



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Petition 339 of 2011**

**VKK** (*petitioning as next of friend and biological mother of D.O. a minor.....***PETITIONER/APPLICANT**

**VERSUS**

**PNO** (*Biological father of D.O. a minor).....***RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Application before this court was brought under a certificate of urgency dated the 28th of December 2011. After hearing the application, the court declined to certify the matter as urgent to be heard during the High Court vacation.
2. The Petition is for enforcement of the rights of a child pursuant to **Section 22** of the **Children's Act** and concerns parental responsibility and maintenance of a child. The subject of these proceedings is a minor, one DO. ("**the child**") aged about ten years(having been born in May, 2002). The Applicant is the biological mother while the Respondent is alleged to be the biological father of the child. According to the Applicant, the couple had cohabited for ten years during which period the couple was known and held themselves out as a husband and wife.
3. The mother of the child brings this petition on behalf of the child who is under her care and control.

**Petitioner's case**

4. By a Notice of Motion dated the 28th December, 2011, the Applicant seeks the following main reliefs:
  1. *That the Respondent be ordered to pay maintenance allowance and or financial support for D.O, at Kshs.275,000/- per month for school fees and school related expenses including medical expenses, accommodation and entertainment allowance inter-alia pending the hearing and determination of the Petition;*
  2. *A declaration that the child's constitutional and statutory rights in terms of **Articles 19, 20, 22, 23, 25, 28, 43 and 53 and Sections 4, 6, 7, 9, 17, 22, 23, 24, 25, 26, 29, 81, 82, 91, 93, 94, 96, 101, 121, 125, 127 and 187 of the Children's Act(No. 8 of 2001)**have been violated;*
  3. *That the Respondent be ordered to comply with his constitutional and statutory obligations under the Constitution and the **Children's Act**;*

4. That the Respondent be ordered to provide permanent residence, shelter or reasonable accommodation in Nairobi and Kisumu cities for D.O; the minor;

5. That the custody of the issue be vested on the Petitioner.

5. The crux of the Petitioner's case is that the Respondent has absconded from his parental responsibility as required both under the Constitution and statute law of providing support, love and care for his family as he provides nothing for the child. This, the Petitioner claims, has caused both the Petitioner and the child emotional injury and avers that the child stands to suffer irreparable loss unless the Respondent was compelled to fulfil his husbandry and fatherly responsibilities.

6. The Application is supported by the Petitioner's Affidavit sworn on the 28th of December, 2012 and a Supplementary Affidavit in which the Petitioner depones that she and the Respondent have cohabited for about 10 years and that the Respondent has introduced her to his relatives and friends as his wife. Further, that prior to and after the birth of the child, the Respondent had taken full parental responsibility and catered for the child in all material respects. The Petitioner has annexed a number of copies of receipts in support of this claim.

7. It is the Petitioner's further contention that the Respondent had agreed orally, to among other responsibilities, transfer substantial properties including a permanent dwelling house in Nairobi's Donholm Estate or Komarock Estate to the minor so as to secure his future, a promise the Respondent has up to date reneged on.

8. The Petitioner avers that the Respondent has deserted the Petitioner and the child thereby causing them mental anguish and torture and has even cut off communication, ignoring her texts and telephone calls on numerous occasions. It is here case that she is deserving of the orders elsewhere reproduced above.

### **Respondent's Case**

9. The Respondent has denied most of the Petitioner's averments and relies on his Answer to the Petition dated the 16th January, 2012, a Further Affidavit dated the 7th June, 2012 and written submissions dated the 16th March, 2012.

10. The Respondent has denied parentage of the minor and contends that there was no marriage or cohabitation between him and the Petitioner. He maintains that he provided maintenance for the family only as a friendly gesture but not as father to the child. He further expresses willingness to take up parental responsibility over the child after a positive DNA test confirming him as the biological father to the child. Regarding the appearance of his name in the Certificate of Birth for the child, the Respondent has maintained that he was not present nor did he consent to the Petitioner putting his names on the register of births.

11. He moves this Court to resolve the issue of paternity prior to issuing the orders sought by the Petitioner and in his Submissions, he has stated that he is willing to go to any clinic or hospital for purposes of the DNA test. It is the Respondent's further submission that he is retired from gainful employment and does not possess the properties alleged by the Petitioner and cannot afford the sums claimed.

12. In his written Submissions, the Respondent also raised the question relating to jurisdiction of this court over the matter. While the Respondent admits to the unlimited original jurisdiction of this Court, he argues that this neither extinguishes the jurisdiction of the Children's Court to handle the matter nor does it stop this court from transferring the matter to the Children's Court.

