiding the applicant in fishing for evidence; that the court has a duty to keep the faith of the deceased person and not interfere with the deceased except in exceptional circumstances; that since the applicant lost the opportunity to stop the deceased's burial, she should not be allowed to interfere with the remains; that the deceased was sick for a long time and the applicant should have taken the opportunity to introduce the children to the family. It was further deponed that the documents exhibited are suspect and that the issues herein should be determined through a full hearing.

Mr. Njogu, Counsel for the applicant filed submissions on 15/11/2019 in which he contests that since the issue of paternity of the applicant's children was raised in the respondent's supplementary affidavit, the dispute can only be resolved through DNA testing to prove beyond doubt the paternity of the said children and resolve the matter conclusively.

Counsel relied on the decision of ***PWM (deceased) 2016 eKLR*** where the court held that a DNA testing on the deceased will determine whether the child was the deceased's and that the High Court has unfettered jurisdiction to order for DNA test and in exceptional and compelling circumstances, the court will order an exhumation if necessary. In the above case, the court also held that the standard of proof is on a balance of probabilities.

Reliance was also made in ***Re Estate of Jacob Mwalekwa Mwambewa (deceased) 2018 eKLR*** where the court also held that exhumation of a deceased was a drastic measure that is prejudicial to the parties and community and the court should be slow to make such orders.

See also ***Hellen Cherono Kimugor vrs Esther Jelagat Kosgei (2008) eKLR and Re Matheson (deceased) 1 All ER 202.*** Counsel also submitted that the applicant has supplied the court with the necessary documentary evidence to prove that the children are the deceased's i.e. baptism card, birth certificates and Identity Cards; that the applicant in her further affidavit also exhibited photographs of the deceased of the deceased which is proof that there was a relationship between the applicant and the deceased. It is also submitted that on the allegations of forgery, the onus is on the respondent to prove the birth certificates were obtained well before the deceased's demise; that prayer 1 that the children of both the respondent and applicant undergo DNA is less intrusive means of proving paternity of the applicant's children and that costs of DNA and exhumation be met by the applicant but costs of this application by the Respondent.

M/s Wahome Ndegwa, Counsel for the respondent filed submissions on 18/02/2020. Counsel addressed two issues; whether the applicant has locus standi to seek the said orders and secondly, whether the court should grant the orders sought; on the first issue, it is submitted that though the applicant claims to be a wife to the deceased, she did not produce any evidence to support that allegation and therefore the issue of marriage must be determined at a full hearing by taking of evidence which can be tested.

Secondly, it is argued that the application is brought on behalf of adults who did not file any affidavits and no reason given why they did not file the application themselves nor is there evidence to show that they gave authority to the applicant to file the application on their behalf. He urged the court to dismiss the application on ground alone.

On the second issue, it was submitted that the orders sought cannot be granted because they are sought against adult persons who have not been confirmed to this application and this court cannot tell whether they would like to be heard or not. Counsel relied on the decision of ***Re Estate of Simeon Kiptum Chege (2017) eKLR*** where the court said that such, ***"order infringes the privacy of the other family members without giving them an opportunity to be heard."***

It was also submitted that objection proceedings where the same issues are raised are still pending determination and therefore the applicant is on an evidence fishing mission and that this application will interfere with the substantive objection proceedings.

It was also submitted that the issues raised cannot be determined on affidavit evidence and would need to go through a full hearing and reliance was made on the **Estate of Simeon Kiptum Choge (Supra)** where J. Chemitei quoted Onguto J. in ***DNM vrs J.K. (2016) eKLR*** where he stated that untested and controverted affidavit evidence may not suffice in such case.

As to whether the court can make an order of exhumation, it was submitted that the deceased died about 20 years ago and opening up the grave for DNA would have extreme psychological ramifications on the family and community at large; that exhumation is unAfrican and against Kikuyu Culture; that besides, there are other ways to prove that one is a beneficiary without necessarily resorting to exhumation. Counsel urged the court to dismiss the application.

I have duly considered the affidavits and rival submissions by the Counsel. The first issue that stands out and which was raised by the respondent is whether the applicant has the locus standi to bring this application.

The petition for letters of administration was filed by the respondent who claims to be the deceased's wife and that her children are the only heirs to the deceased's estate. The applicant also claims to be the deceased's wife and that her children were the deceased's children. The dispute is to whether the applicant was married to the deceased is still pending. The applicant filed objection proceedings on 16/04/2018. In the objection proceedings, the applicant seeks to be recognized as the deceased widow and her children, the deceased's children. The said

application having not been determined, I doubt that she has the locus standi to bring any application in this cause. In her affidavit, the applicant exhibited copies of birth certificates, Identity Cards AGK 5, 6, and 7a, b, c. The applicants three children are all adults but have not given the applicant the authority to seek the orders she seeks now are they party to this application. No reason was given by the applicant why the children did not make the application. Subjecting one to DNA is a very personal and private issue. Court's do not make orders in vain. If this court were to make an order and the applicant's children do not offer themselves for DNA testing, the court would have acted in vain. Since the applicant's children would be the subjects of the DNA, they should have been the persons to make this application. I do agree with the respondent's submission that presently, the applicant has no locus standi in the application and it is therefore a none starter.

