



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 18 OF 2013**

**BETWEEN**

**RMK .....PETITIONER**

**AND**

**AKG ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a petition dated 18<sup>th</sup> January 2013, the petitioner moved the court for the following reliefs;
  - a. *A declaration that the 1<sup>st</sup> respondent is the petitioner's biological father.*
  - b. *A declaration that the 1<sup>st</sup> respondent refusal to acknowledge the petitioner as his son and his continuous denial of the petitioner's use of his name, property and accessibility to the same is unconstitutional.*
  - c. *An order compelling the 2<sup>nd</sup> respondent to change the petitioner's documents to include the 1<sup>st</sup> petitioner family name of KEMBI*
  - d. *General damages*
  - e. *Costs of this petition*
  - f. *Any other relief the court may deem fit to grant.*
2. The petitioner, an adult, claims that he is the son of the 1<sup>st</sup> respondent, from a union between the respondent and one RNK. He states that he grew up in the custody of his mother until he became of age when he sought information of his paternity and the 1<sup>st</sup> respondent was named as his father which fact the 1<sup>st</sup> respondent has not rebutted or denied. He alleges that AKG has also refused to acknowledge paternity formally to the petitioner and continues to withhold such acknowledgement despite demand.
3. The application before me today is a Notice of Motion made under **sections 1, 1A, 1B, 3 and 3A** of the ***Civil Procedure Act (Chapter 21 of the Laws of Kenya)*** dated 7<sup>th</sup> June 2013 and the

petitioner seeks the following orders;

1. *The 1<sup>st</sup> respondent herein be compelled to take a DNA test in any government hospital or any other hospital agreeable upon by both parties to ascertain paternity.*
2. *The DNA test/result be forwarded to the Honourable Court as evidence to determine the issue of paternity.*
3. *The costs of this application be paid by the respondents.*
4. The affidavit supported by the petitioner's own affidavit sworn on the 7<sup>th</sup> June 2013 in which he states as follows;
  1. *That I am the petitioner herein and competent to swear this affidavit.*
  2. *That I filed this matter seeking various orders among them a declaration that the respondent is my biological father.*
  3. *That the 1<sup>st</sup> respondent in his reply has denied paternity and that issue alone touches on the core of this petition.*
  4. *That a DNA test will subsequently resolve and or shed light to the petition and save the court's time.*
  5. *That a DNA test will ultimately be required for scientific evidence in this petition and its only conclusive way of showing paternity.*
  6. *That it is for the benefit of the court and the parties that a DNA test is done to resolve the matters of paternity.*
  7. *That I am ready and willing to surrender myself or any samples that will be required for the test to conclusively settle this matter.*
  8. *That I am taking this petition very seriously because the petitioner has raised very serious issues touching onto my integrity and intentions in the petition.*
  9. *That what is deponed to herein is true to the best of my knowledge, information and belief.*
5. Learned counsel for the petitioner, Mr Gikunda, urged the court to grant the orders on the ground that the denial of the 1<sup>st</sup> respondent to acknowledge paternity was not denied or challenged and that petitioner's fundamental rights to dignity, family and culture were violated as a result. He referred to several provisions of the Constitution including **Article 27(5)** which prohibits discrimination, **Article 28** which protects dignity, **Article 45** which recognises and protects the family and **Article 35** which entitles the petitioner to information. Counsel submitted that the grant of the application before the petition is heard and determined will at least assist the court in resolving the issues before it.
6. The 1<sup>st</sup> respondent has opposed the application on several grounds. First, that the petition does not disclose any reasonable course of action as the declarations sought cannot in reality be granted. Second, the application is not founded on any substantive law that has been disclosed. Ms Wanyoike, learned counsel for the 1<sup>st</sup> respondent, submitted that the application is based on the provisions of the **Civil Procedure Act** which are merely procedural and do not confer substantive rights. Third, the grant of the order will violate the 1<sup>st</sup> respondent's rights and nothing has been placed before the court to persuade the court to override the 1<sup>st</sup> respondent's rights by ordering a DNA test.
7. I have considered the petitioner's deposition and the parties' respective oral and written submissions. As this is a matter for the enforcement of fundamental rights and freedoms, I must consider the substance of the application rather than the form of the application or the provision under which it is brought. The issue for consideration is whether a basis, legal or factual, has been laid to enable the court order the 1<sup>st</sup> respondent to undergo a DNA test to establish paternity at an interlocutory stage.
8. I have taken the trouble to set out the contents in the supporting affidavit at paragraph 4 above and it is abundantly clear that the assertions therein are threadbare. Apart from the petitioner's own

bland assertions, there is nothing to connect the petitioner and the 1<sup>st</sup> respondent that would discharge the burden of persuading the court to permit an intrusion of the 1<sup>st</sup> respondent's rights. In the case of **SWM v GMK Nairobi Petition 235 of 2011 (2012)eKLR** I stated as follows, “[21] *Ordering the respondent to provide DNA for whatever reason is an intrusion of his rights to bodily security and integrity and also the right to privacy which are rights protected under the Bill of Rights. The petitioner bears the burden of demonstrating to the court that the right she seeks to assist or vindicate and which the court would consider as overriding the respondent's rights.*”

9. The petitioner has stated that the court should order a DNA test nevertheless as the facts in the deposition have not been challenged. As I have observed, the burden remains on the petitioner to establish by the pleadings and evidence sufficient nexus between him and the respondent in order to persuade the court to grant the orders. In this case there is no evidence to support such a course.

10. In view of lack of a material basis to make the order sought in the Notice of Motion dated 7<sup>th</sup> June 2013, it is hereby dismissed with no order as to costs.

**DATED and DELIVERED at NAIROBI this 23<sup>rd</sup> July 2013.**

**D.S. MAJANJA**

**JUDGE**

**Mr Gikunda instructed by Gikunda Miriti and Company Advocates for the petitioner**

**Ms Wanyoike instructed by Kairu and Mcourt Advocates for the 1<sup>st</sup> respondent**