REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 13 OF 2018

IN THE MATTER OF THE ESTATE OF SMM'I (DECEASED)

LKN..... APPLICANT

VERSUS

HKM.....1ST RESPONDENT

KM.....2ND RESPONDENT

DR. BERTHA KAIMENYI.....3RD RESPONDENT

R U L I N G

1. This is a ruling on the Summons dated 25/2/2019 brought under ***Section 47 of the Law of Succession Act, Rules 63 and 73 of the Probate and Administration Rules, Article 159 (2) of the Constitution, Sections 1A and 3A of the Civil procedure Act*** and all other enabling provisions of the law.

2. In the application, the applicant sought amongst other orders; that the deceased's body be exhumed to take samples and/or tissue from the body for the purposes of undertaking sibling Deoxyribonucleic acid (DNA) between the applicant and the deceased as well as 2nd and 3rd respondents so as to determine the issue of parentage/paternity; and that **Dr. Perminus Minda Okemwa**, a pathologist, do undertake the testing and analysis.

3. The grounds upon which the summons was grounded upon were set out in its body and the supporting affidavit of **LKN** filed on 27/2/2019. The applicant contended that he is the biological son of the deceased with **JMN**. That although the two were not legally married, they had a long and open relationship with the deceased until the time of his demise.

4. He further contended that he grew up with the rest of the deceased's family at the latter's home at Kathera. The deceased facilitated his education within the Country and abroad, secured a job for him and furthered his business ventures. That it was in bad faith for the petitioner to omit him in her proposed mode of distribution. That in the premises, it was necessary for a test to be undertaken so that the issue of his paternity is put to rest.

5. The Summons was opposed by the 1st and 2nd respondents through their replying affidavits sworn on 11/3/2019, respectively. They contended that the applicant was not a son of the deceased as alleged but a son of **JMN** and one **SN** whose name he had assumed as his surname.

6. They further contended that the two were known to the deceased's family for many years and that the deceased ran some commercial businesses with the applicant's mother. The respondents denied that the deceased had paid school fees for the applicant or that the applicant ever lived with the deceased's family.

7. It was the 1st and 2nd respondent's contention that seeking to take DNA samples from the 2nd respondent or any of the deceased's children would be intrusive and a violation of their basic rights to privacy. They challenged the applicant to tender evidence, file copies of his birth certificate and national identity card which will shed light on his paternity. That re-opening the deceased's resting place to extract tissues for the aforesaid tests will re-open the mourning wounds of his family and loved ones.

8. **RMM,** a son of the deceased also filed a replying affidavit as an interested party on 01/14/2019 opposing the application. He denied the averments by the applicant that they grew up together. He denied ever been to the same schools with the applicant save for one year at the Alliance High School before the applicant followed his mother to the U.S.A. He further deposed that at no time did the deceased introduce the applicant to him as his step brother while at the Alliance High School or at all. He only knew and interacted with the applicant as a child of a business colleague of his father.

9. The parties filed their respective submissions which the Court has considered. The applicant submitted along the lines of his supporting affidavit and relied on the authorities of; **In the re Estate of PWM (Deceased) [2016] eKLR**, **In the re Estate of Jacob Mwalekwa Mwambewa (Deceased) [2018] eKLR** and **Hellen Cherono Kimurgor v Esther Jelagat Kosgei [2008] eKLR** in support of his submissions.

10. The 1st and 2nd respondents submitted by restating the contents of their affidavits. They further submitted that the applicant who is over 40 years of age never attempted to be recognized as a son of the deceased during his lifetime.

11. It was further contended that the applicant did not seek the extraction of any samples before the internment of the deceased and that it is religiously and culturally wrong to disturb the deceased. They relied on the authorities of **George Kariuki Njoroge (also known as George Kariuki Ntimama v Dorcas Pedelai Ntimama (sued as next of kin of the late William Ole Ntimama & another) [2019] eKLR**, **Moses Kipkirui Cheruiyot v Raeli Cheluget & 2 others [2018] eKLR**, **In re Estate of Julius Kiragu Kiara (Deceased) [2018] eKLR** and **Hellen Cherono Kimurgor v Esther Jelagat Kosgei [2008] eKLR** in support of their submissions.

