REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL APPLICATION NO. 526 OF 2008

C. M.S..... APPLICANT

V E R S U S

I.A.K suing through mother and next friend C.A. O..... RESPONDENT

JUDGMENT

Introduction

1. In his petition dated the 29th August 2008, the petitioner, **C. M. S** seeks the following orders:-

(a) A declaration that the orders made on 17th July, 2008 in Children's Court case No. 306 of 2006 are unconstitutional.

(b) The orders made on 17th July, 2008 be set aside and the case do proceed to full hearing.

(c) That this Honourable Court be pleased to make such orders as this Honourable Court deems fit.

2. Simultaneously with the petition, the petitioner filed a chamber summons application seeking orders staying Children's Case No 306 of 2006 pending the hearing and determination of this petition, and an order in those terms was granted on the 22nd of September 2008.

3. The petition was opposed by the respondent and a replying affidavit sworn by C.A.O on the 23rd of July 2010 was filed. The respondent also filed a Notice of Preliminary Objection dated the 23rd July 2010 on the grounds that the petition was incurably defective and was an abuse of the court process. The petitioner filed written submissions dated the 11th of October 2010 while the respondent filed her submissions dated 5th December 2010. The parties highlighted their submissions before me on the 17th of November 2011.

The Petitioner's Case

4. According to Mr. Kiptoo for the petitioner, the main issue for determination is whether an order made by the Children's Court in Nairobi Children's Case No. 306 of 2006 on 17th July 2008 compelling the petitioner against his wishes to undertake a DNA test within 14 days of the order is constitutional.

5. It was the petitioner's case that the order was unconstitutional as it violates the petitioner's freedom of conscience contrary to Chapter 4 section 32(1) of the New Constitution. It was also contrary to Section 70(b) and 78(1) of the old constitution. The order infringed on the freedom of conscience of the petitioner as he made it very clear to the subordinate court that he was not ready for such a DNA test and that he would suffer mental anguish and trauma if he was subjected to a test that he was not ready for.

6. The main reason the petitioner was against such an order was that he felt the issue of a DNA test was

irrelevant to the determination of the case before the Children's Court because, under the Children Act, Section 24(2), the most important matter is parental responsibility. Consequently, the outcome of the test would affect the fair trial of the case. He urged the court to find that for a court to compel a party to undergo a DNA test amounted to infringement of his constitutional rights. He invited the court to take judicial notice of the fact that the Children Act has not been amended so section 24(2) with regard to parental responsibility is still applicable.

7. It was the petitioner's case that he was not the father of the child respondent in this petition, and even if he is, he has no parental responsibility under Section 24(2). He did not want to undergo the DNA test because it is irrelevant.

8. On the preliminary objection that this petition is incurably defective for failure to join the Attorney-General, the petitioner argued that the court can make the orders sought even without the Attorney-General as joinder is an issue of procedure. In the petitioner's view, the respondent is raising procedural technicalities and under Article 22(3) of the Constitution, the court is not required to be bound by procedural technicalities.

The Respondent's Case

9. Mr. Wanyaga for the respondent addressed himself first to the preliminary objection to this petition and argued that the petition is incurably defective. The court must have parties against whom orders are sought. The petitioner has an issue against an order issued by the Children's Court, but neither the Children's Court nor the Attorney General is a party to this petition. The respondent is in this matter only as an Interested Party as she was the Plaintiff on behalf of the child in the case before the Children's Court.

10. The respondent argued that the court has dealt with the matter of having the proper respondent in court in many decisions. He referred to the decision of the court in **Daniel Migichi Njoroge –v- The Land Disputes Tribunal Githunguri Division and 2 Others Constitutional Application No. 680 of 2007** and argued that in this case, the Attorney General is not even named as a party. The petitioner had admitted in submissions on record dated 21st June, 2011 at page 2 that it is mandatory for the Attorney-General to be joined as a party.

11. With regard to the petition itself, the respondent's position was that the order of the Children's Court was made to assist the court in reaching a fair and just decision. It is the petitioner who indirectly invoked the Children Court to make the order when, in an affidavit sworn on 23rd June 2006, he swore that his relationship with the respondent ended in 2000. The child in this case was born in 2005, and unless the petitioner is afraid of being caught in perjury, he should be happy with the DNA test.

12. The respondent argued further that the DNA test is being ordered so as to assist the court as the issue of paternity is important in a children's case. He referred to Article 53(1) (e) which imposes parental case and responsibility on both the mother and father of a child whether they are married to each other or not. The section takes away the position of the petitioner with regard to section 24(2) of the Children Act. That section can only apply to fathers who are not biological fathers who have acquired parental responsibility. For biological fathers, such responsibility is automatic. By virtue of Article 2 of the Constitution the Children Act cannot supersede the provisions of the Constitution. Article 2(4) is clear that any law inconsistent with the Constitution is void to the extent of the inconsistency. Those sections of the Children Act which are contrary to the Constitution are null and void and the petitioner cannot rely on them. In any event the petitioner has invoked Article 32(1) and 32(4) of the Constitution and the petitioner cannot invoke the constitution selectively.

