



CIVIL

· When will the court order D.N.A. testing.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL CASE NO. 1 OF 2011

HENRY RIUNGU KIRIKAAPPLICANT

VERSUS

MORRIS KIMATHIRESPONDENT

RULING

Henry Riungu Kirika (Henry) has filed this action against Morris Kimathi (Morris). He seeks orders of injunction to restrain Morris from entering, trespassing or occupying parcel number *Abogeta/U-Chure/2233* (suit property). That parcel of land is registered in the name of Henry. He also filed an interlocutory application by way of Chamber Summons dated 3rd January 2011. By that Chamber Summons, he seeks interlocutory injunction in the same terms as in the plaint pending the hearing and the determination of this suit. In the affidavit sworn by Henry on 3rd January 2011, he stated that he is the registered owner of the suit property where he resides with his family. He stated that Morris had trespassed the suit property on the allegation that he is his son. That he begun to trespass in September 2009 but stopped when he received a letter from an advocate representing Henry. However on 26th December 2010, Morris deposited building material on the suit property intending to construct a house thereon. It is on that basis that Henry sought an injunction. I will reproduce some portion of the replying affidavit of Morris here to better understand his case.

2 *That I have read and understood the contents of the application dated 3rd January 2011 and it is in reply thereto that I swear this affidavit.*

3 *That the plaintiff/applicant is the only humanly father I know since my birth.*

4 *That I have only been informed by my uncles (the plaintiff's brothers) that I was born outside wed-lock and brought to the home of the plaintiff by my mother and her parents when I was still an infant; less than one (1) year old.*

5 *That I am further informed by the same uncles that by that time my father the plaintiff, had not yet married and so I was then under the joint custody and care of the plaintiff and his parents who are my grandparents.*

- 6 *That subsequently, my father, the plaintiff, married my step-mother after which I was put into the sole custody and care of my father and step-mother who took very good care of me and at that time I did not know that my step-mother was not my biological mother.*
- 7 *That my said parents educated me as all parents do to their children.*
- 8 *That when my step-mother joined college for a teacher training course I was the eldest in the family and I very well assisted the plaintiff in taking care of my younger siblings.*
- 9 *That when I became of age my father the plaintiff had me circumcised and my both parents took very good care of me throughout the initiation ceremony whereafter they took me to secondary school and paid fees promptly until I cleared secondary school.*
- 10 *That after my secondary school the plaintiff gave me a copy of his identity card and signed my own identity card application forms as my father as a result of which to date my identity card bears my surname as Riungu.*
- 11 *That similarly, all my school records and all other official records indicate my father as Henry Riungu Kirika, the plaintiff herein.*
- 12 *That even at the time I married the plaintiff paid my bride price and my wife has always known and regarded the plaintiff as her only father-in-law.*
- 13 *That todate I live very happily and harmoniously with my step-sisters and step-brother as we grew up as brothers and sisters not even knowing we were not born of the same mother.*
- 14 *That it was only in the year 2005 when my biological mother died that the issue of my maternity (sic) came to my knowledge through my uncles; but since my childhood until the current events leading to this suit that my paternity has never been controversial issue known to me.*
- 15 *That the issue is being raised long after the demise of my biological mother, a time when I cannot inquire the truth or otherwise of who else my father could be if not the plaintiff.*
- 16 *That I have been informed by my uncles that my father, the plaintiff, even took a heifer to my biological mother's father as the known Kimeru Costmary pregnancy compensation for fathering me outside the wed-lock when I was still young.*
- 17 *That the plaintiff's home is the only home I know and being ordered not to remain or enter the same is very unconscionable.*
- 18 *That the plaintiff having held himself out as my father and making me believe that am his son for 33 years since I was only months old is stopped from denying the paternity; more so after the death of my biological mother leaving me with nobody to ask who my biological father could be; if not the plaintiff whom I have known as my father since my childhood.*
- 19 *That the orders sought by my father, the plaintiff, if granted would leave me with no family background or trace of the same and would be against the letter and spirit of the Constitution of Kenya and all known principles of law and equity.*
- 20 *That if stopped from putting up a house on my father's compound I would be without shelter as I am unable to conveniently sleep with my wife in the house my father the plaintiff, built for me when I was about to be circumcised as it is also occupied by my youngest brother who is now in secondary school.*

Henry in response to the replying affidavit denied being the father of Morris and denied that he brought him up. He deponed that he was willing to undergo D.N.A test with Morris to establish if he is the biological father. Although Morris did not file an affidavit to respond to the request of D.N.A testing,

learned counsel for Morris Mr. Akwalu stated in submission that Henry was the only father that Morris knew. He therefore opposed the D.N.A testing to be carried out. D.N.A testing is one of the most novel scientific invention by man. It is said that such testing can determine maternal and paternal ancestry. I was unable to understand the argument by Morris against undergoing D.N.A testing. Morris lay his claim to build on the suit property on the allegation that he is the son of Henry. D.N.A testing will put to rest his and Henry's doubt whether they are related. Morris did not show what if any, prejudice he will suffer if D.N.A testing is carried out. In the case **Royford Murithi Nyamu V. Joyce Muthoni Kaburu** Civil Application No. Nai 2 of 2009 the Court of Appeal allowed D.N.A testing to be carried out as ordered by the superior court because the applicant could not show what prejudice she would suffer. The court stated as follows:-

“But what prejudice will the applicant suffer if he was made to undergo the D.N.A. test to ascertain paternity of the two children?”

I find that D.N.A testing once carried out will simplify the issues in this case. I find Henry has satisfied the principle of granting an injunction. He has shown a *prima facie* case with probability of success. See the case of **Geilla Vs. Cassman Brown & Co. Ltd** [1973] E.A. I therefore grant the following orders:-

- 1. An order of injunction is granted to restrain Morris Kimathi from entering, occupying remaining or dealing in any manner with parcel No. Abogeta/U-Chure/2233 until the hearing and determination of this case.***
- 2. An order is issued for both Henry Riungu Kirika and Morris Kimathi to undergo D.N.A testing within 60 days from this date hereof to determine if Henry Riungu Kirika is the father of Morris Kimathi. The cost of that testing will be borne by Henry Riungu Kirika who shall have the right to apply to the court for reimbursement if the D.N.A testing gives a negative result.***
- 3. The cost of Chamber Summons dated 3rd January 2011 shall be in the cause.***

Dated, signed and delivered at Meru this 31st day of March 2011.

MARY KASANGO
JUDGE