



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 213 OF 2015**

**IN THE MATTER OF THE ESTATE OF JSM alias JM alias JSM alias JMR alias JS M (DECEASED)**

**MWNT.....OBJECTOR/RESPONDENT**

**VERSUS**

**MNM.....FIRST APPLICANT**

**MM..... SECOND APPLICANT**

**RULING**

1. Before the Court is an Application dated 27<sup>th</sup> June, 2018 filed by Muriuki Meme who is the Administrator of the estate of the Deceased. The Applicant is seeking an order compelling the Objector, to present the child, JNM, at the Government Chemist at Kenyatta National Hospital, or any other government certified hospital for extraction of Deoxyribonucleic Acid (DNA) samples for siblings testing within Ten (10) days of issuance of such an order. It is the Administrator's assertion that no loss, hardship or prejudice will be occasioned to the Respondent or the child if the orders sought are granted.

2. The Application is premised on the grounds set out on the face thereof and in the Supporting Affidavit of Muriuki Meme dated 27<sup>th</sup> June, 2018 wherein he deponed that the family of the deceased had no prior knowledge of the Objector's alleged marriage to the Deceased, and are strangers to the allegation that the purported union bore a child known as JNM. The Applicant together with his siblings, being the beneficiaries of the estate, therefore wish to verify and confirm paternity to enable the aforesaid child to fully benefit from the estate.

3. In a Further Affidavit sworn on 25<sup>th</sup> July, 2018, the Applicant produced an Eulogy marked "MM6" wherein the subject child has not been named as a child of the Deceased. The Applicant contended that the Objectors own case for revocation of grant is riddled with contradictions and suspicion due to the fact that the purported Birth Confirmation Form of the subject child was obtained on 28<sup>th</sup> March, 2012, a day after the death of the Deceased and raises suspicions as to the Objectors motives.

4. It was the Applicant's averment that all his siblings were amenable to providing samples for purposes of sibling DNA testing. Further, no loss, hardship or prejudice would be occasioned to the said Objector or the subject child if the orders sought herein were granted.

5. In a Supplementary Affidavit dated 4<sup>th</sup> December, 2018, the Applicant deponed that although they would wish to have the remains of their father remain undisturbed in the grave, the Applicant and his siblings would accede to the same should the Court deem it fit for parental DNA to be conducted instead.

6. In submissions dated 4<sup>th</sup> December, 2018 the Applicant referred the Court to the case of **DNM v JK [2016] eKLR** wherein Onguto J held that DNA testing may be ordered even at an interlocutory stage. The Applicants also cited the case of **WKG v JWM & Another [2016] eKLR** where the Court stated as follows:

**"The matrix of the competing interests which involve the Petitioner's right to have the dispute adjudicated fairly and the Respondent's interests to have his constitutional rights to bodily integrity and privacy protected, would dictate that the level of certainty to be achieved is not simplified. Rather the court should be satisfied that an appropriate basis has been laid...**

**... It is true a determination of paternity (or more correctly, non-paternity) puts to rest nagging questions or doubts. A basis however needs to be set for such a test. Such a basis may be set in the preliminary stages of the suit where there is clear and irrefutable conduct pointing towards paternity...."**

7. The Applicant urged the Court to allow the application for sibling testing and submitted that a finding that the subject child is his biological sister, without ordering for a DNA test, would not only occasion a miscarriage of justice, but would have long term psychological

and emotional consequences for the family as the paternity dispute goes far beyond mere inheritance of their father's property.

8. The Objector has opposed this Application via a Replying Affidavit dated 18<sup>th</sup> July, 2018 and Further Replying Affidavit dated 11<sup>th</sup> October, 2018 in which she contended that presenting her daughter at the Government Chemist, or any other Government Certified Hospital as sought by the Applicant would not serve any meaningful purpose other than traumatizing and discriminating against the young child.

9. It was her contention that the Applicant and his siblings were not the biological children of the Deceased and therefore sibling DNA testing to determine the subject child's biological relationship with the Deceased would not be possible. The Objector alleged that the Deceased suffered a fertility disorder that was only corrected in the year 1990, after the birth of the Applicant and his siblings.

10. The Objector contended that the subject child was indeed a child of the Deceased as she was named after the Deceased's mother as required by Meru Customary law during a child naming ceremony attended by the Deceased's close relatives. In Affidavits bearing the date 11<sup>th</sup> October, 2018, IR, JR, KR and KR, being the said relatives of the Deceased, support the Objectors aversion that the child naming ceremony indeed took place.

11. The Objector also argued that Birth Certificate no. 81276 issued on 3<sup>rd</sup> February, 2009 clearly indicated that the Deceased was indeed the father of the child, further, that the Certificate of Birth Confirmation from Matter Hospital dated 28<sup>th</sup> March, 2012 was a confirmation of hospital records, which details were provided by the Deceased himself when he escorted her to deliver the child. It was the Objector's averment that the Deceased also took care of the Objector's prenatal, maternity and postnatal bills and produced a bundle marked "MWT 8" being relevant medical documents and receipts.

