REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. SUCCESSION APPLICATION NO. 8 OF 2010

JANE MWIHAKI NJUGUNA.....APPLICANT

VERSUS

DAVID OLE NGEITWA.....RESPONDENT

RULING

By an application made by way a Chamber Summons dated and filed on 27th July 2010 ***("the Application"),*** the Applicant sought three orders -

(1) that the Respondent be ordered to attend a DNA test with regard to the subjects; J Ole N and L. K.N.

(2) that the Respondent do bear the costs of the DNA test, and

(3) that the costs of the application be provided for.

The application is based upon the grounds on the face thereof, and the Supporting Affidavit of the Applicant sworn on 27th July 2010, and the Further Affidavit of the Applicant enclosing handwritten and hardly legible copies of proceedings in Nyahururu Children's Court Case No. 20 of 2009.

The Application was opposed, by the Respondent's Replying Affidavit sworn on 6th September 2010 and filed on 14th September, 2010.

In addition to the grounds and the Supporting Affidavit, and Further Affidavit, Mr. Mbeche learned counsel for the Applicant also filed written submissions dated and filed on 1st November, 2010. Mr. Karanja learned counsel for the Respondent had filed on 29th October 2010 his written submissions dated 27th October 2010.

The application herein is premised upon the provisions of Sections 6(1) and 22(1) & (2) of the Children Act (No. 8 of 2001), (the Act). Section 6(1) of the Act provides that ***"a child shall have a right to live with and be cared for by his parents."*** Section 22(1) provides for the enforcement of that right brought by any person who alleges that any of the rights of a child under Section 4-19 *(inclusive)* of the Act has been or is being or is likely to be contravened. Section 22(2) confers upon the High Court the right to hear and determine an application brought by any such person under Section 22(8), and the jurisdiction to issue such writs and give such directions as it may consider appropriate for the purpose of enforcement of any of the provisions of Sections 4 to 19 (inclusive) of the Act.

The right to be enforced in this application is conferred by Section 6 of the Act - ***"a child shall have the right to live with and be cared for by his parents."***

In his submissions counsel for the Applicant referred to a host of international instruments including the United Nations Universal Declaration of Human Rights (Articles 7 & 25), which both emphasise the right to protection of the child under the law, and Article 53(2) of the Constitution of the Second Republic that the child's best interest is of paramount importance in every matter concerning the child.

Counsel also submitted that the Application is brought in good faith and that sufficient cause has been shown, and that the court has the necessary jurisdiction to issue the orders for DNA test under Section 22 of the Act. In this regard, Counsel relied on the decision of Hon. Mr. Justice GBM Kariuki in the case of MW vs. KC H.C. at Kakamega Misc. Appl. No. 105 of 2004) in which the learned judge applying the provisions of Section 22(1) & (2) gave orders for DNA test against the Respondent.

On his part, Mr. Karanja Counsel for the Respondent in opposition to the Application relied upon the decision of Hon. Mr. Justice Ouko in Meru H. C. Misc. Application No. 184 of 2006, (**Freda Gakii Nathan** (suing as the mother and next friend of - **Sharon Mutembei vs. Richard Kinyua Karani**), in which the learned judge declined to grant similar orders for DNA test, principally on the ground that the Applicant having failed to establish a case against the Respondent in an existing suit was fishing for evidence to witness her case. This case is similar.

The Applicant and the Respondent are engaged in a tussle in the Children's Court at Nyahururu Children's Case No. 20 of 2009 in which the Applicant seeks orders for maintenance of the Children, custody of them, and costs of that suit. The applicant has closed her case, and the defence case is pending.

It seems to me that where parties are engaged in matrimonial acrimony, a party which seeks particular or certain prayers ought to be sufficiently prepared both before, filing suit, and more particularly before setting it down for hearing.

I think it is an abuse of the process of court to commence proceedings in one court, abandon or pend those proceedings and go out on a shopping expedition to another court for orders evidence to sustain the pending suit. The court is extremely jealous and protective of its process and will not allow it to be so abused.

What the applicant should do in such unfortunate circumstances is to complete or finalize the matter in the lower court, and if dissatisfied with the outcome, appeal against the decision. It is an abuse of the process of court to maintain both actions at the same time, particularly as in this case, to obtain evidence

in order to succeed in the case before the lower court. Such an application is not brought in good faith.

For those reasons, the application dated and filed on 27th July 2010 is dismissed with a direction that each party bear its own costs.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 25th day of February 2011

M. J. ANYARA EMUKULE

JUDGE