



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 100 OF 2011**

**SOLOMON KIROMO MBUGUA ..... PLAINTIFF**

**V E R S U S**

**1. VIRGINIA MURUGI KARIUKI**

**2. JUDY NJERI MURUGI ..... DEFENDANTS**

**R U L I N G**

The Defendants are mother and daughter respectively. The Plaintiff's case against them is that they have, from August 2010, "stated as a fact and spread unfounded statements to (the Plaintiff's) family and friends, (particularly to the Plaintiff's daughter, Ann Njeri Kiromo) that the Plaintiff is the 2<sup>nd</sup> Defendants biological father".

At paragraph 5 of the plaint the Plaintiff has stated that he is not the 2<sup>nd</sup> Defendant's biological father and asserts that he has never sired a child with the 1<sup>st</sup> Defendant, nor maintained the 2<sup>nd</sup> Defendant.

The Plaintiff's further case is that the Defendants' allegations are motivated by malice and ill-will, are unfounded and have damaged the Plaintiff's reputation, and have had the effect of ridiculing him among his wife, children and friends. The Plaintiff further pleads that the Defendant's action has caused him and his family and friends distress. He there seeks the following main reliefs –

- 1) An order to compel the 2<sup>nd</sup> Defendant to undergo a DNA test with the Plaintiff at **Kenyatta National Hospital** in order to ascertain whether the 2<sup>nd</sup> Defendant is the Plaintiff's biological daughter.
- 2) A declaration that the Plaintiff is not the 2<sup>nd</sup> Defendant's biological father.
- 3) An injunction to restrain the Defendant from "spreading rumours that the Plaintiff is the 2<sup>nd</sup> Defendant's biological father".
- 4) General damages.

The Defendants duly entered appearance and filed defence and counterclaim. They denied that they have spread rumours or made claims regarding the paternity of the 2<sup>nd</sup> Defendant as alleged. Regarding paragraph 6 of the plaint, the Defendants pleaded that the Plaintiff did indeed maintain the Defendants and variedly gave financial support to them. They therefore sought dismissal of the Plaintiff's suit.

The Defendants' counterclaim is that by virtue of the suit herein brought against them by the Plaintiff, they have been exposed to ridicule and embarrassment before right-thinking members of society, and further that the order for a DNA test sought would amount to infringement of the 2<sup>nd</sup> Defendant's privacy. They claim damages on that account. The Defendants have further counterclaimed that the

Plaintiff's suit is based on unfounded allegations which have damaged the Defendants' reputation, and have gravely prejudiced them. They thus claim damages.

The Plaintiff filed a reply to defence and defence to counterclaim. He joined issue with the Defendants upon their statement of defence. In paragraph 4 of the reply to defence and defence to counterclaim, the Plaintiff states that he has not had an intimate relationship with the 1<sup>st</sup> Defendant and that the Defendants are known to him only as neighbours. The counterclaim is denied.

The Plaintiff subsequently filed an application by **chamber summons dated 13<sup>th</sup> June 2011**. He sought the main order that the 2<sup>nd</sup> Defendant, Judy Njeri Murugi, be compelled to "attend" a DNA test at the Government Chemist Laboratory in Nairobi and present DNA samples within 10 days of issuance of such order to ascertain whether the 2<sup>nd</sup> Defendant is the Plaintiff's biological child. The application is stated to be made under **sections 1A (1), 1B (1), 3 and 3A of the Civil Procedure Act, Cap 21**.

The grounds for the application as stated on the face thereof are as follows –

- 1) That the Defendants have continued to spread unfounded information that the Plaintiff is the 2<sup>nd</sup> Defendant's biological father.
- 2) That the solution to this dispute is solely dependent on the carrying out of a DNA test to ascertain the 2<sup>nd</sup> Defendant's paternity.
- 3) That the Plaintiff and his family continue to suffer emotional damage due to the said allegations.

The application is supported by the Plaintiff's affidavit. He deposes that he is married to one **Elizabeth Wangari Kiromo**; that the 1<sup>st</sup> Defendant lives near the Plaintiff's farm in Gatundu while the 2<sup>nd</sup> Defendant lives in Nairobi, and that both Defendants are known to the Plaintiffs as neighbours; that while visiting his farm in Gatundu he occasionally met the 1<sup>st</sup> Defendant at a bar in which she was an attendant; and that he and his wife occasionally worshiped at Gachika Catholic Church where the Defendants also attended Sunday service.

The Plaintiff has further deposed that on or about 15<sup>th</sup> October 2010, the 2<sup>nd</sup> Defendant told the Plaintiff's daughter, Anne Njeri Kiromo, to her face that she was her sister; that in the month of August 2010 the Defendant started spreading malicious rumours that he was the 2<sup>nd</sup> Defendant's biological father; that in December 2010, he invited the Defendants to come with elders so that the matter could be arbitrated by them, but the Plaintiff declined; that the Defendants allegations have caused him great anguish, pain and suffering, and have humiliated him before his wife, children and friends; and that he and his family want the issue whether or not he is the father of the 2<sup>nd</sup> Defendant be determined once and for all by way of a DNA test, but that the 2<sup>nd</sup> Defendant is not willing to co-operate by consenting to such test.

