



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO E001 OF 2020**

**MMK.....PLAINTIFF**

**VERSUS**

**JCM.....DEFENDANT**

**AND**

**RK.....1<sup>ST</sup> INTERESTED PARTY**

**MCM.....2<sup>ND</sup> INTERESTED PARTY**

**PCM.....3<sup>RD</sup> INTERESTED PARTY**

**JUDGMENT**

1. The plaintiff filed this suit against the defendants seeking the following orders:-

- a. A declaration that there is no limitation on the duration or timeline within which a DNA test can or ought to be done and that the same can be done any time in life.*
- b. A declaration that a serious lingering doubt on biological paternity can only be resolved through DNA testing.*
- c. An order compelling or directing the plaintiff and the interested parties to present themselves at the government chemist in Nairobi within 7 days from the date of the judgment for extraction of samples and DNA sampling/testing.*
- d. That the Defendant and the interested parties do bear the costs of this case with the interest at court rates.*
- e. Any other relief at the Honourable Court would deem fit to grant.*

2. The plaintiff stated that he has filed Divorce Petition No. xx of 2020 and that he has taken care of the interested parties as his children and met all their basic needs including paying for education up to the university level.

3. The defendant filed statement of defence on 29<sup>th</sup> October 2020, denying the averments in the claim. The defendant denies ever being in an extramarital affair, she stated left the matrimonial home due to the emotional and physical abuse by the plaintiff. She denies that plot Ngoro/Ngata Block x/xxx was matrimonial property, she acquired the same for the benefit of the 1<sup>st</sup> interested party. She stated that her utterances in her text message were out of anger and bitterness.

4. The case proceeded for hearing on 28<sup>th</sup> June 2021.

**PLAINTIFF'S EVIDENCE**

5. The plaintiff MM who testified as PW1 testified that he is a retired public servant, and JC is his legally married wife and has lived with her for 29 years and in separation for 4 years and the interested parties are his known children. He stated that his estranged wife deserted the matrimonial home on 31<sup>st</sup> January 2017.

6. The plaintiff informed court that what prompted him to request for DNA test is a text message sent to him by the defendant which stated that the interested parties are not his biological children. He said the text message created doubt in his mind concerning paternity of the

interested parties and said this suit has been filed in utmost good faith intended to clear the lingering doubt as to the paternity of the interested parties.

7. The plaintiff said the interested parties are all adults living on their own and have distanced themselves from him. He testified that he had authorized the defendant to acquire the matrimonial property in her name during the subsistence of the marriage and they built a matrimonial home which they lived in but later, the defendant fraudulently transferred the matrimonial home to the 1<sup>st</sup> interested party who attempted to evict the plaintiff but was estopped by an order of the court in Nakuru Matrimonial Cause x of 2019.

8. He further stated that he seeks to know the relationship between him and the interested parties; paternity of the 3 children and added that he does not know the 1<sup>st</sup> interested party's wife or children.

9. On cross-examination by counsel **Ogange**, he stated that he was not an abusive person and denied that the defendant was undergoing emotional turmoil. He said eviction notice was served upon him by the 1<sup>st</sup> interested party. He stated the defendant was involved in extramarital affairs that led to her deserting the matrimonial home.

#### **DEFENDANT'S CASE**

10. The defendant JC testified as DW1. She testified that confirmed being the plaintiff's wife and stated that she has 3 children with the plaintiff. She further stated that the plaintiff mistreated her in their marriage. She denied having turned away the children from their father and in her opinion, DNA is not necessary as the children belong to the two of them. She said the utterances on the text message were made out of anger.

11. On cross examination, the defendant said the children do not need DNA test as they have been with plaintiff all along as their father and DNA should have been done during their tender years. She further stated that she has no problem with the DNA test being done if the plaintiff will pay for the test.

#### **DEFENDANT AND INTERESTED PARTIES WRITTEN SUBMISSIONS.**

12. The defendant and interested parties submitted that the only issue for determination is on the DNA test and the interested parties are not against who substantive orders may be made are not substantive parties to the suit and cited the case of **Joseph Leboo & 2 others vs. Director Kenya Forest Services & Another (20130) eKLR** the environment and land where the court held that the choice of whom to sue is that of the plaintiff and there may be cogent reasons as to why a litigant has opted not to sue other persons.

13. They submitted that interested parties are not proper parties to the suit and no evidence has been adduced to show that the plaintiff is not the biological father of the interested parties; and the applicant has assumed parental responsibilities over the interested parties of the years of their lives and therefore the outcome of the DNA will have no legal effect.

14. They further submitted that the application is a waste of the judicial time; that the court should spend judicial time addressing real disputes as the plaintiff has not brought a real dispute before the court. Further that DNA testing will be in violation of the right to privacy of the interested parties and cited the case of **S.W. M. vs. G. M.K. (2012) eKLR** the court held as follows:-

***“Ordering the respondent to provide DNA for whatever reason is an intrusion of his rights 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 right”***

15. Plaintiff did not file written submissions but opted to rely on the evidence on record.

#### **ANALYSIS AND DETERMINATION**

16. I have considered evidence adduced and submissions filed herein and find that the issue for determination is whether the plaintiff has made a case for granting of orders sought.

17. **In the case of S.W.M vs. G.M.K [2012] eKLR**, the court 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”.***

18. **Further, in the case of P.M vs. J.K [2010] eKLR**, the court also declined an application for DNA testing on the fact that it was against the principle of self- incrimination.

19. From the foregoing, there is no doubt that before granting orders of DNA testing, the court should be satisfied that there are clear circumstances that warrant the granting of such orders.

20. From evidence adduced herein, reason advanced by plaintiff for requesting DNA test is a text message sent to him by the defendant indicating that the interested parties are not his children. The defendant's explanation for sending the said text is, it was sent out of anger

following mistreatment by the plaintiff.

21. In my view, the defendant may have had valid reason for the statement in the said text, but any reasonable person will question the statement. Such statement cannot be taken lightly despite the circumstances under which it is made. It is the mother who knows the father of her children and when such statement comes from her, it is bound to create doubt in the mind of the person known as the father of a child.

22. A child hearing or knowing of such a statement wish also likely to have questions in his or her mind concerning paternity. In view of the doubt created in the mind of the plaintiff and most likely in the interested parties 'minds, it would be in the interest of justice for all to find closure to the issue of paternity. No prejudice will be occasioned to the defendant as the plaintiff has indicated willingness to meet the costs of the DNA test.

23. From the foregoing, I find that the plaintiff has demonstrated reason to grant orders sought.

**24. FINAL ORDERS**

- 1) DNA test to be done to establish relationship between the plaintiff and interested parties.**
- 2) Cost of DNA test to be borne by the plaintiff.**
- 3) Each party to bear own costs of this suit.**

**JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 21<sup>ST</sup> DAY OF OCTOBER, 2021**

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**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Jenifer - Court Assistant

Mr. Ochang for Applicant

Ms. Ogange for Respondents