



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

MISCELLANEOUS APPLICATION NO. 33 OF 2019

IN THE MATTER OF THE CHILDREN'S ACT NO. 8 OF THE LAWS OF KENYA

AND

IN THE MATTER OF REMOVAL/RECTIFICATION OF PARTICULARS IN THE BIRTH CERTIFICATE OF DM (CHILD)

AND

IN THE MATTER OF REGISTRAR OF BIRTHS AND DEATHS DEPARTMENT OF CIVIL REGISTRATION NAIROBI

BWW.....APPLICANT/MOTHER

AND

REGISTRAR OF BIRTHS AND DEATHS.....1ST INTERESTED PARTY

DEPARTMENT OF CIVIL REGISTRATION.....2ND INTERESTED PARTY

ATTORNEY GENERAL OFFICE.....3RD INTERESTED PARTY

RULING

1. The Applicant filed the Originating Summons dated 19th March 2019 seeking the following orders;

(i) THAT this Court be pleased to direct the 1st and 2nd Interested parties to remove and strike out the name of FWM (Deceased) from the Birth Certificate of DM (the child).

(ii) THAT the Child be issued with another Birth Certificate which does not bear the names FWM (Deceased)

2. The Originating Summons is supported by the Affidavit of the Applicant dated 19th March 2019 in which deponed as follows:

(i) THAT the Child's grandfather's name was erroneously indicated and inserted in her child's Birth Certificate as the biological father of the Child.

(ii) THAT the whereabouts of the child's biological father are not known since birth.

(iii) THAT the Applicant has never been married and she has been carrying herself out as a single-parent.

(iv) THAT sometimes in April 2018 the child school informed the parents to furnish the school with Birth Certificates of their children for purposes of enrolling the children in the EMIS system as was required by the Ministry of Education.

(v) THAT as such it became necessary to rectify the Birth Certificate to include the proper particulars of her child's Birth Certificate.

(vi) THAT the Applicant has never been married to the child's father and she has been carrying herself out as a single parent.

(vii) THAT the Birth Certificate of the minor child does not bear the father's names as he is unknown.

(viii) THAT the welfare of the minor child is a matter that requires immediate action even without prior notice to the father.

(ix) THAT the Applicant has single-handedly provided for all the needs of the child since birth to include but not limited to financial support, emotional, psychological, religious and social needs.

3. The Respondents filed a Replying Affidavit sworn by MILKAH ODALO, A Civil Registration Officer with the 2nd Respondent in which she states as follows:

(i) THAT the Birth Certificate is an extract from a Birth Register which is completed on the basis of information provided by informants as expressed in Section 10 of the Births and Deaths Registration Act.

(ii) THAT the Act provides the first persons who are obligated to give notice and therefore, such information as may be required for the registration of birth of a child are the father and mother of the child as indicated in section 11 of the Act which in part reads: ***"Upon the birth of any child the registration of whose birth is compulsory, it shall be the duty of the father and mother of the child, and, in default of the father and mother,..... to give notice of the birth.....to the registrar of the registration area in which the birth occurs"***

(iii) THAT further the Act also provides for circumstances under which a person shall be entered in the register as the father of a child, as stipulated in Section 12 of the Act which reads as follows: ***"No person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or, in accordance with some recognized custom"***

(iv) THAT in order to ensure that the requirements of Sections 12 are complied with, the registration Assistants inquire from the mother whether she is married to the father of the child before a name is entered in the register as the name of the father.

(v) THAT registration of births and deaths i.e. filing of birth and death registers is done by registration agent namely hospital and provincial administration personnel who register births that occur in hospital; and at homes respectively.

(vi) THAT any information put on a birth register by the registration agents is supplied by an informant who from our experience in most instances is one of the child's parents.

(vii) THAT it is therefore clear that in discharging this statutory duty the Registrar relies on diligence and utmost good faith from persons notifying a birth.

(viii) THAT it therefore follows that in all instances the information provided for purposes of registration is assumed to be correct and valid until its invalidity is notified to the Registrar.

(ix) THAT the name of FWM was entered in the birth register serial No. B [xxxx] having satisfied the requirement of section 12 that the father and mother of the child were married as shown in part 10 in the register of birth (FORM B1) serial no. B [xxxx] birth entry No. [xxxx] .

(x) THAT information and particulars including name of the father of the child given for purposes of registration of the Birth of child were supplied by BWW holder of ID No. [xxxx] and consequently entered in Register Birth Serial No. B [xxxx].

