



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

MISCELLANEOUS APPLICATION NO. 104 OF 2017

IN THE MATTER OF BABY LWW (CHILD)

AND

IN THE MATTER OF AN APPLICATION BY:

RMW.....1ST APPLICANT

MAEW.....2ND APPLICANT

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

THE DIRECTOR OF IMMIGRATION & REGISTRATION

OF PERSONS.....2ND RESPONDENT

THE REGISTRAR OF BIRTHS & DEATHS.....3RD RESPONDENT

RULING

Case for the Applicants

1. This matter concerns Baby LWW. It was instituted by way of a Notice of Motion dated 31st July 2017. It brought by the two applicants. It is anchored on Article 53 of the Constitution of Kenya 2010; Section 3A of the Civil Procedure Act Chapter 21 Laws of Kenya; Sections 4 and 11 of the Children Act, No. 8 of 2001; Section 12 of the Births and Deaths Registration Act, Chapter 149 of the Laws of Kenya and all other enabling provisions of the law.

2. The Application seeks the following orders:

(a) That the 2nd Applicant's name be deleted and/or removed as the father from the Birth Notification of the Child herein dated 12th February, 2017 and obtained from (name of place withheld).

(b) That the 2nd Applicant's name be deleted and/or removed as the father of the Child from the Birth Certificate which has since been processed by the Civil Registry Department of Births and Deaths at (name of place withheld).

(c) That the 3rd Respondent be ordered to remove and/or delete the 2nd Applicant's name from the Births Certificate of the Child.

(d) That each party to bear their own costs.

3. The application is supported by the affidavits of the 1st Applicant and the 2nd Applicant both sworn on the 31st July 2017.

4. The 1st Applicant is a Kenya citizen while the 2nd Applicant holds a Germany Passport No. [.....] (a copy of the same is attached to these pleadings).

5. The 1st Applicant deposes in her affidavit that she met the 2nd Respondent in 2016 when he was part of a volunteer programme that commenced in September 2015 and ended in August 2016. They became intimate and she became pregnant. She informed the 2nd Applicant of the pregnancy at a time when he was remaining two weeks before he left the country for Germany upon completion of the volunteer programme.

6. The 2nd Applicant planned to return to Kenya in January 2017 on a tourist visa. He was present during the birth of the Child on 21st February 2017 at (name of place withheld). The birth of the child was recorded in the Register of Births and an acknowledgement of Birth Notification Serial Number [.....] was issued. The 2nd Applicant was of the view that both applicants take a paternity test for purposes of identification of the child and commencement of the process of obtaining German citizenship for the Child (A copy of the Birth Notification is attached to these pleadings).

7. That a DNA test was conducted at the Government Chemist on 6th March, 2017. It was confirmed through the DNA test results that the 2nd Applicant is not the biological father of the child. This was communicated through a letter dated 4th April 2017 signed by the Government Analyst J. K. Mungai (copy attached to these pleadings).

8. The applicants sought to know from the Civil Registration Department at (name of place withheld) whether the Birth Certificate had been processed. They were informed that indeed it had been processed and was only awaiting collection. It became necessary to seek a court order to have the 2nd Applicant's name removed or deleted as the father of the child from the Birth Notification and the Birth Certificate following DNA test results.

9. The 2nd Applicant has confirmed these facts as deposed to by the 1st Applicant are true.

Case for the Respondents

10. I response to the application, Shumary Malleon, a Principal Civil Registration Officer in Civil Registration Services at the Ministry of Interior and Coordination of National Government filed a Replying Affidavit sworn on 3rd October 2017. In that affidavit it is deposed that the a birth certificate is an extract from the Births and Deaths Register which is completed on the basis of information by the person giving the notification of the birth. It is deposed that the mother and the father of a child are the persons obligated to give that notification and that no person is entered in the register as the father of the child except upon request of that person or the mother of the child.

11. The Replying Affidavit further states that the information entered in the birth register is supplied to the registration agents by one or both of the parents and that the name of the 2nd Applicant was entered in the register after having been satisfied that the information given was correct; that the provisions of Births and Deaths Registration Act has been complied with in entering the name of the 2nd Applicant in the register.