12. The dispute in the main Protest is the paternity of the applicant. In the present application, the issue for determination is ***whether or not the body of the deceased should be exhumed for purposes of taking samples and/or tissue from the body for purposes of DNA tests.***

13. The Courts in this country and elsewhere have delivered themselves on the issue of whether interred bodies should be exhumed for purposes of DNA tests.

14. In **Hellen Cherono Kimurgor v Esther Jelagat Kosgei [2008] eKLR,** the Court delivered itself thus:-

> ***"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 arise 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 it 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.*
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> ***The cited case emphasizes the basis of burial or interment of the bodies of the dead. It states that it has always been accepted that after death there should be a decent and reverend burial of the body of the dead. Thereafter, the dead should remain undisturbed for all purposes except when otherwise directed by a court of law. This was best expressed in the*** *Re Matheson* ***case at page 204 thus?***
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> > *"As I have said, the primary function of the court is to keep faith with the dead. When a man nears his end and contemplates Christian burial, he may reasonably hope that his remains will be undisturbed, and the court should ensure that, if reasonably possible, this assumed wish will be respected. In all these cases the court must and will have regard to the supposed wishes of the deceased. I say supposed wishes, because it can rarely, if ever, happen that the circumstances giving rise to the application can have been contemplated, still less, discussed, in the lifetime of the deceased."*

15. **In re Estate of Julius Kiragu Kiara (Deceased) [2018] eKLR,** the Court held:-

> ***"My opinion is that, DNA profiling for purposes of proving parentage may be the best option. The court retains discretion to order such profiling in a suitable case. However, from time immemorial, it is a known fact that the place of the dead is to remain in the grave undisturbed. Once the body has been interred, in my view, a court should be slow to order disinterment of a body unless in clear and desirable circumstances.***
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> ***…***
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> ***In this regard, it is the natural desire of man, be he Christian or an adherent of African traditions and customs, that after his death, his body should not only decently and reverently interred, but should forever remain in the grave undisturbed. This is a view, in my opinion, which should be respected by all including the courts. However, when certain circumstances arise and make it desirable and imperative that a body be disinterred, the court should not unnecessarily fetter its discretion but should order such disinterment".***

16. In this Cause, the applicant has contended that he was fathered by the deceased and that he is therefore a beneficiary of the estate of the deceased. This has been strenuously denied by the respondents.

17. In support of his contention, the applicant gave a history of his association with the deceased and the deceased's family from childhood until adulthood. He alleged that he lived with the deceased's family and went to school with the deceased's children and in particular the interested party, which the latter strenuously denied. He produced photographs that were taken of him, his mother and the family of the deceased. There was further allegation of association in adulthood to the effect that deceased got a job for the applicant at KTDA where the deceased was the Board Chairman and that the deceased provided him finances as well as set up businesses for him.

18. The 1st and 2nd respondent firmly retorted that the photographs taken in childhood were taken in the circumstances of the families of the

applicant and the deceased being business partners. That the deceased was an endowed man who was generous and must have assisted the applicant financially on that basis.

19. This Court is alive to the fact that the combatants herein have filed lengthy affidavit evidence and that the witnesses are yet to testify. This cause has been in the system for close to 2 years. Litigation is about seeking the truth, fairness and justice. One of the principles found in ***Article 159 of the Constitution*** is that in seeking justice, there should be no fetter by reason of technicalities and that justice should be dispensed with expeditiously.

20. **Professor JMN,** the mother of the applicant has already appeared and given a lengthy testimony. She was cross-examined at length. She told the Court that she met the deceased in 1975 when a close and love relationship developed between her and the deceased. That the same resulted in the birth of the applicant in 1977. Her contention was that the deceased was the biological father of the applicant. She urged that a DNA test should be undertaken to establish the truth or otherwise of what she was contending.

21. This Court is alive to the fact that only one witness has testified in this case. That there are others lined up to testify. That the best way of proving or disapproving paternity is by way of DNA tests.

