REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

PETITION NO. 161 OF 2015

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 22, 23, 45, 47, 50,

53, 165, 159 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ARTICLES 45 AND 53 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF DOCTRINE OF THE BEST INTERESTS OF THE CHILD

AND

IN THE MATTER OF THE DOCTRINE OF THE RULE OF LAW AND THE DIGNITY OF THE COURT

AND

IN THE MATTER OF SECTIONS 4 AND 76 OF THE CHILDREN'S ACT 2001

AND

IN THE MATTER OF THE CHILDREN'S COURT AT NAIROBI

IN THE MATTER OF

B.M.M.....MINOR

E.M.M.....MINOR

BETWEEN

D M M.....PETITIONER/APPLICANT

VERSUS

HON. A. N. NYOIKE, AG SENIOR RESIDENT MAGISTRATE,

CHILDREN COURT NAIROBI.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

R K.....INTERESTED PARTY

JUDGMENT

1. The petitioner and the interested party got married on 22nd December 1999 under the **Marriage Act (Cap 150)** (now repealed). They lived together as husband and wife for 13 years up to sometimes in 2012 when they separated.

2. On 5th October 2009 the interested party filed a suit in the Children's Court in Cause No. 639 of 2009 seeking the custody of two children of the marriage and also their maintenance. The children were B.M.M. and E.M.M. and are presently aged 16 and 13, respectively. The interested party's case was that the petitioner had become drunk, cruel and violent and that he had chased her together with the children from the matrimonial home. They were now staying with relatives, she claimed. The petitioner filed a defence denying the claims by the interested party. He instead pleaded that the interested party habitually spent nights away from the matrimonial home; had become a drunk and reckless and had subjected the children to needless psychological and emotional anguish; failed to financially contribute to the upkeep of the children although she was a woman of means; and, that, she had deserted the matrimonial home since 24th September 2009. He sought the dismissal of the suit and counterclaimed for the custody, care and control of the children. Lastly, he asked that the interested party be ordered to provide maintenance for the upkeep of the children. The counterclaim was defended.

3. The interested party filed before the same court a chamber application in Cause No. 1100 of 2012 seeking that a DNA test be conducted on the children and the petitioner to establish their paternity and that the children's biological fathers be enjoined in the matter. The parties filed other three applications. The court delivered a ruling on 24th September 2014 allowing the interested party's application for DNA tests and for joinder of the children's biological fathers. She had claimed that the petitioner was not the children's biological father; had not supported the children; and that the children had each a biological father who was supporting it. The petitioner's case was that he was the children's biological father, he had brought them up and had always provided for them. The birth certificates of the children show that he is their father.

4. It is this ruling that led the petitioner to file this petition under **Articles 20, 22, 23, 45, 47, 50, 53, 159** and **165** of the Constitution of Kenya 2010. His case was that the order for DNA had contravened **Article 53** as it was not in the best interest of the children. The parties had consented to having the alleged biological fathers joined into the case. He stated that the interested party had disobeyed the order by not producing the fathers or joining them into the case. That, according to him, offended his rights under **Article 50(1).** He stated that the interested party has made sure that he does not access the children. That, he said contravened his rights, and the children's rights to have access to their father. He relied on **Article 45(3).** Lastly, he made reference to **section 76(1)** of the **Children Act (Cap. 141)** which provides that:

> i. **Subject to section 4 where a court is considering whether or not to make one or more orders under this Act with respect to a child it shall not make the order or any other orders unless it considers that doing so would be more beneficial to the welfare of the child than making no order at all."**

His case was that the order for DNA testing was not beneficial to the welfare of the children.

5. The 1st and 2nd respondents filed grounds of opposition to say that they had not violated any of the

rights of the petitioner, and that the decision of the 1st respondent to order for DNA test did not violate his rights, and neither did it go against the children's best interests.

