



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 52 OF 2015

IN THE MATTER OF THE ESTATE OF R.N. AND N. A. K. (MINORS)

C K L.....APPLICANT/DEFENDANT

VERSUS

M B K WRESPONDENT/PLAINTIFF

RULING

The Applicant/Appellant filed an application under certificate of urgency and under **Section 80 of the Children Act, 2001** and sought the following order;

- a. Stay of execution of the Court orders emanating from the Senior Resident Magistrate Hon. Ms Munyi's Ruling delivered on 28th May, 2015

on the following grounds;

- b. The Orders were issued after *ex parte* orders were issued on 14th January, 2015. The Appellant applied for review of the *ex parte* orders as the Respondent lied to the Court. The Application for review was not considered by the Court and the Appellant was condemned unheard.
- c. The Trial Court proceeded with a Notice to Show Cause application on the basis of *ex parte* orders.
- d. The Trial Court dealt with Warrant of Arrest application on the basis of the *ex parte* orders.
- e. Appellant/Applicant contests paternity of the two (2) children of the marriage. The Applicant demands of that DNA should be conducted before the payments if any are enforced.

The Respondent by a Replying Affidavit filed on 10th July, 2015 and deposed that the Appellant never paid any money towards maintenance and education of the children of the marriage. The Applicant and Respondent were married on 28th November, 2008 and the twins were born on 5th April, 2009.

The Appellant and Respondent separated thereafter and the Respondent left with the twins. The Appellant filed for divorce which was heard *ex parte* and judgment was delivered on 28th November 2013. In the judgment, the Appellant agreed to pay Kshs.10, 000/= each month for the maintainance of the children. He paid a few months and later stopped. The Respondent stated that she never told the Appellant to stop payment of maintainance as she wanted nothing from him and the twins were not biologically his children. The children were born during marriage and they lived together.

The Appellant was not condemned unheard by the Trial Court. Instead the two (2) Applications dated 21st January, 2015 and 2nd February, 2015 were heard by the Trial Court and dismissed.

The Appellant has parental responsibility to the two (2) children of the marriage as envisaged under **Section 24 and 25 of the Children Act 2001**. Therefore he ought to exercise parental responsibility and provide for the children. The issue of DNA testing does not arise as this is a delaying tactic and an afterthought in light of the above mentioned provisions on parental responsibility.

By a further affidavit of 7th October, 2013, the Appellant stated that the Respondent admitted to him the other relationships she had. The Respondent mentioned to him the father of the children. Hence it is critical that DNA testing is done to conclusively determine paternity of the children and not to be punished as being their father and yet he is not their father.

The Appellant stated that the Respondent was fixing him because of the divorce he obtained through *ex parte* proceedings. They were married and he had an obligation to look after the children. They are divorced now and therefore the DNA testing should determine the matter once and for all.

Both the Appellant and Respondent addressed the Court on the issues pleaded through their respective Counsel on the hearing date 4th February, 2016.

Both the Appellant and Respondent filed written submissions and reiterated that some issues already alluded in the Court.

ISSUES

1. Should DNA testing be conducted to determine paternity of the children of the marriage?
2. Should the Appellant pay the arrears of Kshs.10, 000/= maintenance for the children?
3. Should the Appellant pay the school fees and school fees expenses for the children?

DETERMINATION

Article 53 (2) of the Constitution 2010 and section 4 of Children Act 2001 provides for the best interests of the child being paramount. **Article 53(1)(e) Constitution 2010** provides for equal parental responsibility to the children **Section 24(1) Children Act 2001** joint parental responsibility of the children of the marriage.

In the instant case, there is no dispute that the twins now aged 6 years were born during the marriage between Respondent and Appellant and the Appellant provided for them. Even after the divorce he agreed to pay Ksh. 10,000/= as maintainance.

The Appellant claims that the Respondent told him that he was not the father of the children and stated their father's name to him. In light of that he refused and stopped payment of Ksh 10,000/=. They tried mediation and agreed on DNA testing which the Respondent did not pursue and instead filed the matter in Court. The Respondent obtained *ex parte* orders and the Appellant's applications were not heard. This is a fact that can only be determined perusal of the Trial Court file.

The Law on DNA testing is as follows;

In the case of **PKM versus SPM Children Court & JW Constitutional Petition 138 of 2012** the court considered the Petitioner's Constitutional right to privacy and dignity as espoused in **Article 28 and 31 of Constitution vis a vis the rights of the child in Article 53 of Constitution 2010** and Hon. **Lenaola J** stated;

There is no doubt in my mind that between the Petitioners's inconvenience at being subjected to DNA testing and the need to conclusively determine paternity of the child, in the child's interests 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 DNA testing once but for the child not to know its parents and benefit from their protection and care, the danger may linger for years to come. I choose to protect the baby as opposed to the Petitioner.

In the instant case the Appellant is consistent as shown in the pleadings that he raised the issue of paternity during mediation and in the Trial Court and in this Court. The Respondent on the other hand relies on **Section 24 and 25 of the Children Act 2001** on parental responsibility. The Court can only invoke parental responsibility where the natural parents of the children and the children are their biological children or where the step- parent agreed to have the child or children as his or her own in spite of not being the biological parent. In these instances neither parent can abdicate parental responsibility to the child or children. In this case the Respondent states the Appellant is the biological father of the children. The Respondent states he believed he was or is the biological father of the children until the Respondent told him that he was not the father and named the children's father.

These are 2 competing versions and this Court cannot conclusively determine the same without cogent evidence. This Court has no other way of determining this question;

Whether the Appellant has abdicated his role to parental responsibility as the biological father of the children of the marriage by maligning the Respondent as she told him that he is not the father of the children when all along he believed he was the father of these children or the Respondent is aware and has always known the paternity of the children of the marriage and it is a vendetta against the Appellant to have him maintain and educate the children of the marriage yet he is not the father of the children.

The fact can only be conclusively determined by DNA testing of the Appellant the Respondent and the children of the marriage. It is imperative a DNA testing be conducted on the Appellant and the children to determine paternity once and for all.

The issue regarding maintenance, the Appellant admitted that he agreed to pay Ksh 10,000/= each month in the divorce proceedings in **Divorce Cause 141 of 2013** and judgment of 28th November 2013. Again, the Respondent alluded to the fact that the Respondent declined payment of maintenance. This fact also hinges on the controversial issue of paternity. Therefore, the issue should await the outcome of DNA testing.

The issue regarding school fees and school expenses for the Children also relates to the vexing question of paternity. It will also await DNA testing results.

COURT ORDERS

1. **The DNA testing shall be conducted at Kenyatta National Hospital Government Chemist the costs shall be shared equally between the parties.**
2. **The DNA testing shall be conducted within 60 days from today and the report to be filed in Court.**

READ AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22nd DAY OF APRIL, 2016

MARGARET W. MUIGAI

JUDGE

In the presence of,

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