The Defendants have opposed the application by replying affidavit filed on 16<sup>th</sup> September 2011, which is sworn by the 2<sup>nd</sup> Defendant. She has pointed out that in the statement of defence the Defendants have denied making claims or allegations that the Plaintiff is the 2<sup>nd</sup> Defendant's biological father. She has also deposed that a DNA test is a matter of personal choice and that she cannot be compelled to undergo the same, particularly because the Constitution of Kenya guarantees the right to privacy, and being compelled to undergo a DNA test against her wish would be a clear violation to the constitutional right to privacy; and that in any case, the pleadings of the parties as filed in this suit do not disclose the 2<sup>nd</sup> Defendant's paternity as an issue since all the parties have denied that the Plaintiff is the biological father of the 2<sup>nd</sup> Defendant.

I have carefully considered the submissions made by the learned counsels appearing for the parties.

First of all, it must be noted that the main order sought in the present application is the very same main relief sought in the plaint. Granting the order would have the effect of deciding the main suit

unheard. The court would be extremely reluctant to determine a suit upon an interlocutory application that is not specifically or particularly, under the rules of procedure, geared towards that end.

But the main impediment to the Plaintiff's application is that it is not predicated upon an issue in the suit. To put it another way, the application is not predicated upon an issue that will have to be determined at the trial of the action.

The application seeks an order to compel the 2<sup>nd</sup> Defendant, who is an adult sued as such, to undergo a DNA test along with the Plaintiff to establish whether or not the Plaintiff is the 2<sup>nd</sup> Defendant's biological father. The question that must be asked is whether or not the 2<sup>nd</sup> Defendant's paternity is one of the issues to be tried in this suit.

By his own pleadings and affidavits the Plaintiff has stated that he is not the 2<sup>nd</sup> Defendant's father. He has further stated in his reply to defence and defence to counterclaim that he has never had any sexual relations with the 1<sup>st</sup> Defendant. In his affidavit sworn in support of the application and also in his plaint, he has stated that he has known the Defendants only as neighbours.

On their part, the Defendants have not put forward any claim that the Plaintiff is the 2<sup>nd</sup> Defendant's biological father. They have specifically denied making any allegations or spreading rumours to that effect. At paragraph 9 of their statement of defence they have affirmed that they have not any joint or several claim against the assets of the Plaintiff or his family.

In these circumstances, the 2<sup>nd</sup> Defendant's paternity cannot be and is not an issue at all in this suit. So, upon what issue is the Plaintiff's application based? Upon what premise would this court, in the circumstances of this case, and even without considering the likely Constitutional ramifications, compel the 2<sup>nd</sup> Defendant to undergo a DNA test to establish her paternity? Her paternity is not an issue at all in this suit.

An order as is sought will not be issued merely to settle any domestic problems the Plaintiff might have with his wife and family, no doubt brought by his philandering ways, and I make this statement advisedly. During hearing of this application the Plaintiff informed the court through his counsel at the bar that after the year 1980 he had sexual intercourse with the 1<sup>st</sup> Defendant at least once a month for "sometime". He further stated that he did not know when the 2<sup>nd</sup> Defendant was born.

It was quite apparent that the Plaintiff had not made this disclosure to his wife who was present in court. The wife became so distressed that she had to be removed from the court-room.

Even if there was cause to grant the order sought, would the Plaintiff, who has obviously come to court with dirty hands, be entitled to the court's discretion? I think not. He has pleaded in his pleadings that he has never had any sexual relations with the 1<sup>st</sup> Defendant, and only knew her as a neighbor. He has stated as much under oath. It was only in open court that he felt compelled to speak the truth.

Any litigant who approaches the court on false premises for exercise in his favour of the court's discretion cannot be looked upon with favour. But in the present case, there is no case made out for the grant of the order sought for the reason already stated, that the paternity of the 2<sup>nd</sup> Defendant is not an issue in the present suit.

In light of that finding, I need not discuss or rule upon the further issue whether or not the court would have jurisdiction to compel an adult to undergo a paternity test when such adult has not made any paternity claim. For the same reasons, I need not discuss or rule upon the various Constitutional ramifications submitted upon by the learned counsels.

In the premises the present application is misconceived. It is hereby dismissed with costs to the Defendant. It is so ordered.

**DATED AT NAIROBI THIS 19<sup>TH</sup> DAY OF OCTOBER 2011.**

**H.P.G. WAWERU  
JUDGE**

**DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF OCTOBER 2011**