



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

MISC. CIVIL APPLICATION NO.8 OF 2011

LAWRENCE GACHUKIA

MACHARIA.....APPLICANT

Versus

WAMBUI GICHU.....RESPONDENT

RULING

Lawrence Gachukia Macharia, the applicant herein, took out the motion dated 1st February 2011 pursuant to the provisions of section 4, 6(1), 7(1), 9 and 22(1) and (2) of the Children Act no. 8 of 2001, in which he sought for the following orders:

- 1. That this application be certified urgent and be heard ex-parte in the first instance pending service upon the Respondent.***
- 2. That the Respondent be ordered and compelled to undergo a DNA test for the purposes of determining the paternity of the Minor, L.W.W, at the Kenyatta National Hospital or at any such other medical facility appointed by the court.***
- 3. That upon the confirmation of the paternity of the child, the Registrar of Births do issue the birth certificate of the minor, L.W.W, reflecting the Applicant, Lawrence Gachukia Macharia, as the father of the minor and in the event the respondent has already obtained a birth certificate for the minor, the same be rectified to reflect the Applicant as the father of the minor.***
- 4. That upon confirmation of the paternity of the minor, the Respondent be ordered and compelled to return the minor, L.W to H.S Academy to continue her upper primary education and the Respondent be further restrained from withdrawing the minor from the said school without the consent of the applicant.***
- 5. That the Respondent do bear the costs of this application.***

6. *That such other appropriate orders be made as the honourable court may deem fit and just to grant.*

The applicant swore an affidavit he filed in support of the motion. The motion was served upon Wambui Gichu the respondent herein, who did not file any response to the motion. Apparently the Respondent was present in court when the motion came up for hearing.

I have considered the grounds set out on the face of the motion and the facts deponed in the affidavit of support. The applicant has alleged that he had a brief intimate relationship with the Respondent in the year 200 and as a result of that relationship Lydia Wambui Wachira a minor was born. The applicant further averred that he acknowledge the paternity and undertook parental responsibility of the minor by paying school fees and meeting her other financial needs. It is further alleged that the Respondent has withdrawn the minor from H. S Academy without consulting him thus prejudicing the best interest of the minor of getting good affordable education. It is also alleged that the Respondent has raised doubts about the paternity of the child but has again refused to submit herself and the minor to a DNA test. The applicant stated that the Respondent's conduct violates the rights of the child to know her father and to be cared for under section 6(1) of the Children Act No. 8 of 2001. The applicant further pointed out that the notification of birth of the minor bears the names of a third party, Samuel Wachira whom he alleged at one time cohabited with the Respondent.

The thrust of the applicant's application is to the effect that he is not sure whether the sired a child with the Respondent. He has pointed out that at the time of the birth of the minor, he knew the Respondent was in another relationship and was actually cohabiting with one Samuel Wachira Ngatia. His suspicion is further supported by the fact that the Respondent gave the name of her fiancée i.e. Samuel Wachira Ngatia as the father of the child. He wants the order to be given to him to clear the doubts over the paternity issues. He claims the Respondent had deliberately refused to cooperate in undergoing a voluntary DNA testing which had been arranged in advance. The question is whether this court should issue the orders sought? A careful consideration of the material placed before me indicates that the Applicant and the Respondent have fallen out in their relationship. The applicant is seeking to determine as to whether or not he is the father of the minor. The Respondent has not bothered to answer to the issues raised. Under S. 24(3) (a) it is expressly stated that where a child's father and mother were not married to each other at the time of child's birth and have not subsequently married each other, the mother shall have parental responsibility at the first instance. In the case before me, the applicant is in doubt as to whether he is the father or not. What is clear in my mind is that the Respondent is the mother of the minor hence she automatically assumes parent responsibility of that child under section 24(3)(a) of the children Act. The Applicant claims that the child may lose his support as a parent if the paternity issue is not determined. I do not find logic in the Applicant's argument because there is no evidence that the Respondent is unable to provide the child with the necessary support required by law as the lawful parent. It is the argument of the Applicant that the child is entitled to know the name of her father. In fact he has applied to have the name of Samuel Wachira to be deleted from the notification of birth of the minor as the father.

In my view that prayer cannot be given without the input of Samuel Wachira. I expected the Applicant herein to enjoin Samuel Wachira as a party to this motion but he deliberately omitted to do so. It is possible that Samuel Wachira is the biological father of the child. The Respondent in any case has not sought for the Applicant's participation in sharing parental responsibility of the child. In my humble view I find no good reason to grant the discretionary orders sought. The motion is ordered dismissed with no order as to costs.

Dated and delivered this 15th day of July 2011.

J.K. SERGON

JUDGE

In open court in the absence of the parties with notice.

J.K. SERGON

JUDGE