12. The Objector asserted that the subject child was not the Objector herein and the Application was therefore misconceived and a red herring. In submissions dated 22<sup>nd</sup> January, 2019, the Objector referred the Court to the case **Constitutional & Human Rights Division Petition No. 133 of 2015 D N M v J K [2016] eKLR** wherein Onguto J observed as follows:

**"Even though the court's core role is to determine disputes, the courts often deploy methods of compulsion not necessarily to get to the truth but to help determine disputes fairly. It is thus common to see witnesses being summoned and also being compelled at the risk of jail, to answer questions. In all instances though, the party seeking the court's assistance must lay a firm legal and factual foundation for his case. It is not different where DNA testing is sought. In the case of DNA testing the basis must be laid even where a child is involved, as ordering DNA testing is not a mere procedural matter but is substantive enough given that an individual's constitutional rights may be limited through such testing."**

13. It was the Objector's submission that the sibling DNA test as sought by the Applicant was misconceived and it was unclear who would give the sample to be compared. It was however her submission that in the event the Court finds this case suitable for DNA testing, the body of the Deceased be exhumed for extracting of primary samples and the Applicant and his siblings also be subjected to rule out tomb fraud.

#### **Analysis and Determination**

14. I have considered the pleadings and the lengthy submissions filed by the learned counsels. A number of issues of law and fact have been raised in this application that are so closely linked to and are inextricably mixed with issues raised in the main application for Revocation of Grant. These issues at this early stage cannot be determined and must await the hearing of the main suit.

15. The issue for determination under the instant Application is whether the Applicant herein has laid sufficient basis to warrant the issuance of an order compelling the Objector to present the subject child for sibling DNA testing.

16. Bearing in mind that the Objector's child who is the subject matter of this application is a minor, this is Court alive to the provisions of **Article 53(2) of the Constitution** which states that in every matter concerning the child, the child's best interests shall be of paramount importance. In addition, the **Children Act** under **Section 4 (2)** states as follows:

**"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."**

17. The Court also takes note of the fact that a child may be a dependant of a male deceased under **Section 3 (2) of the Law of Succession** without ever being his biological child. **Section 3 (2) of Law of Succession Act** provides:

**"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".**

18. The nature of the order sought by the Applicant at this interlocutory stage is mandatory and the Court must therefore be satisfied that there exist special circumstances sufficient to warrant the issuance of such order. In the case of **S.W.M vs. G.M.K [2012]eKLR** Majanja J stated as follows:

**"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.”**

19. In the instant Application, the Administrator has alleged that the family of the deceased had no prior knowledge of the Objector's purported marriage to the Deceased and are strangers to her averment that their union bore the subject child. By way of Affidavit, the Applicant has also challenged the documentary evidence produced by the Objector including the Birth Certificate and Birth Confirmation Form.

20. The Applicant has alleged that the Birth Certificate and Birth Confirmation Form of the subject child were fraudulently obtained owing to the fact that the Birth Certificate was obtained on 3<sup>rd</sup> February, 2009 yet the Certificate of Confirmation of Birth is dated 28<sup>th</sup> of March, 2012. The Applicant has also alleged forgery of documents by the Objector in an attempt to link herself to the Deceased and referred the Court to a forensic document examiner's report which indicates that there is a fraudulent addition of the name "nkathathura" to one of the Objector's annexures under "MTW5."

21. The Objector on the other hand has submitted that the allegations of forgery made by the Applicant have not been proved and that the subject child is indeed a child of the Deceased. The Objector asserts that Birth Certificate no. 81276 issued on 3<sup>rd</sup> February, 2009 clearly indicates that the Deceased was indeed the father of the child, further, that the Certificate of Birth Confirmation from Matter Hospital dated 28<sup>th</sup> March, 2012 was merely a confirmation of hospital records, which details were provided by the Deceased himself when he escorted her to deliver the child.

22. A number of the Deceased's relatives have filed Affidavits in support of the Objectors averment that they were invited by the Deceased to attend a naming of the child ceremony. In an Affidavit sworn on 11<sup>th</sup> October, 2018, Isabella Rukaria stated that she is the mother of the Deceased and that the Deceased had indeed invited her to the naming of the child ceremony, however, she was unable to attend due to illness. The brothers of the Deceased, JR and KR as well as the sister of the deceased one KR have also filed Affidavits sworn on the same date wherein they deponed that they attended the naming of the child ceremony.

23. The Applicant has contested the aforementioned Affidavits, alleging that the averments therein were false and that they were obtained by way of promise of monetary compensation. The Applicant has also argued that Isabella Rukaria is not the mother of the Deceased as deponed, but the step-mother.

24. In the case of **D N M v J K [2016] eKLR**, Onguto J rendered himself thus:

**“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.”**

25. It is the view of this Court that much of the Affidavit evidence adduced by the Applicant, the Objector and their respective witnesses, ought to be subjected to appropriate challenge and testing through cross examination prior to any final orders being issued.

26. For the afore-going reasons this Court makes a finding that the Applicant has not satisfied this Court that there exist special circumstances sufficient to warrant the issuance of the orders sought at this stage. Consequently, the Application dated 27<sup>th</sup> June, 2018 be and is hereby dismissed with no orders as to costs.

It is so ordered.

**SIGNED DATED and DELIVERED in open Court this 14<sup>th</sup> day of May, 2019**

.....

**L. A. ACHODE**

**JUDGE**

**In the presence of.....Advocate for the Objector/Respondent.**

**In the presence of .....Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Applicants.**