Whether the court can grant an order compelling the respondent's children to subject themselves to a DNA; Again the respondent's children are adults. They have not been confirmed to this application. They are the persons who would be affected by the court's order yet they have not been enjoined to the application nor have they been served with the application so that they can give their input, either to support or oppose the application. An order given without offering a party a right to be heard infringes on a party's constitutional right to be accorded a hearing.

In ***DNM vrs J.K. (2016) eKLR*** Onguto J. when considering an application for DNA affecting adults had the following to say;

> **25"The law on the topic of compulsory blood or DNA testing in paternity disputes, which is also partly an issue in the petition here, is yet to be completely and satisfactorily developed locally. There is no express legislative framework, which specifically regulates the position in Civil cases. The few Judicial pronouncements on the topic do not appear unanimous in approach or principle;**

Whereas in relations to children, the courts have occasionally been quick to act in the child's best interest and ordered DNA testing, with regard to non-consenting adult the Jurisdiction has been left hazy…..;

> **48. In conclusion I hold the view that where paternity is in dispute then with reasonable limits and in appropriate cases DNA testing of non-consenting adults may be ordered even at an interlocutory stage. 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 and 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."**

I agree with the above holding. First the respondent's children have not been given opportunity to react to the application. Secondly, the application is based on affidavit evidence which can not be interrogated by the parties by way of eness examination or calling of witnesses. In ***Re Estate of Simeon Kiptum Choge's case,*** Chemetei J. concluded **"……what the applicant has presented are affidavits evidence and to allow it at this juncture would almost amount to comprehensively declining the process without giving the opportunity to the opposing parties to interrogate the real nexus between the two deceased persons. In fact, I dare state that it shall be infringing on the privacy of other family members without giving them an opportunity to be heard."**

I totally agree with the above finding. To grant this application would be infringing on the rights of the respondent's children without offering them an opportunity to be heard. The objection proceedings that are pending are the right forum to determine whether or not a paternity test will be necessary after all parties have been heard. I think that in the circumstances, the application is preemptive and as the respondent has put, it's a fishing expedition for evidence and in my view, premature. I would not grant the order at this stage.

As for the alternative prayer for exhumation of the deceased's body for purposes of DNA testing; The general trend is that in applications for exhumation for purposes of DNA are drastic and the court will be very reluctant to grant such order except in exceptional circumstances. It is an exercise of the court's discretion and therefore which or not the court will grant the order or not depends on the special circumstances of the case. In ***Hellen Cherono Kimurgor vrs Esther Jelagat Kosgei,*** J. Onyancha observed as follows;

> **"From time immemorial it has been the natural desire of most men that after their death, their bodies should not only be decently and reverently interred, but should also remain in the grave undisturbed. This view should and is indeed respected by societal institutions including the courts of law. Occasions however arisen when unforeseeable circumstances make it desirable or imperative that a body should be disinterred for good reasons. While the court would usually be slow to make orders for disinterment, it nevertheless will not hesitate to do so in suitable cases. The court will, on the other hand, avoid placing any fetters on its discretionary power to do so. That is to say the court will without fear make orders for disinterment whenever the circumstances of the case make I t desirable or imperative to do so. This, in my view, is the tenor of the case of Re Matheson (deceased) (1958) 1 AII E.R. 202.**

> **……On a balance of probability satisfied on the facts and the circumstances of this case, that the applicant failed to establish a sufficient link between herself and the late Charles Kimurgor during his lifetime to persuade this court to find it desirable or imperative to make the drastic order of exhumation of the deceased's body for purposes of a DNA test."**

See also **Re Matheson Supra.**

The process of exhumation being so drastic can only be undertaken where there is dire necessity. As observed earlier, this application is premature. There are other available ways which the applicants can establish their rights in the objection proceedings other than calling for exhumation at this stage. Further to that, there must be evidence lasted at the hearing to determine whether exhumation is necessary; For all the reasons discussed above, I find no merit in this application and I must dismiss it, with costs.

Dated, Signed and **Delivered** at **NYAHURURU** this **15th** day of **October**,**2020.**

……..

R.P.V. Wendoh

JUDGE

PRESENT:

Mr Njogu for applicant

Mr Maina Kairu for Respondent

Henry Court Assistant