



**DKK v DOA & another (Family Miscellaneous Application
E036 of 2023) [2023] KEHC 26400 (KLR) (29 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 26400 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY MISCELLANEOUS APPLICATION E036 OF 2023**

G MUTAI, J

NOVEMBER 29, 2023

BETWEEN

DKK APPLICANT

AND

DOA 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

The misconduct of a child’s parents by failing to disclose critical information and previously misrepresenting facts in a birth certificate application should not be visited on the innocent child.

The applicant sought an order to remove the name of the 1st respondent, DOA, from her child’s birth certificate, asserting that he was not the biological father. The request followed a series of prior amendments to the child’s registration details. Despite DOA’s support for the application, the 2nd respondent, the Registrar of Births and Deaths, opposed it, arguing that the applicant failed to disclose critical information and had previously misrepresented facts. The court, acknowledging the applicant’s lack of candor but prioritizing the child’s best interests, reluctantly granted the application to amend the birth certificate while condemning the applicant’s and DOA’s earlier conduct. Each party was ordered to bear their own costs

Reported by John Ribia

Children Law – rights of the child – birth certificate – amendment of a birth certificate – procedure – whether the court could order the deletion of a father’s name from a child’s birth certificate when the mother, after registering the father as the child’s parent based on an anticipated marriage, later sought to amend the registration due to a subsequent breakdown in their relationship and the absence of a biological connection between the father and the child - whether the failure of a parent to disclose previous amendments to a child’s birth registration, coupled with the provision of false information under oath, affects the court’s discretion in granting an application to alter the child’s birth certificate - Constitution of Kenya, 2010 article 53(1) and (2); Legitimacy Act (cap 145) section 3(3); Children Act (cap 141) section 8(1) and (2)



Brief facts

The applicant, a mother seeking to amend her child's birth certificate, filed an application to remove the name of the 1st respondent, who was not the child's biological father but was registered as such following the applicant's expectation of marriage. The applicant had previously made multiple changes to the child's registration details, and despite support from the 1st respondent, the application was opposed by the 2nd respondent, citing the applicant's failure to disclose material facts and concerns about the integrity of the registration process.

Issues

- i. Whether the court could order the deletion of a father's name from a child's birth certificate when the mother, after registering the father as the child's parent based on an anticipated marriage, later sought to amend the registration due to a subsequent breakdown in their relationship and the absence of a biological connection between the father and the child.
- ii. Whether the failure of a parent to disclose previous amendments to a child's birth registration, coupled with the provision of false information under oath, affects the court's discretion in granting an application to alter the child's birth certificate.

Held

1. It was not the first or the second time the applicant sought to change the name of the child. The child was initially registered as IMA in the first registration, the name of the father was left blank. Registration was done on the basis of the information availed to the Registrar by the parent. The second registration was done under the Legitimacy Act. In the second birth certificate, the name of the child was changed to IM. The 1st respondent was added as the father of the child. The applicant and the 1st respondent asserted that the latter was the biological father of the child, something that they denied in the instant application.
2. In her application the applicant failed to disclose that she had obtained the first birth certificate. The lack of candour was most upsetting. Litigants must provide all the material information, whether or not it favoured the case they were making.
3. The applicant explained that she made numerous applications in the best interest of her child. It was difficult to know if, she was telling the truth, given the low regard she had for the truth. However, she appeared remorseful. The application was being made so that the child could get travel documents. Improvement of the child's chances in life was in IM's best interest
4. Retaining the registration details was not justified in light of the vehement denials by the 1st respondent and the applicant. It was advisable to amend the details. If it turned out in due course that the applicant and the 1st respondent lied under oath, they may be prosecuted for perjury.
5. The court condemned the actions of the applicant and the 1st respondent. They both lied under oath and misled government officials. However, their misconduct should not be visited on the innocent child. The child deserved to have the correct details of her paternity in her registration documents.

Application allowed.