Applicants' Submissions

12. This court directed that parties file written submissions. The Applicants have filed their submissions dated 7th March 2018. They have identified one issue for determination, to wit: whether it is in the best interest of the child to retain the 2nd Applicant's name as "father" in the Births Notification and Birth Certificate. To this issue it is submitted that the law from Article 53 of the Constitution of Kenya 2010, Section 4(2) of the Children's Act (No. 8 of 2001), Article 3 of the UN Convention on the Rights of the Child and Article 4 of the African Charter on the Rights and Welfare of the Child consider the best interest of the child to be of the paramount importance.

13. They submitted that they do not contest in any way the right of the child to have knowledge of his biological parents as espoused and the right of the child to a name and nationality. They however contest the assertion that retaining the 2nd Applicant's name on the Notification of Birth and Birth Certificate would be in the best interest of the child. The Applicants referred this court to **N. M. M vs J O W (2016) eKLR** on this issue.

14. They submitted that the child's right to parentage and legitimacy of the names on the birth certificate must be resolved. They submitted that the right of the child to bear a name and the right to know his biological parents stems from Articles 7 and 8 of the UN Charter on the Rights of the Child. They argue that this right is coupled with the right to access information which information must be accurate. They submitted that the child herein has a right to know the identity of his biological parents and that the Birth Certificate herein mis-identifies the child's father, thereby threatening access to accurate information about the child.

15. It was submitted that the Applicants are entitled under Section 13 of the Access to Information Act to have incorrect or inaccurate information about them corrected and/or deleted from public records in a bid to avoid misleading the child and others as to who the father of the child is.

16. They submitted that the best interest of the child applies to every decision that affects the child and that this includes matters touching on the child's birth registration documents including a Birth Certificate that informs on the parentage in Kenya, date of birth, identity of parents, gender of the child and the place where the birth occurred.

17. It was submitted that the 1st Applicant was under an honest belief and with consent from the 2nd Applicant bearing a similar belief caused to be inserted the name of the 2nd Applicant as the father of the child only to be discovered through a DNA test that the 2nd Applicant was

not the biological father. The Applicants cited **F. K. K & Another vs. Attorney General & 2 others [2015] eKLR** where the court (Ougo, J) was of the view that the right to a name and nationality includes the right to a correct identity and argued that even with the removal of the name of the 2nd Applicant from the birth documents, the child is not deprived of his identity.

18. They submitted that the best interests of the child are achieved through clearing up disputes about the child's identity or true genetic origins through scientific means; that a DNA test was done in this case and the same revealed that the 2nd Applicant is not the biological father of the child.

Respondents' Submissions

19. The Respondents, represented by Consolata Ogola on behalf of the Attorney General, files their submissions dated 17th February 2018. The submissions raise two issues, namely that (i) It is not in the best interest of the child to delete the name of the 2nd Applicant from the Birth Certificate and (ii) The 2nd and 3rd Respondents could not delete the name of the 2nd Applicant from the Birth Certificate because the Applicants had not yet obtained a court order compelling them to alter the register.

20. The Respondents cited the law under Article 53 of the Constitution of Kenya 2010 and Section 4 of the Children's Act to stress the point that the best interests of the child is of paramount importance in every matter concerning the child. They also cited the case of **FKK & Another vs Attorney General & 2 Others [2015] eKLR** where the court in arriving at the decision to have the name of the father deleted from the child's birth certificate noted that in arriving at the decision as to whether to order for the deletion of the name of the father from the child's birth certificate the court must satisfy itself that the best interest of the child was protected.

21. The Respondents have distinguished this case with the authority cited above in that in the case before the court the 2nd Applicant contributed significantly to the well-being of the child by being present when the child was born and was willing to provide financial support to the child and therefore to delete his name would relieve him from any parental responsibilities over the child and hence deprive the child of financial support and basic needs. It is further submitted that the 1st Applicant cannot identify the father of the child with certainty thereby violating the child's right to identity and parental care as provided in Article 53 of the Constitution.

22. The Respondents argue that the court can order for removal or deletion of the name after satisfying itself that the Applicants have provided sufficient reasons to necessitate this change that will affect the child and secondly that the court has the responsibility to determine that any orders given meet the best interests of the child. They pray that this Application be dismissed.

