



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 143 OF 2012

BETWEEN

R. K.PETITIONER

AND

H. J. K. 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. The issue for consideration is whether the court should order the 1st respondent to submit to a DNA test to establish the paternity of the petitioner at an interlocutory stage.
2. The petitioner in this matter seeks the following order in the Notice of Motion dated 1st March 2013.

[2] THAT upon hearing this application inter-partes, this Honourable court be and is hereby pleased to issue an order compelling the 1st respondent undergo a DNA test to confirm whether he is the petitioner's applicant's biological father.

3. The Motion is supported by the petitioner's own affidavit of 1st March 2013 in which she alleges that she was born out of a union between her mother and the 1st respondent, HJK, in 1981.
4. She depones that in 1995 she was introduced to HJK by her mother. After the initial introduction she requested her mother several times to take her to HJK whom she believed was her father after the first introduction. Her mother informed her that HJK did not want any relationship touching on child born out of wedlock.
5. RK further states that in April 1997 she was taken to the HJK's office where he gave her 3000/= pocket money. Such visits continued until she completed her education. At these visits, she alleges that HJK would give her pocket money. He also indicated that he would spend little time with her

as he was busy. Upon completion of her secondary education in 2001 she attempted to re-establish the relationship but he turned her away.

6. The petitioner avers that her fundamental rights and freedoms have been violated as she has suffered mental anguish, dejection, ridicule and odium by the failure and/or refusal by HJK to recognise her as his daughter. She claims that she has been denied the use of the name associated with her biological father and as a result she has lost the benefits that accrue due to pedigree and lineage. The petitioner has relied on the case of **MW v KC Kakamega Misc. Appl. No. 105 of 2004 [2005]eKLR** where the court granted an order directing the respondent undergo a DNA test to on the basis that it had been established that the petitioner was the father of the child.
7. HJK opposed the application on the basis of his own replying affidavit sworn on 8th May 2013. He denies the allegation that the petitioner and/or her mother are known to him. He also denies allegations of a union between him and the petitioner's mother or even any relationship. He also refutes knowledge of any facts that would entitle the petitioner to relief in this matter.
8. Counsel for the 1st respondent argued that the petition does not disclose a cause of action in that the petitioner has not identified the specific rights violated and how these rights are violated. He relied on the case of **Anarita Karimi Njeru v Republic (No. 1) [1979] 1 KLR**. He also pointed out the order sought could not be issued as the petitioner was not a child to take advantage of special provisions that govern the rights of the child and parental responsibility. On this basis he urged the court to strike out the petition
9. I have heard and considered the oral and written submissions by the parties and the issue for consideration is whether I should order the 1st respondent to undergo a DNA test. As this is an interlocutory application, I shall limit my observation to what is necessary for determination as it is clear that all the facts are disputed.
10. The evidential basis laid for the petitioner's case is a statement attached to the petitioner's own affidavit purportedly signed by her mother which sets out the history between HJK and the petitioner's mother. The circumstances under which the statement was written are unclear. Moreover, the statement is not made on oath. At this stage, there is very little probative value that can be attached to it. I agree with the sentiments expressed in **SWM v GMK, Nairobi Petition No. 235 of 2011(2012) eKLR** that; "[21] *Ordering the respondent to provide DNA for whatever reason is an intrusion of his right to bodily security and integrity and also the right to privacy which rights are protected under the Bill of Rights. The petitioner bears the burden of demonstrating to the court the right she seeks to assert or vindicate and which the court would consider as overriding the respondent's rights.*" These sentiments apply to this case.
11. I have also considered the case of **MW v KC (Supra)** and I think it can be distinguished on the basis that the matter concerned the rights of a child to seek maintenance from the father under the provisions of the **Children Act, 2001**. In this case it is not in dispute that the petitioner is not a child and therefore different considerations may apply particularly in view of the special rights of children under **Article 53** of the Constitution. These matters though will be subject of argument when the petition is heard.
12. I also take the position that an order of such finality should not be made at this stage of the proceedings particularly where the evidence does not surmount the threshold necessary to interfere with the 1st respondent's rights. The necessity or otherwise of granting this order will become evident once the petitioner has established the breach of constitutionally protected rights and fundamental freedoms. Indeed, the prayer sought at this interlocutory stage is in fact amongst the prayers that the petitioner has sought in the main petition.
13. I also decline to take the drastic action to strike out the claim on the basis of opposition to the motion before the court and in the absence of a formal application to that effect.

14.The Notice of Motion dated 1st March 2013 is hereby dismissed with no order as to costs.

DATED and **DELIVERED** at **NAIROBI** this 23rd day of August 2013.

D.S. MAJANJA

JUDGE

Mr Omas instructed by Kabue Thumi and Company Advocates for the petitioner.

Mr Ouma instructed by Ochieng' Onyango, Kibet and Ohaga Advocates for the 1st respondent.