Orders

- i. *The Registrar of Births and Deaths was ordered, through the 2nd respondent, to delete the name of the 1st respondent, DOA, as the father of IM in the birth certificate number xxxxx and the said IM be issued with a new birth certificate.*

Citations

Statutes

1. Children Act (cap 141) — section 8(1); 8(2) — Interpreted
2. Constitution of Kenya, 2010 — article 53(1); 53(2) — Interpreted
3. Legitimacy Act (cap 145) — section 3(3) — Interpreted



Advocates

Ms. Gichira for Applicant

RULING

1. The Applicant is the mother of a child, IM. The name of the father of the child in the birth certificate No. xxxx is given as DOA, the 1st Respondent herein. The Applicant avers that the 1st Respondent is not the child's biological father and seeks to have his name deleted. Her attempt to have the said details amended by the Registrar of Birth and Deaths and by the Immigration & Registration of Persons Department hasn't been successful, as the said Department is aware that the proposed change would be the 3rd time the child's registration details are being changed.
2. The Applicant thus filed the instant cause. *Vide* a Notice of Motion dated 22nd September 2023, she sought the following orders:-
 1. Spent;
 2. This honourable Court be pleased to order the Registrar of Births and Deaths through the 2nd Respondent to delete the name of the 1st Respondent as the father in the birth certificate number xxxx of the child, IM;
 3. This honourable Court be pleased to grant such orders as it deems fit and just; and
 4. Costs of this application be provided for.
3. In the grounds in support of the application and the supporting affidavit sworn on 22nd September 2023, Ms. Kubai averred that she is the child's biological mother. The 1st Respondent isn't her father, is separated from the Applicant and has his own family. She seeks to remove his name from the birth certificate. The 1st Respondent isn't opposed to the application. She deposed that she broke up with the biological parent of the child while still pregnant with her and met the 1st Respondent, who then became her lover. Upon the child's birth, the 1st Applicant applied for and was issued birth certificate No. xxxx, in which the 1st Respondent is indicated as being Baby IM's father. The Applicant avers that she registered the 1st Respondent as the father of the child in the expectation that they would get married and that he would be the father figure to her daughter. This was not to be as the Applicant and the 1st Respondent broke up. The 1st Respondent now has another family.
4. The Applicant urgently needs a passport and "would desire it to reflect the correct name of the child, and all the documents need to be aligned to have the correct name that reflects the child's true identity".
5. The 1st Respondent supports the application. Although he did not file a supporting Affidavit, he appeared before this honourable Court on 18th October 2023 and testified in support of the Applicant's application. In a nutshell, his evidence is that he is not the child's biological father. He testified that he was registered as IM's father, as he then played the role of a father. As he was no longer in a relationship with the Applicant, and pursuant to her request, he desired to have his name removed as the father of the child. When cross-examined, he indicated that where the paternity of a child is contested, the mother ought to be trusted.
6. The application was opposed by the 2nd Respondent. *Vide* Grounds of Opposition dated 2nd October 2023. The 2nd Respondent argued that the Applicant hadn't been candid in her application and failed to disclose material information. It was urged that it was incumbent on the Applicant to show that the 1st Respondent wasn't the child's biological father. For that reason the 2nd Respondent prayed that the



application be dismissed with costs for being an abuse of the process of Court. The 2nd Respondent filed a Replying Affidavit of Judith Emily Auma sworn on 17th October 2023. In the said affidavit, the deponent stated that the child was initially registered as IMA on 3rd March 2016. In the first birth certificate (No.xxxx), no details of the father were given.

