



REPUBLIC OF KENYA

IN THE CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

MILIMANI LAW COURTS

PETITION NO. 147 OF 2018

IN THE MATTER: ARTICLES 2,3(1),10 (1 & 2b),19,20,22,23(1 & 3),27 (1& 2),28,31, 47(1),159 (2), 165(3b) AND 258(1) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER: RULES 10,11,22,23 AND 24 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE PROCEDURE RULES, 2013

AND

CHILDREN’S CASE NO. 523 OF 2017 IN THE CHILDRENS COURT AT NAIROBI

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2,3(1),10 (1 & 2b),19,20,22,23(1 & 3),27 (1& 2),28,31, 47(1),159 (2), 165(3b) AND 258(1) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

BETWEEN

FMM.....PETITIONER

VERSUS

RESIDENT MAGISTRATE CHILDREN’S

COURT AT NAIROBI.....1ST RESPONDENT

AAO.....INTERESTED PARTY

RULING

1. On 1st March 2018 the Resident Magistrate’s Court sitting in Nairobi Children Civil Cause No. 523 of 2017 issued orders directing the Petitioner to present himself at the offices of the Kenya Medical Research Institute for Deoxyribonucleic Acid Test (DNA Test) to ascertain whether or not he was the biological father of the interested party’s child.

2. Through the petition filed on 18th April 2018, the petitioner herein, who describes himself as an adult male of sound mind sued the respondent herein, the Nairobi Resident Magistrates Court, challenging the said orders of 1st March 2018 and seeking the following orders:

a) A declaration that the respondent’s actions and directions in Children’s Civil Cause No. 523 of 2017 in directing that the petitioner attends DNA testing on the 16th March 2018 at the Kenya Medical Research Institute for no reasonable cause or at all constitutes breach of the petitioner’s constitutional rights.

b) An order staying and setting aside the respondent’s order of 1st March 2018 directing the petitioner to attend DNA testing on 16 March 2018.

c) *General damages.*

d) *Costs of the petition.*

3. Concurrently with the petition, the petitioner also filed an application, under certificate of urgency, seeking orders for stay and setting aside of the impugned orders of 1st March 2018 pending the hearing and determination of the petition which application is the subject of this ruling. The application is premised on the grounds, inter alia, that the respondent's orders constitute a breach of the petitioner's right to privacy under Article 31 of the Constitution, which includes the right not to have his person, home, or property searched; his possessions seized; information relating to his family or private affairs unnecessarily required or revealed; or the privacy of his communication infringed.

4. The petitioner further states that the impugned orders constitute a clear breach of his right to dignity under Article 28 of the Constitution.

The Respondents' Case

5. The Respondent filed Grounds of Opposition to the Application and Petition in which it listed the following principle grounds:-

a) ***THAT the impugned order issued by the Resident Magistrate Court on 1st March 2018 lapsed on 6th March 2018. Accordingly, the orders for stay and setting aside as sought by the Petitioner in his motion are no longer available as the Court cannot vary orders which have lapsed.***

b) ***THAT Article 53 (1)(e) provides that "Every child has the right 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"***

c) ***THAT further, Article 53 (2) of the Constitution provides that "a child's best interests are of paramount importance in every matter concerning a child". As such, the right of baby IP (particulars withheld) to parental care takes precedence.***

d) ***THAT the Petitioner who is contesting the paternity of the child will not be prejudiced as the results of the DNA will be beneficial to him as it will vindicate him.***

6. The interested party similarly filed grounds of Opposition and listed the following grounds:

a) ***The application is based on a false affidavit.***

b) ***The petitioner has already partially complied with the orders of the Children's Court by paying fees.***

c) ***The petitioner has thus taken up parental responsibility.***

d) ***The application is incompetent, misconceived and fatally defective.***

e) ***The application is mischievous and made in bad faith.***

f) ***It is in the best interest of the child that the application be denied,***

g) ***The defendant has disobeyed the court orders issued by the Children's Court and has therefore come to court with dirty hands.***

h) ***That the present application is a mischievous attempt on the part of the petitioner to circumvent court process and deny the interested party a chance for a fair trial.***

i) ***A paternity test is the only mechanism available to confirm the parentage of the child.***

j) ***That the application is in the whole unmerited and should be dismissed with costs.***

7. All the parties filed their respective written submissions to the application which I have carefully considered and I note that the main issue for determination is whether the petitioner has made out a case for the issuance of the orders of stay and setting aside of the orders issued on 1st March 2018.