Analysis and Determination

23. I have analysed the Application and the Response filed herein. The case for the Applicants is understood easily as one seeking to have the name of the 2nd Applicant removed or deleted from the Notification of Births and from the Birth Certificate in respect of Baby LWW. The Applicants who are the biological mother of Baby LWW and a friend met in 2016 when the 2nd Applicant was on a Volunteers Mission in Kenya. They became intimate. During the time of their intimacy the 1st Applicant became pregnant. It was her belief that the 2nd Applicant was the father of her unborn child. She informed him. He believed he was the father of the child. His volunteer programme ended and it became necessary that he travels back to Germany with a promise to return for the birth of their baby. He did return on tourist visa and was present during the birth of the baby on 21st February 2017. The birth was notified to the Registrar of Births and Deaths and was registered as evidenced by Acknowledgement of Birth Notification Serial No.[.....]. The name of the 2nd Applicant was entered in the Notification as the father of the baby.

24. Out of necessity to process documents for the identification of the baby and documentation in respect of obtaining German citizenship for the baby, as deponed to by the 1st Applicant, a paternity test was required. Both Applicants and the baby went to the Government Chemist where DNA samples were taken and tested with the result that the 2nd Applicant was not the biological father of Baby LWW.

25. This issue is conceded to by both Applicants and both are desirous to have the name of the 2nd Applicant removed or deleted from the Birth Notification document and the Birth Certificate. Although the Birth Certificate has not been obtained, this court has been informed through these pleadings that it is ready for collection. There is no evidence to the contrary.

26. The law guards the rights of a child jealously. To my mind this is because children are vulnerable members of our society and although they have parents, it is paramount that the law lends its hand in protecting them to ensure that they can enjoy the rights granted to them by the law. Starting with the Constitution of Kenya 2010 and the relevant statutes thereunder as well as the international instruments, it is evident that there is a common thread running through all these pieces of legal instruments to the effect that the best interests of the child is of paramount importance. Article 53 (1) (a) of the Constitution of Kenya 2010 provides that **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**.

27. This legal requirement to give paramountcy to the best interest of the child in all actions concerning the child is repeated in Section 4 (2) and (3) of the Children's Act (No. 8 of 2001) which provides that:

(2) 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.

(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act 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;

(c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.

28. The same legal requirements are found under Article 4 of the African Charter on the Rights and Welfare of the Child and Article 3 of the United Nations Convention on the Rights of the Child.

29. What are the best interests of the child? To answer this question it is my view that the best interests of the child includes but is not limited to the following:

- a. Right to a name.
- b. Right to nationality.
- c. Right to identity.
- d. Right to parental care.
- e. Peaceful and comfortable environment.
- f. Protection from harm and harmful practices.
- g. Right to food and shelter.
- h. Right to religion or cultural considerations.
- i. Acceptance by family and community.
- j. To be loved
- k. Recreation
- l. Education and proper guidance, etc.

30. When a child is born, either one or both of the parents are present. It is the two parents or the one parent or any other person acting on behalf of the parent(s) who are obligated by the law to notify the authorities about the birth of that child. Throughout the Republic of Kenya there are registration centres and registrars appointed to receive and register births and deaths in a register of births and deaths. A person giving notification provides the registrar with the name of the child; date of birth; gender of the child; nature of birth (whether born alive or otherwise); place of birth and names of the parent or parents of the child. This information becomes useful later in obtaining the birth certificate of the child.

31. In this matter the information contained in the Birth Notification dated 22nd February 2017 contains the names of the 1st Applicant as the mother and the 2nd Applicant as the father of baby LWW. It is this fact that leads the Respondent to content that the Applicants provided the information recorded on the register and that it is this information that was used to process the Birth Certificate and therefore in bringing this application, the 2nd Applicant is trying to avoid his responsibilities as the father. The Respondents are relying on Section 10 of the Births and Deaths Registration Act (Chapter 149 Laws of Kenya) to support their case that the information provided by the notifying person must have been certified as regards its correctness by the person giving the notification and as such it binds Applicants.

32. I have noted that the Applicants are in agreement that removing or deleting the name of the 2nd Applicant from the Notification and Birth Certificate is the best cause of action since the 2nd Applicant is not the biological father of Baby LWW.