13. According to the advocate for the Respondent, the Children's Court is the proper court to deal with the issues raised in the Petition by dint of **Section 11** of the **Civil Procedure Act** which provides that suits shall be instituted in the Court of the lowest grade competent to try it, and **Section 73** of the **Children's Act** which vests in the Children's Court power to deal with issues of custody and maintenance

of a child such as those raised in the present matter.

14. The Petitioner however opposes the above line of argument and has contended that **Article 22** of the **Constitution** has conferred on this court enforcement jurisdiction as far as fundamental rights of an individual was concerned and in so doing, the Court could grant an appropriate relief for such enforcement such as those sought by the Petitioner. In the Petitioner's written submissions dated the 21st February, 2012, counsel for the Petitioners also referred this court to the case of *MW v KC*, **Misc. Application No. 105 of 2004** for the proposition that this court had the jurisdiction to enforce any of the provisions of sections 14 to 19 of the Children's Act.

### **Issues for determination**

15. The two issues for determination at this stage are:

*(i) Whether this court is seized of the jurisdiction to determine the matter or whether the matter ought to be transferred to the Children's Court for determination.*

*(ii) (If the answer to the first question is in the affirmative), whether this Court should grant an order for a paternity test in form of DNA testing as prayed by the Petitioner before the substantive determination of the Petition.*

16. It is uncontested that this Court has original jurisdiction in civil and criminal cases under **Article 164(3)(a)** of the **Constitution**. As I understand it, the bone of contention is not whether this Court lacks jurisdiction to entertain the matter *per se* but whether this matter ought to be transferred to the Children's Court as the more ideal forum and the proper court to canvass and dispose of the issues raised in the Petition.

17. This Court takes cognizance of the fact that **Article 22** allows access to any person to approach this Court on claims of violations of any of the fundamental rights and freedoms enunciated in the Bill of rights. The **Article** provides thus:

*“Every person has the right to institute court proceeding claiming that a right or fundamental freedom in the Bill of rights has been denied, violated or infringed, or is threatened.”*

18. There is therefore no doubt that this Court has jurisdiction to hear the matter. The question that begs an answer is whether, this is the better forum to dispose of the matter, taking into account the need to safeguard the best interests of the child as this Court enjoined under **Article 53(2)** to take into account the best interest of the child principle in all cases involving children. The Article provides thus: **“A child's best interests are of paramount importance in every matter concerning the child.”**

19. The **Children's Act(No. 8 of 2001)** which came into force on March 2002 is the special legislation governing children affairs. According to the preamble to the **Act**, it is an **Act of Parliament** 'to make provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children; to make provision for the administration of children's institutions; to give effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and for connected purposes.'

20. I am not convinced that this is a matter that should be handled by this Court as opposed to the Children's Court which is the specialised court that deals with children matters. Although I am aware that this court possesses unlimited jurisdiction in civil and criminal matters and that the Petitioner has a right to a hearing before this court on allegations of breach of fundamental rights and freedoms, those provisions must be read together with the specific rights of the children protected under **Article 53** of the **Constitution** and the **Children's Act**. I am of the view that those rights being paramount are best protected by having a full hearing in the Children's Court. That court for example will need to conclusively determine the child's parentage before going to all other issues raised in the Petition.

21. I think it would set a dangerous precedent and risk rendering our institutions redundant if all matters however arising are brought before this Court in the form of Constitutional Petitions. There was a specific need that the legislature intended to address by setting up a Children's Court to specifically deal with children-related matters. Furthermore, I see no prejudice or injustice that may be occasioned on either parties by referring this matter to the Children's Court for hearing and determination.

22. I therefore hold that the Children's Court established in **Part VI** of the **Children's Act** is the Proper Court with jurisdiction to determine matters relating the welfare of children, including custody and maintenance issues. The Court will be able to hear both parties, make the appropriate orders concerning paternity and DNA testing and determine what best constitutes the best interest and welfare of the child in question. It is otherwise improper to determine all these issues on the basis of opposing Affidavits filed by the parties.

23. For the reasons stated above, I would decline to further hear the matter or grant any of the prayers sought and would make the following Orders:

*(i) That the proceedings in this matter, that is petition No.339 of 2012 be and are hereby transferred to the Children's Court at Nairobi for hearing and determination and,*

*(ii) I would make no order as to the costs of the proceedings which shall in any event abide the determination of the issues raised in the Petition.*

24. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 12TH DAY OF OCTOBER, 2012**

**ISAAC LENAOLA**  
**JUDGE**

**In the presence of:**

Coram: Irene – Court clerk

Mr. Wasuma hold brief for Mr. Omondi for Petitioner

No appearance for Respondent

**Order**

Judgment duly delivered.

**ISAAC LENAOLA**  
**JUDGE**  
**12/10/2012**