



**In re WTM (Child) (Children Miscellaneous Application  
E006 of 2024) [2024] KEHC 10281 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 10281 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CHILDREN MISCELLANEOUS APPLICATION E006 OF 2024**

**AK NDUNG’U, J**

**JULY 26, 2024**

**IN THE MATTER OF REMOVAL/RECTIFICATION OF PARTICULARS IN  
THE BIRTH CERTIFICATE OF WAYLEN THEURI MACHARIA (CHILD)**

**AND**

**IN THE MATTER OF REGISTRAR OF BIRTHS AND  
DEATHS DIRECTOR OF CIVIL REGISTRATION**

**BETWEEN**

**MNM ..... APPLICANT**

**AND**

**REGISTRAR OF BIRTHS AND DEATHS LAIKIPIA WEST  
DISTRICT ..... 1<sup>ST</sup> INTERESTED PARTY**

**DIRECTOR OF CIVIL REGISTRATION ..... 2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. The court has been moved through a Notice of Motion dated 25<sup>th</sup> July, 2024 and filed in court on 26<sup>th</sup> July, 2024 in which the Applicant seeks the following orders;
  1. That the application herein be certified as urgent and the same be heard on priority basis.
  2. That the honourable court be pleased to review and set aside its judgment delivered on the 25<sup>th</sup> July, 2024.
  3. That the Originating Summons dated 29<sup>th</sup> April, 2024 be allowed in terms of the consent dated 25<sup>th</sup> July, 2024 executed by M/S Waichungo Martin & Co. Advocates and one PAT
  4. That the honourable court be pleased to grant any other or further reliefs as may deem fit so just to grant.



2. The application is supported by the affidavits of Waichungo Martin and PAT and based on the following grounds interalia;
  1. That on the 25<sup>th</sup> July, 2024 the honourable court dismissed the Originating Summons dated 29<sup>th</sup> April, 2024 which essentially sought for removal of PAT as the father of the subject.
  2. That on communicating the outcome of the suit to the Applicant, it emerged that PAT was indeed in Kenya for a visit and was scheduled to leave the country on 4<sup>th</sup> August, 2024.
  3. That the said PAT has consented to his name being removed from the birth certificate of the subject Waylen Theuri Macharia.
  4. That it is therefore fair and just and for the best interest of the subject for the suit to be determined as per the consent.
  5. That the Applicant has abandoned other prayers in the Originating Summons dated 29<sup>th</sup> April, 2024.
  6. That PAT is ready and willing to attend court before he leaves the county or to attend virtually to confirm the terms of the consent.
3. It is further stated in the supporting affidavit of PAT that:
  1. The Applicant MNM the mother of Waylen Theuri Macharia is no longer his wife and the child was conceived and born after the dissolution of our marriage.
  2. That his name was nevertheless included in the birth certificate of Waylen Theuri Macharia as the father and this was pursuant to Section 118 of the Evidence Act Laws of Kenya although he is not the biological father of the child.
  3. The biological father of Waylen Theuri Macharia is one James Macharia Theuri a fact which has been confirmed through DNA testing.
  4. That he has no objection to his name being removed from the birth certificate of Waylen Theuri Macharia.
4. Further in a consent dated 25<sup>th</sup> July, 2024 it is stated that the judgment delivered on the 25<sup>th</sup> July, 2024 be set aside/reviewed on the terms that the Registrar of Births and Deaths – Laikipia West District and the Director of Civil Registration be ordered to remove the name of PAT from the birth certificate of Waylen Theuri Macharia.
5. Section 80 of the Civil Procedure Act provides as follows:-
  80. Any person who considers himself aggrieved-
    - (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
    - (b) by a decree or order from which no appeal is allowed by this Act, May apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
6. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows:-
  45.
    - 1 (1) Any person considering himself aggrieved-



- (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.”

7. A clear reading of the above provisions shows that section 80 gives the power of review while Order 45 sets out the rules. The rules restrict the grounds for review. They lay down the jurisdiction and scope of review. They limit review to the following grounds:-

46.