33. I have considered this matter. I have noted that it is the desire of both Applicants to have the prayers they are seeking granted. As the law dictates, it is not their interests this court is looking at in determining this matter. It is the best interest of the child that is of concern to this court. But I ask myself this question: Is it in the best interest of the child to impose the name of the 2nd Applicant who is not the child's biological father and who is not willing to be named as a father to Baby LWW on the child? The mother, the 1st Applicant supports the 2nd Applicant in seeking these orders. The DNA test results was conclusive evidence on paternity that tilted the balance in favour of the Applicants.

34. To my mind, Baby LWW will 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. He has a right to a father whether biological or foster. But that father must be willing to be a father to him for his normal and conducive upbringing. In my considered opinion I do not think that imposing the name of a man who is not the biological father of the child and who is not willing to play the role of a father of the child is in the best interest of the child. Notification of his birth has already been given under the mistaken belief of the Applicants that the 2nd Applicant is the biological father. This is not the case. I note that the child bears the name "W" as his middle name. This is the name the 1st Applicant has used as her

surname. By removing the name of the 2nd Applicant as the surname of Baby LWW the child remains with two (2) names LW. I agree with the submissions of the Applicants that the right to a name and nationality includes the right to a correct identity and their argument that even with the removal of the name of the 2nd Applicant from the birth documents, the child is not deprived of his identity. In my view his two names will suffice. Better still, if need be his name can be changed through a deed poll to include a surname of a father who is willing to be a father to him.

35. In **Re R (a Child) (Surname: Using Both Parents’)** the court was dealing with a case where the issue was the surname of the child. The mother has separated with the biological father of the child and had changed the surname of the child without consulting the father. Lady Justice Hale, while arguing *inter alia* that the choice of a surname is a matter of parental responsibility, stated as follows:

“The crucial point, however, is that it is important for a child for there to be transparency about his parentage and for it to be acknowledged that a child always has two parents; and if it turns out (as it often does) that children have both social parents and birth parents, it is important that that fact too is acknowledged. It can be even more important in cases where there is a risk of links fading or becoming less strong as the years go on, because in the future it can prompt a child to wish to re-establish links which have become weaker or have even disappeared.”

36. I agree with the Applicants that a child has a right to know about his parentage as stated in the **Re R (a Child) case** above. Baby LWW has a right to know about his parentage and it is in his best interest. But the information about his parentage must be the correct information. In my view having two names is not a violation of his rights and it is not contrary to the best interest of Baby LWW.

37. I have also considered the decision of **F K K & Another vs. Attorney General & 2 Others [2015]** where the court was dealing with similar circumstances like this one. F K K, the mother of the child in that case registered the birth of her child and gave the name of the 2nd 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. I am persuaded by that decision.

38. I have considered the facts of this matter, the relevant law and the cited authorities. The Respondents don’t seem to have a strong case in my view. Other than stating that it is not in the best interest of the child to delete the name of the 2nd Applicant from the Birth Certificate, the Respondents have not given concrete reasons why this would be the case. It is true that the Applicants gave the information on the birth of the child to the registrar of births but they acted on the mistaken belief that the 2nd Applicant was the biological father. They sought to rectify that immediately they learned that he was not. Both Applicants are in agreement on this one.

39. In conclusion, I am satisfied that it would be in the best interest of the child to remove/delete the name of the 2nd Applicant from the Birth Notification and Birth Certificate in respect to Baby LWW. I therefore allow the Notice of Motion dated 31st July 2017 and grant the following orders against the Respondents:

1. That the 2nd Applicant’s name be deleted and/or removed as the father of the Child herein from the Birth Notification of the Child herein dated 21st February 2017 and obtained from (name of the Health Facility withheld).
2. That the 2nd Applicant’s name be deleted and/or removed as the father of the Child herein from the Birth Certificate which has since been processed by the Civil Registry Department of Births and Deaths in (name of the place withheld) and is pending collection.
3. That the 3rd Respondent be and is hereby ordered to remove and/or delete the 2nd Applicant’s name from the Birth Certificate of the Child herein.
4. That each party to bear their own costs.

40. Orders to issue accordingly.

41. Dated, signed and delivered this 22nd April 2021.

S. N. MUTUKU

JUDGE

Authorities cited

1. **NMM vs JOW [2016] eKLR**
2. **FKK & Another vs Attorney General & 2 Others**
3. **Re H (a minor(blood tests: parental rights) [1996] 4 All E R**
4. **Re (a Child) (Surname: Using Both Parents’) [2001] EWCA Civ. 1344**