8. The petitioner's case was that the impugned orders violate his right to privacy and dignity under Articles 31 and 28 of the Constitution respectively. *Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity protected while Article 31 of the Constitution on the other hand provides:*

Every person has the right to privacy, which includes the right not to have:(c) information relating to their family or private affairs unnecessarily required or revealed; or(d) the privacy of their communications infringed.

9. It must however be noted that even though the Constitution guarantees the right to dignity and privacy, the said rights are not absolute and may under Article 24 of the Constitution be limited. Article 24 (1), (2) and (3) provide as follows:

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

a. The nature of the right or fundamental freedom;

b. The importance of the purpose of the limitation;

c. The nature and extent of the limitation;

d. The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

e. The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

f. In the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

g. Shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

h. Shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

10. From the provisions of Article 24 of the Constitution, it is clear that for a limitation to be justified it must satisfy the criteria that it is **“is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”**. The Supreme Court of Uganda while dealing with a similar provision on limitation of rights had the following to say in the case of **Obbo and Another vs. Attorney General [2004] 1 EA 265** :

“It is not correct that the test of what is acceptable and demonstrably justifiable for the purposes of limitation imposed on the freedoms of expression and freedom of the press in a free and democratic society must be a subjective one. The test must conform with what is universally accepted to be a democratic society since there can be no varying classes of democratic societies for the following reasons: - (i). First Uganda is a party to several international treaties on fundamental and human rights, and freedoms all of which provide for universal application of those rights and freedoms and the principles of democracy. The African Charter for Human and Peoples Rights and the International Covenant on Civil and Political Rights are only two examples. (ii). Secondly, the preamble to the Constitution recalls the history of Uganda as characterised by political and constitutional instability: recognises the people’s struggle against tyranny, oppression and exploitation and says that the people of Uganda are committed to building a better future by establishing through a popular and durable constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress. When the framers of the Constitution committed the people of Uganda to building a democratic society, they did not mean democracy according to the standard of Uganda with all that it entails but they meant democracy as universally known...It is a universally acceptable practice that cases decided by the highest courts in the jurisdictions with similar legal systems which bear on a particular case under consideration may not be binding but are of persuasive value, and are usually followed unless there are special reasons for not doing so.”

11. From the above decision it is clear that the court is required to take into account the international treaties on fundamental and human rights, and freedoms all of which provide for universal application of those rights and freedoms and the principles of democracy as well as decisions by Courts in jurisdictions with similar legal systems in determining what is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

12. In this case, it is noteworthy that the respondent did not make the impugned orders out of the blue or for no justifiable cause as there was a live case before it involving the interest of a child in which the issue of paternity arose thereby necessitating the order that a DNA test be conducted in order to protect the interest of the child which is similarly protected under Article 53 of the Constitution which stipulates that:

53. (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. (Emphasis added).

13. Having regard to the provisions of Articles 24 and 53 of the Constitution and considering that the issue of the paternity of the child was one of the issues that were in contention before the Children's Court I find that the respondent was well within its mandate to order for the DNA test and that such an order cannot in the circumstances of this case be deemed to be a violation of the applicant's rights.

14. In upholding the spirit of the Constitution of Kenya in protecting the child's interest, this Court has in many occasions pronounced itself that the interest of the child overrides that of the parent who wished not to incriminate him or herself by undertaking DNA testing. Courts have on many occasions been faced with similar cases that require a balance between the right of a litigant to privacy and not to be subjected to DNA testing against his will and the right of a child to parental care and protection. In such cases the courts have held the view that the interest of the child prevails where a prima facie case has been made out to warrant an order for the DNA testing. This was the finding in the case of **P K M v Senior Principal Magistrate Children's Court at Nairobi & another [2014] eKLR** where this Court held as follows:-

“Article 53(1) (e) of the Constitution provides as follows;

“Every child has the right-

(a)

(b)

(c)

(d)

(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,”

Parental care can only be an obligation if paternity can be ascertained and one way of doing so is by DNA testing. But the Petitioner claims that by being forced to undergo DNA testing, the Respondent would further violate his right to dignity as provided for under Article 28 of the Constitution. This Article states as follows;

“Every person has inherent dignity, and the right to have that dignity respected and protected”.