7. Subsequently, the Applicant applied for re-registration under Section 3(3) of the *Legitimacy Act*. the application was supported by a similar application by the 1st Respondent. The Applicant and the 1st Respondent swore a joint affidavit dated 19th August 2019 indicating that they got married on 9th March 2019 at Kangeta Location, Meru county under the customary laws of the Meru people. Pursuant to the foregoing the minor was issued with a new birth certificate (No.xxxx) which the Applicant now seeks to change. Given the circumstances, it was urged that the application lacks merit, having been made by a party who approached the Court with unclean hands. It was thus prayed that I dismiss the application with costs.
8. Judith Emily Auma, the Principal Civil Registration Officer, in the Civil Registration Department of the Ministry of Interior and Coordination of the National Government, testified on behalf of the 2nd Respondent. In addition to what she stated in her affidavit, she testified that given the circumstances of this case, one could not be sure who the biological father of the child was. In the circumstances, she stated, it would be necessary to subject the 1st Respondent to a DNA test so as to establish the truth.
9. The Applicant and the 2nd Respondent filed Written Submissions for and against the application. I have considered the same and must now make my determination. In my view, the issue that calls for my determination is whether, given the previous conduct of the Applicant, the orders she seeks should be issued. To do so, I must look at the *Constitution* of Kenya, 2010 and also at the applicable law.
10. Article 53(1) & (2) of the *Constitution* of Kenya, 2010 provides that: -
 - “(1) Every child has the right—
 - (a) to a name and nationality from birth;
 - (b) to free and compulsory basic education;
 - (c) to basic nutrition, shelter and health care;
 - (d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;
 - (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and
 - (f) not to be detained, except as a measure of last resort, and when detained, to be held—
 - (i) for the shortest appropriate period of time; and
 - (ii) separate from adults and in conditions that take account of the child’s sex and age.
 - (2) A child’s best interests are of paramount importance in every matter concerning the child.



11. Section 8(1) and (2) of the *Children Act, 2022* provides that: -

- “(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—
- (a) the best interests of the child shall be the primary consideration;
 - (b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.
- (2) All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—
- (a) safeguard and promote the rights and welfare of the child;
 - (b) conserve and promote the welfare of the child; and
 - (c) secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.”

12. It is clear from the evidence before me that this is not the first or the second time the Applicant seeks to change the name of the child. The child was initially registered as IMA In the first registration, the name of the father was left blank. Registration is done on the basis of the information availed to the Registrar by the parent.
13. The second registration was done under the *Legitimacy Act*. In the second birth certificate, the name of the child was changed to IM. The 1st Respondent was added as the father of the child. I note that the application for registration under the said Act was supported by 3 affidavits, one each by the Applicant and the 1st Respondent, as well as by a joint affidavit. In these affidavits, the Applicant and the 1st Respondent asserted that the latter was the biological father of the child, something that they now deny.
14. In her application the Applicant failed to disclose that she had obtained the 1st birth certificate. I find this lack of candour most upsetting. Litigants must provide all the material information, whether or not it favours the case they are making.
15. The Applicant explained that she made numerous applications in the best interest of her child. It is difficult to know if, in this instance, she is telling the truth, given the low regard she has for the truth. I however had the opportunity of observing her during the hearing. She appeared remorseful. In any case the application is being made so that the child can get travel documents. Improvement of the child’s chances in life is in IM’s best interest
16. I do not think that retaining the current registration details is justified in light of the vehement denials by the 1st Respondent and the Applicant. It is advisable, in my view, to amend the details. If it turns out in due course that the Applicant and the 1st Respondent lied under oath, they may be prosecuted for perjury.
17. The upshot of the foregoing is that I allow the application reluctantly in the interest of justice. While doing so, I condemn the actions of the Applicant and the 1st Respondent. They both lied under oath and misled government officials. I should hope that they will reflect on their conduct and mend their



ways. I am, however, not persuaded that their misconduct should be visited on the innocent child. The said child deserves to have the correct details of her paternity in her registration documents.

18. I therefore order the Registrar of Births and Deaths, through the 2nd Respondent to delete the name of the 1st Respondent, DOA, as the father of IM in the birth certificate number xxxx and the said IM be issued with a new birth certificate.
19. This being a family matter, each party shall bear own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED THIS 29TH DAY OF NOVEMBER 2023 AT MOMBASA VIA MICROSOFT TEAMS

GREGORY MUTAI

JUDGE

In the presence of: -

Ms. Gichira, for the Applicant;

No appearance for the 1st Respondent;

No appearance for the 2nd Respondent; and

Arthur – Court Assistant.