(xi) THAT inclusion of the name of FWM in the birth register of DM was on the basis of information supplied by the Applicant otherwise in normal circumstances the Registration Assistant for the hospital where the birth occurred would not be aware of the past or present relationship between the Applicant and FWM to warrant inclusion of FWM'S name in the minor's register of birth.

(xii) THAT the Births and Deaths Registration Act only provides for entry in the birth register of the name of the legal father that is to say one who is married to the mother at the time of registration or biological father where there is a joint request for the name of the father to be entered in instances where the father and mother of the child are not married.

(xiii) THAT in the case of DM (Minor) the legal father of the minor was established at FWM as the marital status between him and the Applicant was indicated as married as indicated in birth register serial No. B [xxxx] birth entry No. [xxxx].

(xiv) THAT the Applicant gave two false declarations namely the name of the father of the child and that she was married to the father of the child during registration of the child's birth and attested to the correctness of the declarations by signing the register of birth herein .

(xv) THAT the name of FWM was entered in the birth register of the minor DM in the first instance on the basis of a declaration by the Applicant.

4. The Parties were directed to file Written submission in the Originating Summons which I have duly considered. My findings are as follows:

(i) I find that it is not in dispute that the name of FWM is indicated as the father of the child in the Birth Certificate serial B

No. [xxxx].

(ii) It is not in dispute that the Applicant is indicated as the mother of the child.

5. The issues this Court must determine are as follows:

(i) Whether the name FWM was erroneously entered in the register as the father of the child.

(ii) Whether it is in the best interest of the child to remove the said name from the Register.

6. The Respondents filed a Replying Affidavit opposing the Originating Summons to remove the name FWM from the Birth Certificate on the grounds that the particulars were taken from the Birth Register which contains information provided by informants as provided in the Act.

7. The Applicant has stated in her affidavit in support of the Originating Summons and also her further Affidavit that FWM (deceased) was not the biological father of the minor. The Applicant stated that she is a single parent and that the biological father of the child is unknown.

8. I have considered the arguments made by the parties on the issue at hand. The Court also considers the provisions of the Constitution and particularly **Article 28** thereof, which provides that every person has inherent dignity and the right to have that dignity respected and protected, and decisions made on the constitutionality of section 12 of the Births and Death Registration Act.

9. In **L.N.W vs Attorney General & 3 Others (2016) e KLR** the High Court (Mumbi Ngugi J.) did indeed find that section 12 of the Births and Death Registration Act was inconsistent with Articles 27 of the Constitution on freedom from discrimination, and Article 53 of the Constitution on the rights of a child to a name and nationality and parental care, and was therefore null and void. The Court further ordered that the said section be construed with the necessary alterations, adaptations, qualifications and exceptions necessary to bring it with conformity with Articles 27 and 53 of the Constitution.

10. In the present application the Applicant insists that the biological father of the minor is unknown. The Respondent is however adamant that these records were from the register of births which implied that they were given by the mother or the father. They argue that their hands are tied in issuing the birth certificate with the name of the father as FWM.

11. The import of the decision in **L.N.W vs Attorney General & 3 Others** is that marriage is no longer the only determinant in deciding the issue of registration of a father in a birth certificate, and that the provisions of the Constitution take precedence in this regard.

12. Article 53(2) of the constitution of Kenya provides that in all matters concerning a child, the best interest of the child is of paramount importance.

13. In this case, I find that there is uncontroverted evidence that FWM was the father of the Applicant BWW and the grandfather of the child and that his name was erroneously entered in the Birth Register by the Applicant.

14. The Respondents did not make any averments to the contrary and I find that no reason not to rely on the supporting affidavit that the entry which was made by the Applicant is erroneous.

15. I find that it is in the best interest of the child that this application be allowed for the purpose of protecting and respecting the inherent dignity of the child in accordance with the Article 28 of the constitution of Kenya.

16. The Application dated 19/3/2019 is accordingly allowed in the following terms;

(i) THAT the Registrar General be and is hereby directed to remove and strike out the name of FWM (Deceased) from the Birth Certificate of DM (the child).

(ii) THAT the Child be issued with another Birth Certificate which does not bear the names FWM (Deceased) as the father of the child

(iii) THAT the father of the child be indicated as unknown.

Orders to issue accordingly.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 21ST DAY OF JUNE, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.