22. From case law relied on by the 1st and 2nd respondent, it is clear that a court should be very slow in granting an order for exhumation of a body of a deceased. This is so for reason of religious and customary beliefs as to the place of the dead, to lie in their tombs undisturbed.

23. In the present case, the deceased is said to have been an elder and adherent of the Methodist Church of Kenya. That it will not be proper to disturb him by ordering the exhumation of his remains. That it will awaken the wounds of his loved ones. Those may not be empty sentiments.

24. On the other hand however, the applicant has been able to establish a link with the deceased. His mother tenaciously held firmly that she gave birth to him through the deceased. It is also the duty of the Court to render justice without fear or favour. In so doing, the truth is supposed to be the guiding principle in order to arrive at fairness. The Court should weigh the interest of the family vis a vis those of the applicant.

25. The applicant is craving that he be recognized as a child of the deceased and be allowed to partake in the distribution of the deceased's vast estate. He alleges that the deceased recognized him as such in his lifetime. The respondents on the other hand retort that the applicant is a stranger who wants to squeeze them unfairly in their entitlement to their deceased husband and father.

26. The view this court takes is that, if the truth is not unraveled, an otherwise entitled child, whether illegitimate or not, of the deceased will forever be disinherited or a stranger will wrongly be permitted to take a share in the deceased's estate thereby prejudicing the real beneficiaries thereto.

27. **In re Estate of Jacob Mwalekwa Mwambewa (Deceased) [2018] eKLR,** Thande J rendered herself thus:-

> ***"This Court would wish to keep faith with the deceased herein and not disturb his remains. Nevertheless, the pursuit of the truth overrides the supposed wishes of the Deceased. Further, family as well as cultural discomfort and outrage must give way to establishing the truth regarding the paternity of the Objector/Respondent which as stated earlier is central to the succession dispute herein. The DNA testing will not prejudice the Objector/Respondent if anything it will reaffirm his claim as the only son of the Deceased and settle the dispute herein with finality."***

28. I fully reiterate the foregoing in this matter. The truth will not only set the parties free, but will enable the Court render justice to all with absolute fairness. The only way to uncover the truth and separate fiction from fact is through DNA profiling. The 1st respondent stated in her affidavit that, instead of exhumation, there are available children of the deceased from whom DNA comparison can be obtained instead of disturbing the deceased.

29. It was contended that the children of the deceased should not be compelled to submit the samples against their free will. That it will amount to invading their right to privacy.

30. I am in agreement with the 1st respondent that before disturbing the deceased, who probably expects that his family should do all that is necessary to preserve his peace until the day of his resurrection, all the available options should be exhausted first.

31. I am alive that the right to privacy is protected under ***Article 31 of the Constitution***. However, in the present case, the applicant is categorical that he was sired by the deceased. That he lived with and grew in the family of the deceased. His biological mother has supported him on that front. Two of the children of the deceased **KM and RMM** have sworn affidavits vehemently denying that fact.

32. It is in the best interest for the beneficiaries of the deceased that a stranger is not included in the distribution of the estate of their late father. It is for this reason that my view is that a DNA comparison be undertaken between the children of the deceased and the applicant.

33. Accordingly, I allow the application in the following terms: -

a) An order hereby issues that a sibling Deoxyribonucleic Acid (DNA) test be undertaken with the view of ascertaining the paternity of the application.

b) That samples be taken from the applicant and **KM and RMM,** the children of the deceased**,** for purposes of comparison and

establishing the paternity of the applicant.

c) That the said test and analysis be undertaken by a government pathologist in conjunction with independent private Pathologists appointed by the applicant and the aforesaid **KM and RMM.**

d) The said exercise be undertaken within 45 days of the date hereof and the report(s) be filed with the Court on or before the next hearing date.

e) The costs of the DNA tests to be shared equally between the estate and the applicant on a 50:50 basis.

f) The costs of the application be in the cause.

DATED and DELIVERED at Meru this 5th day of December, 2019.

A. MABEYA

JUDGE