13. He asked the court to dismiss the petition with costs to the respondent noting that this is a children's matter which started in 2006 and the two guiding principles in children's matters are the best interest of the child and speedy trial of the issues in any case involving a child. Five years down the line, all the proceedings in the children's case were stopped, and only a DNA test can ascertain who the biological father of the child is so that the child's rights under Article 53 can be

enforced since the petitioner has denied being the biological father. No rights of the petitioner would be infringed by an order compelling him to undergo a DNA test.

Findings

14. I will first address myself to the preliminary objection raised by the respondent in this matter. The petitioner seeks orders directed at the Children's Court which issued the order directing him to undergo a DNA test to establish the paternity of the child, I.A.K. No orders are sought against the sole respondent in this petition, and indeed none can be given. As Wendoh J found in **Daniel Migichi Njoroge –v- The Land Disputes Tribunal Githunguri Division and 2 Others** (supra) at page 7 of the judgment, ***'the Respondent Ruth Wambui is irregularly enjoined to this originating summons as a Respondent because this being a constitutional application, it can only be brought against the state which guarantees the private rights of individuals. The 3rd Respondent could only have been enjoined as an interested Party.'***

15. That this petition is incurably defective for failure to join the Attorney General as a party is directly admitted on record by the petitioner in his very eloquent submissions in support of his unsuccessful application for leave to join the Attorney General as a party to this petition. On the second page of his submissions dated 21st June 2011, the petitioner submits as follows:-

'The government of Kenya is the Custodian, Guarantor and protector of the fundamental rights and freedoms of individuals as enshrined in the constitution. The Attorney General being the legal advisor of the Government is therefore a Respondent in any application to this Honourable Court since the orders that would be made thereafter would affect the Government. .....it is our submission that it is therefore mandatory that the Attorney-General be joined as a party to the Petition herein.'

I need not add any more on this point.

16. It is important, however, in order to lay to rest this matter, to consider whether, had the petitioner properly brought these proceedings before this court, it would have been possible to find the orders of the Children's Court requiring him to undergo a DNA test an infringement of his right to conscience. It should be noted that the petitioner's case is that ***'the order infringed on the freedom of conscience of the petitioner as he made it very clear to the subordinate court that he was not ready for such a DNA test and that he would suffer mental anguish and trauma if he was subjected to a test.*** 'He also considers that the test is irrelevant to the determination of his parental responsibility to the child.

17. From the evidence on the record, I observe that the child was born in 2005. His right to parental care is a continuing right, and so the provisions of Article 53(1) (e) of the Constitution in this regard apply. The argument by the petitioner that the issue of paternity is irrelevant in order to establish parental responsibility is therefore untenable. Further, in light of the provisions of Article 2 of the Constitution with regard to the supremacy of the Constitution, any provision of the Children Act that is in conflict with the Constitution must give way to the Constitution.

18. In determining a matter such as this, the court must of necessity weigh the competing rights of the child and the petitioner who is alleged to be the biological father. The right of the child to parental care takes precedence, in my view, particularly in light of the cardinal constitutional principle set out in Article 53(2) that in matters such as this, the paramount consideration is the best interests of the child.

19. Would it be an infringement of the petitioner's constitutional right to freedom of conscience either under the new or the old constitution to require him to undergo a DNA test? I do not believe so.

Article 78(1) of the old constitution provides that ***'Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section that freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom, either alone or in community with others and both in public and in private to manifest and propagate his religion or belief in worship, teaching, practice and observance.'***

Article **32(1)** of the Constitution provides that ***'Every person has the right to freedom of conscience,***

religion, thought, belief and opinion.'

20. These two provisions protect the right of all persons, including the petitioner, to freedom of thought and religion, and of the freedom to change his religion and belief and to practice his religion. The petitioner has not demonstrated how being required to undergo a DNA test violates his freedom of conscience as guaranteed by the Constitution. All he asserts is that he is being asked to undergo the test against his will. The question that must be asked is whether his unwillingness to undergo the DNA test is sufficient to override the interests of the child who may thereby be denied the constitutional right to parental care.

21. The High Court has had occasion to consider the question of whether or not to compel a putative father to undergo a DNA test to establish paternity and did so order in the case of **MW-v-KC Kakamega HC Misc Application No. 105 of 2004.** A similar order was made in the High Court at Delhi in the case of **Shri Rohit Shekhar-v- Shri Narayan Dutt Tiwari & Anr IA NO 4720 of 2008.** The principles that emerge from these decisions are local and are from a jurisdiction with a legal system similar to ours that an order for DNA testing should be made if it is in the interests of the child and if a prima facie case has been made to justify such an order. Such an order would not in my view be in violation of any of the petitioner's constitutional rights and would be in the best interests of the child.

23. In light of this court's finding both on the preliminary objection and the substantive issue raised in the petition, I find the petition has no merit and dismiss the same with costs to the respondent.

Dated and Delivered at Nairobi this 20th day of January, 2012.

Mumbi Ngugi

Judge