There is no doubt that he is entitled to that right and the question therefore is whether his unwillingness to undergo a DNA testing in furtherance of his right to dignity is sufficient to override the interests of the child who may be denied the constitutional right to parental care. As stated above, a general principle emerging from case law is that an order for DNA testing should be made if it is in the interests of the child and if a prima facie case has been made to justify such an order -See M.V v K. C Kakamega HC Misc Applic No.105 of 2004. In that regard, Mumbi J in C.M.S v I.A.K (supra) stated as follows;

“In determining a matter such as this, the court must of necessity weigh the competing right of the child and the Petitioner who is alleged to be the biological father. The right of the child to parental care takes precedence, in my view, particularly in light of the cardinal principle set out in Article 53(2) that in matters such as this, the paramount consideration is the best interests of the child.”

I agree and while I would be averse to classifying rights in order of priority, there is no doubt in my mind that between the Petitioner's inconvenience at being subjected to DNA testing and the need to conclusively determine the paternity of the child, in the child's interest and certainly in the Petitioner's interest, the child's interest must prevail. For the Petitioner, it would be a minor inconvenience if he attends to DNA testing once but for a child not to know its parents and benefit from their protection and care, the damage may linger for years to come. I choose to protect the baby as opposed to the Petitioner in such circumstances. It would have been very different if the person seeking DNA testing is another adult for the sake of knowing his parentage but the Constitution specifically protects a child and I am upholding that principle.”

15. A similar decision was made in the case of **FKW (suing as the mother and next friend of GDW (Minor) v DMM [2015] eKLR** where this Court held:

“This determination is even more necessary because the burden of parental responsibility does not come light; it is almost a

lifetime burden and that is why a court of law must be absolutely certain that the person at whose door it holds the buck stops is none other than the parent of the child in issue. I do not see any other way that the court can come to this conclusion other than by subjecting the putative parent to a scientific examination of his deoxyribonucleic acid (DNA) and determine whether it is consistent with that of the child and therefore whether, as the case may be, he is the father of the child. I may be wrong on this, but I suppose that a man who thinks or is certain that he has, for some malicious or mischievous or for any other reason, been implicated into fatherhood that he has nothing to do with would readily embrace such an opportunity, if not for anything else, to prove his tormentors wrong... What all these decisions point to is that where it is in the best interests of the child that a paternity test should be undertaken; where there is no other means of determining the father of a child other than by means of a paternity test and therefore where such a test is necessary in the circumstances and, where, in any event, the applicant has made out a prima facie case for such a test, then a court of law will ordinarily make an order for such a test."

16. In **HCK vs. EJK [2008] eKLR**, the court stated that prior to ordering any DNA testing even where a child is involved there was need to establish a link between the person claiming paternity and the one claiming non-paternity. The court stated and held as follows:

"No reasonable court will order for a DNA test against a person in circumstances which do not appear to link the person with the child intended to be protected. There must therefore be facts strongly linking the respondent to the child. Otherwise an applicant will look at the richest person among those she generally associated with and claim him to be the putative father of her child to thereby entitle her to seek a DNA test against him."

17. In the instant case, I find that the respondent must have been satisfied that a prima facie case had been made out so as to warrant the issuance of an order for the DNA test. I further find that in the event the petitioner was not satisfied with the respondent's order, then the proper cause of action to take should have been to appeal against it or seek its review as the trial court simply exercised its mandate in adjudicating on a paternity dispute that was before it.

18. Having regard to the findings that I have made in this ruling, I find that the instant application is not merited and I therefore dismiss it with orders that costs shall abide the outcome of the main petition.

Dated, signed and delivered in open court at Nairobi this 15th day of March 2019

W. A. OKWANY

JUDGE

In the presence of:

Non appearance of parties

Court Assistant - Ali