



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**FAMILY DIVISION**  
**MISCELLANEOUS APPLICATION NO. 6 OF 2018**  
**IN THE MATTER OF VAA (CHILD)**

AND

**IN THE MATTER OF AN APPLICATION BY:**

MABK.....1<sup>ST</sup> APPLICANT

DJAT.....2<sup>ND</sup> APPLICANT

VERSUS

BAR.....1<sup>ST</sup> RESPONDENT

ATTORNEY GENERAL ON BEHALF OF

REGISTRAR OF BIRTHS & DEATHS,

THE IMMIGRATION & REGISTRATION

OF PERSONS DEPARTMENT.....2<sup>ND</sup> RESPONDENT

**RULING**

1. By an application dated 17.4.18, MABK and DJAT, the Applicants herein seek orders that:

*1. Spent.*

*2. The joint legal custody of the child VAA be granted to both Applicants.*

*3. The actual custody of the child VAA be granted to the 1<sup>st</sup> Applicant.*

*4. This Honourable Court be pleased to order the Registrar of Births & Deaths through the 2<sup>nd</sup> Respondent to delete the name of the 1<sup>st</sup> Respondent as the father in the birth certificate number 01\*\*\*\*\* of the child VAA and replace it with the name of the 2<sup>nd</sup> Applicant.*

*5. After grant of prayer 4 above this Honourable Court be pleased to order the Immigration and Registration of Persons Department through the 2<sup>nd</sup> Respondent to provide appropriate and necessary assistance and protection of the child herein with regard to processing of immigrations documents relating to the child.*

*6. The Honourable Court be pleased to grant such orders as it deems fit and just.*

*7. Costs of this application be provided for.*

2. The Application is premised on the grounds that the Applicants are the biological parents of the child who was born on 27.8.02. However, the name appearing in the child's birth certificate as the father of the child, is that of **BAR**, the 1<sup>st</sup> Respondent, who is in fact, not the biological father of the child. The 1<sup>st</sup> Applicant avers in her affidavit sworn on 17.4.18 that she is a Kenyan citizen while the 2<sup>nd</sup> Applicant is a British citizen; that when her love relationship with the 1<sup>st</sup> Applicant ended, she immediately met the 1<sup>st</sup> Respondent who became her lover; that while cohabiting with the 1<sup>st</sup> Respondent, she was aware that she was carrying the 2<sup>nd</sup> Applicant's pregnancy and gave birth to the child; that she indicated the 1<sup>st</sup> Respondent as the father of the child when she applied for the child's birth certificate; that she did this believing that the 1<sup>st</sup> Respondent would marry her and take up parental responsibility of the child; that instead, the 1<sup>st</sup> Respondent shortly abandoned her and the child; that to date, she does not know the whereabouts of the 1<sup>st</sup> Respondent; that she and the 2<sup>nd</sup> Applicant later resumed contact and he has been supporting the child and they have a good relationship; that a paternity DNA test confirmed that the 2<sup>nd</sup> Applicant was indeed the father of the child, a fact he knew all along.

3. The Applicants now wish that the name of the 1<sup>st</sup> Respondent be removed from the child's birth certificate and replaced with that of the 2<sup>nd</sup> Applicant as her biological father.

4. Neither of the Respondents entered appearance nor filed a response to the Application. The Court did on 29.10.18 allow the 1<sup>st</sup> Applicant to serve Application on the 1<sup>st</sup> Respondent by substituted service. Being satisfied that service was duly effected and no response filed, the matter proceeded to hearing as undefended.

5. I have considered the Application and the supporting affidavit as well as counsel's submissions. The 2<sup>nd</sup> Applicant also appeared before me. Additionally, I have seen the report dated 3.11.18 by Lancet Kenya (PLK) on the DNA test done on the child and the 2<sup>nd</sup> Applicant to confirm the child's paternity. The report states:

***The results of DNA profiling analysis of the 2 persons identified above indicates that BJT cannot be excluded as the biological father of VAA. The child exhibits a compatible obligatory paternal allelic profile with that of DJT. The statistical calculations indicate that DJT is 183,000 times more likely to be the biological father than any other randomly chosen man from the same population group.***

6. The foregoing findings of the paternity test make it manifestly clear that the 2<sup>nd</sup> Applicant is the biological father of the child. The information contained in the child's birth certificate indicating that her father is the 1<sup>st</sup> Respondent is therefore incorrect.

7. The child has the right to have the incorrect information contained in her birth certificate rectified. This right is enshrined Article 35(2) of the Constitution of Kenya, 2010 which provides:

***Every person has the right to the correction or deletion of untrue or misleading information that affects the person.***

8. The Court notes that the 1<sup>st</sup> Applicant planted the child on the 1<sup>st</sup> Respondent with a view to getting him to support a child that she knew very well was not his. The 1<sup>st</sup> Applicant's conduct in this regard is nothing but deceitful and reprehensible! The matter however concerns a child and no matter how conniving the 1<sup>st</sup> Applicant appears to have been, I am mindful of Article 53(2) of the Constitution of Kenya, 2010 which enjoin this Court to place the best interests of the child above all else as follows:

***A child's best interests are of paramount importance in every matter concerning the child.***

9. This paramountcy principle is also embedded in Section 4(3) of the Children Act which provides:

***(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.***

10. Duly bound by the foregoing provisions, I do find that it is in the best interests of the child that the incorrect information in her birth certificate is corrected. This will enable her enjoy the right *inter alia* to a name and nationality, parental care and protection from both parents as guaranteed by Article 53(1) of the Constitution of Kenya, 2010.

11. As regards, the prayer for an order that the Immigration and Registration of Persons Department do process immigration documents relating to the child, the Court finds that the child must make an application in the prescribed manner and meet the requirements, for consideration by the relevant department. To grant the orders sought would result in undue interference with a government department's statutory mandate. The Court therefore declines to grant the orders sought in this regard.

12. In the end, and in the best interests of the child, the Court grants the following orders:

a) The joint legal custody of the child VAA is hereby granted to both MABK and DJAT.

b) The actual custody of the child VAA is hereby granted to MABK.

c) The Registrar of Births & Deaths is hereby directed to delete the name of BAR as the father of VAA in its records, and issue a new birth certificate for the child indicating DJAT as the father of the child VAA.

**DATED, SIGNED and DELIVERED in MOMBASA this 6<sup>th</sup> day of March 2020**

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**M. THANDE**

**JUDGE**

In the presence of: -

.....for the Applicants

.....for the 1<sup>st</sup> Respondent

.....for the 2<sup>nd</sup> Respondent

.....Court Assistant