REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY AND PROBATE DIVISION

CIVIL APPEAL NO. 9 OF 2015

DMM…….APPELLANT

VERSUS

RK……..…RESPONDENT

(Being an appeal filed against the ruling delivered in Nairobi Children Case No. 1100 of 2012 on 24th December 2014)

RULING

1. The application for determination is a Motion dated 25th November 2015. It seeks in the main orders to facilitate access to the children by the appellant. The appeal herein was brought against orders made by the lower directing the parties to undergo a deoxyribonucleic acid (DNA) test. The appellant was aggrieved by the order on the grounds that the same that such a test would be traumatizing to the children. The application before me is founded on grounds that the appellant, the father of the children, has been denied access to the children. The factual background to the application is set out in the affidavit sworn by the applicant on 25th November 2015.

2. In response to the application, the respondent has averred that the appellant has had a close relationship only with her and not with the children. She states that the children should not be accessed by the respondent for he is not their biological father and that they are confortable where they are. She alleges that he is a danger to them, and that the birth certificates indicating that he was their father were forged. Her affidavit in reply was sworn on 5th February 2016.

3. The appellant has reacted to those allegations, by swearing an affidavit on 7th March 2016, where he asserts that what the respondent has averred in her affidavit are all lies, given that when the respondent moved the court in the lower court it was on the basis that she and him had been married and blessed with the two children that she now claims are not his. He has attached copies of the pleadings in the lower court to buttress his arguments.

4. The application was argued orally before me on 10th March 2016. Counsel appearing breathed life to the arguments made in the papers filed herein by both sides.

5. What is before me is fairly straightforward matter on whether the appellant should be allowed to access the children the subject of the dispute.

6. I have seen the pleadings filed in the lower court in Nairobi Children's Court Case No. 639 of 2009. In

paragraph 3 of the plaint it is pleaded that the appellant and the respondent herein got married on 22nd December 1999 and that they were blessed with the two issues of the marriage, the children who are now the subject of these proceedings. The couple apparently lived peacefully, according to the pleading, until trouble broke out in 2009. The respondent also swore an affidavit on 5th October 2009 along similar lines, that they married in 1999 and were blessed with the children with the subject of the current proceedings.

7. From these pleadings it is clear to me that the parties were in a marriage. A copy of the marriage certificate is exhibited. The children were born in 1999 and 2001, respectively, according to the certificates of birth on record. The children were apparently born during wedlock. The parties cohabited and lived with the children up to 2009 when the problems cropped up. It has not been pleaded that the marriage has been dissolved. It is still subsisting. The contents of Plaint and the affidavit of 5th November 2009 cannot sit well with the affidavit that the respondent swore on 5th February 2016 and filed herein on 1st March 2016. It can only mean that the respondent is blowing both hot and cold, and is approbating and reprobating. She is speaking from both sides of her mouth as it were.

8. The appellant is still the parent of the children in question in the circumstances of what I have stated in paragraphs 6 and 7 here above. He no doubt acquired parental responsibility over the children when they were born within wedlock, and when he lived with them. The DNA test has been suspended by this court in HCP No. 161 of 2015. There is nothing to show that the appellant has been divested of parental responsibility. As such he is entitled to access the children of the marriage.

9. The respondent has made allegations to the end that the appellant is a danger to the children. No proof has been provided to support that assertion. She alleges that the birth certificates procured by the appellant were forgeries, yet she has furnished the court with what she considers to be the genuine certificates of birth.

10. I am persuaded that the appellant is entitled to the orders sought. Consequently, I shall allow the application dated 25th November 2015 in the following terms:-

a. That pending the hearing and determination of the appeal herein the appellant shall be entitled to have access to and custody of the children herein, that is to say BMM and EMM, during school holidays, in the following terms:-

i. That the appellant shall have access to and custody of the children during the second-half of all school holidays;

ii. That the order above shall apply with effect from the current Christmas school holiday, that is to say for the year 2016/2017;

b. That there shall be liberty to apply; and there shall be no order as to costs.

c. That there shall be no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 9TH DAY OF DECEMBER, 2016.

W. MUSYOKA

JUDGE