- a) Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
- b) On account of some mistake or error apparent on the face of the record, or
- c) For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

8. In its ruling dated 25<sup>th</sup> July 2024, this court stated;

“To begin with, it is not clear how the Applicant bore a child with an African male named James Macharia Theuri on 15<sup>th</sup> July 2022 and proceeded to include the name of Ake Tilander as the father yet, in his purported letter marked “MNM3” annexed to the applicant’s affidavit, the two had not met since 6<sup>th</sup> September 2020. What was the motive on the part of the applicant? Wasn’t the Applicant’s giving out the name of Tilander as the father fraudulent in the first place? Whereas a child born in wedlock would be presumed to be sired by the husband, the circumstances in this case would require further inquiry.

This becomes important since neither the now revealed ‘biological’ father nor the former husband to the Applicant has sworn an affidavit to ascertain the facts. The DNA results tendered are not certified and therefore the probative value is not only diminished but is reduced to zero. Further, a children officer’s report would have been a suitable tool to verify the facts surrounding this matter. None was procured and/or presented”.

9. In essence, the court’s concern was that PAT’s position on the matter of removal of his name from the birth certificate of the minor was not ascertained since he had not sworn an affidavit on the matter and the letter exhibited purportedly as his consent to the removal of his name was a copy that had not been authenticated.

10. Tilander has since filed an affidavit in which he confirms that MNM, the Applicant and the mother of Waylen Theuri Macharia is no longer his wife and the child was conceived and born after the dissolution of their marriage.



11. That his name was nevertheless included in the birth certificate of Waylen Theuri Macharia as the father and this was pursuant to Section 118 of the *Evidence Act* Laws of Kenya although he is not the biological father of the child and that the biological father of Waylen Theuri Macharia is one James Macharia Theuri who has sworn an affidavit confirming this fact and giving his consent to the inclusion of his name in the birth certificate of the minor.
12. Further, Tilander confirms that he has no objection to his name being removed from the birth certificate of Waylen Theuri Macharia.
13. He has further executed a consent dated 25<sup>th</sup> July, 2024 executed by M/S Waichungo Martin & Co. Advocates and one PAT agreeing to removal of his name.
14. While the court appreciates that there is no discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by her at the time when the decree was passed or the order made and neither is there some mistake or error apparent on the face of the record, am persuaded that there is sufficient reason advanced for review. I would understand the initial reluctance of Tilander in offering this evidence earlier taking judicial notice of the emotional toll and acrimony associated with spouses who are parting ways.
15. Taking into account the principle of the best interest of the minor herein, the order for review sought is merited. The *Constitution* ring fences best interest of a child in the following terms;

Article 53 (1) (a) every child has the right to a name and nationality from birth; and under Article 53 (2), a child’s best interests are of paramount importance in every matter concerning the child.
16. PAT having confirmed he is not the biological father of the minor and his desire to have his name removed from the birth certificate of the minor, it is in the minor’s best interest to have the name of Tilander removed from his birth certificate. I fall back on my finding in the ruling dated 25<sup>th</sup> July 2024 where this court stated;

“To my mind, the minor will in the fullness of time grow and become aware of the circumstances surrounding his birth and the paternity issue. He deserves to know the truth. He has a right to know his biological father and be certain of his nationality.

I am fortified in this finding by the persuasive decision in *F K K & Another v Attorney General & 2 Others* [2015] where the court in similar circumstances like this one arrived at the same reasoning. In that case, F. K. K., the mother of the child registered the birth of her child and gave the name of the 2<sup>nd</sup> Applicant K L M as the father believing this was the case. A DNA test results revealed that this was not the case. Both brought an application to have the name of K L M deleted and removed as the father in the Birth Certificate of the child. The court allowed deletion of the name stating that it is in the best interest of the child”
17. From the foregoing and for reasons above stated, am satisfied that sufficient reason abounds for the review of the ruling of this court dated 25<sup>th</sup> July 2024. In addition to there being a sufficient reason, the application has been lodged timeously without delay. I set aside the ruling and allow the present application. I make the following orders;
  - a. The Ruling delivered on the 25<sup>th</sup> July, 2024 is hereby set aside



- b. The Originating Summons dated 29<sup>th</sup> April, 2024 be and is hereby allowed in terms of the consent dated 25<sup>th</sup> July, 2024 executed by M/S Waichungo Martin & Co. Advocates and one PAT.
- c. There be no order as to costs.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 26<sup>TH</sup> DAY OF JULY, 2024**

**A.K. NDUNG’U**

**JUDGE**