6. The interested party took out a notice of preliminary objection to say that the petitioner appealed against the decision that ordered DNA test to be done. The appeal is Nairobi HC Civil Appeal No. 9 of 2015. Her case was that the issues in the appeal and the petition were substantially the same, and since the appeal was filed on 30th January 2015, and the present petition on 23rd April 2015, the court has no jurisdiction to hear and determine the petition. She also stated that the petition raises the same issues raised in Nairobi Children's Cause No. 1100 of 2012 before the parties. She asked that it be found that the petition is an abuse of the process of the court. She swore a replying affidavit to deny the factual matters deponed to by the petitioner.

7. The court asked that the objection and the petition to be taken together. Parties were asked to file written submissions. Mr Nyamu for the petitioner did file the submissions. I have duly considered them.

8. I have looked at the Memorandum of Appeal that was filed subsequent to the order that DNA test be carried out to establish the paternity of the children. In grounds 2, 3, and 4 the petitioner stated as follows:-

> **"2) The learned magistrate erred in law and fact by failing to consider the interests of the minors.**
>
> **3) The learned magistrate erred in law and in fact by failing to appreciate that the appellant was already in *loco parentis* in relation with the children and therefore entitled to participate in matters touching on the children's education.**
>
> **4) The learned magistrate erred in law and fact by failing to appreciate that despite the application for DNA, the names of the purported fathers of the minors were not brought forth."**

It is clear to me that in both the appeal and in the petition the petitioner is complaining against the order for DNA test be carried out to establish the paternity of the children. His case is that he is the father of the children; that the children were born during the marriage; each has birth certificate showing him to be the father; and that he brought up the children in the marriage. He states that the order for the DNA test is not in the best interests of the children, and neither is it beneficial to their welfare. The appeal was filed earlier than the petition. The questions to be answered by the petition are directly and substantially the same ones to be answered by the appeal. It is trite that where there is a matter pending in a court of competent jurisdiction between substantially the same parties touching on the same issues the court lacks jurisdiction to entertain a similar matter. **(Ismail S. Mboya & Others v Haji Issa & Others HCCC 106 of 2003 at Kisumu**).

9. Secondly, the principle of the best interests of the child attaches to any and every matter concerning a child. It is protected by **Article 53(2)** of the Constitution of Kenya 2010, but it does not matter in which forum the matter is. Indeed, under **section 4(1)** of the **Children Act** the matter may be in a court of law, before an administrative authority or a legislative body. It may be before a public body or a private social welfare institution. Whichever body that is dealing with a matter concerning a child it must bear in mind that the best interests of the child shall be a primary consideration. It follows that the petitioner should not imagine that the only way to provide for the best interests of the children in this case is to file a constitutional petition. Baptising this matter as constitutional does not make it one **(Karuri & Others v Dawa Pharmaceuticals Co. Ltd & Others [2007] E.A., L.R. 236).** The bottom line is that it is an abuse of the process of the court to have multiple suits between the same parties over the same matter. **(Nyanza Garage v Attorney General [1994] IV KALR 39).**

10. Even as I dismiss this petition with costs for want of jurisdiction and for being an abuse of the process, and allow the interested party's objection with costs, there is an issue that has disturbed me. The trial court has made an order for DNA test to determine the paternity of the children. However, in the

plaint filed by the interested party against the petitioner in **Children Court Cause No. 639 of 2009** she stated as follows in paragraph 3:-

> **"3. On 22nd December 1999 the plaintiff and the defendant got married and have since been blessed with two issues of marriage namely:**
>
> a. **B.M.M.**
>
> b. **E.M.M."**

It is trite that parties are bound by their pleadings. Secondly, Mr Nyamu referred the court to **section 118** of the **Evidence Act (Cap. 80)** and the decision of the Court of Appeal in **Njenga v Njenga [1985]eKLR.** The Court of Appeal was basically saying that in every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence or divorce, sexual intercourse is presumed to have taken place between the husband and wife, until the presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when, by such intercourse, the husband could, according to the laws of nature, be the father of such child, The court hearing the appeal will have to discuss these principles and their applicability to the matter. In order to allow the appeal to be heard and determined without any party being prejudiced, and in the wider interests of the matter and best interests of the children, I direct that the DNA test should not be carried out in the meantime.

DATED and DELIVERED at NAIROBI this 30th October 2015.

A.O. MUCHELULE

JUDGE