



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL SUIT NO. 55 OF 2009

LESIIT J.

JACK MUTUMA ANGAINE.....APPLICANT

VERSUS

DENIS KIOGORA MUTUMA.....RESPONDENT

R U L I N G

The Application is a Chamber Summons dated 27th August 2009. It has been brought under S.6 and S.22 of the Children's Act and S3A of the Criminal Procedure Rules. It is seeking the following orders:

1.
2. **That the honourable court be pleased to grant an order compelling the Respondent DENIS KIOGORA MUTUMA to submit to a Deoxyribonucleic Acid Test DNA with a view to ascertaining his paternity.**
3. **That upon granting prayer 2 above, the honourable court be pleased to order that the Respondent do pay in full, all the expenses for the said Deoxyribonucleic Acid Test.**
4. **That costs of this application be provided for.**

The application is premised on the grounds cited on the face of the application which are as follows:

- (a) **That paternity is substantially in issue in Children Case No. 12 of 2008 in which the Respondent now aged 26 seeks maintenance.**
- (b) **That the determination of paternity will ease and speed up, the disposal of the above mentioned cause.**
- (c) **That no prejudice will be caused to the Respondent in the grant of orders sought herein.**
- (d) **That this Application is brought in good faith and in the interest of justice.**
- (e) **That the Applicant is prepared to meet the expenses of the DNA test.**

The application is further premised on a supporting affidavit sworn by the Applicant herein.

This application is opposed. The Respondent has sworn a replying affidavit dated 28th September, 2009.

I have considered this application together with the grounds both on the face of the application and in the supporting affidavit. Mr. Rimita counsel for the Applicant in his submissions in support of this application urged the court to compel the Respondent to submit himself to a DNA test in order to ascertain his paternity. Mr. Rimita urged that subjecting the Respondent to the test will remove any doubts as to the paternity of the Respondent, and will for the good of the Respondent. Counsel urged that the Respondent will not suffer any prejudice if the order prayed for is allowed.

I have considered the contents of the replying affidavit. The Respondent who appeared in person, made submissions opposing the orders sought in the instant application. In his submissions the Respondent urged that the current application is pegged on the Children's Case No. 12 of 2008 which he filed to compel the Applicant to pay his university fees by virtue of being his father. The Respondent urged that since the Children's Case was settled out of court and consent entered to that effect, the instant application has been overtaken by events. The Respondent urged that the Applicant, in the filed consent in Children's Case, bound himself to pay his university fees which he has done in full and that since then he is about to graduate. The Respondent urged that the ground given for the application, that the DNA test should be carried out in order to expedite the Children's Case is not a good ground since that case was concluded two years ago. The Respondent urged that the application is not in good faith because the Applicant paid his fees at the primary school level, secondary school, college and university. In addition the Respondent urged that he has lived with his mother in the home of the Applicant's father for the last seven years. The Respondent urged that if the Applicant wanted to know the paternity of the Respondent he ought to have applied for that test many years ago and not now.

I have considered the rival arguments by Mr. Rimita for the Applicant and the Respondent in person. It has been urged that the instant application in this Miscellaneous Civil Suit is pegged on a Children Case No 12 of 2008. The respondent has urged that the Children Case was concluded two years ago when the parties entered a consent settling the matter. The consent filed in the said Children Case is annexure 1 to the Respondent's replying affidavit.

The Applicant has not denied that the Children's Case was settled with the entry of the consent order aforementioned. It is trite law that any averment in a disposition which has not been controverted by an opponent must be considered to have been admitted. The Applicant has not controverted the Respondent's averment that the Children's Case has since been concluded and that the application is therefore overtaken by events. Apart from the fact that the Children's Case is virtually concluded as the purpose for which the Respondent filed it has fully been met, I was curious about the Law under which the application is made.

The Applicant has invoked sections 6 and section 22 of the Children's Act as the law he is relying upon to have the prayers sought made. Section 6 provides for childrens' right to parental care. Section 22 is a general provision providing for power to enforce the rights of the child.

Mr.Rimita for the Applicant did not quote any of these sections in his submissions in support of the application. I do not understand how they apply to the application at hand. If anything the instant application seems to be setting a stage for the denial to the Respondent of parental care and/or the general rights of a child.

I have considered the provision of section 2. The definition of the term "relative", sub-section (b) thereof, suggests that a father in relation to a child need not be the biological father of a child especially where he has acknowledged paternity and is contributing towards the maintenance of the child even in situations where the child was born outside marriage.

There is a consent annexed by the Respondent to his replying affidavit in which the Applicant bound

himself to pay University fees for the Respondent. Payment of education fees is part of parental care and maintenance of a child. It would be quite in order to conclude that given the circumstances of the case the Applicant has acknowledged paternity of the Respondent and has contributed to his maintenance and his entire education to the University level.

I have carefully considered the applicant's application for a DNA test. It gives me shivers and creates amazement that a person would go the whole way to maintain a child to the University level as the Applicant has done with the Respondent in this case, only to turn around and demand to know from the same child who he is. At this stage of their life, it can only be in bad faith and mischievous that the applicant has all of a sudden entertained doubt and curiosity as to his status in regard to the Respondent and now seeks to know whether he is the biological father of the Respondent.

I know that the Respondent is not a child within the meaning of section 2 of the Children's Act. Nevertheless I think he should enjoy the right to privacy and should be spared being compelled to have his veins punctured and blood drawn just for the Applicant to have the luxury of determining whether he sired the Respondent. At this late stage of the matter. If the Applicant really needed to know that fact, he should have enquired from the mother of the respondent. Alternatively he should have sought this test at the appropriate time before entering into the consent agreement. In any event as humanity, people pay fees for those who are not even their relations. It defeats reason that the Applicant should approach the court to have a DNA done pegging it on a case filed against him which stands settled.

Am well aware that the Children's Case was filed by the Respondent against the Applicant, and not by the Respondent's mother against the Applicant. I would understand the Applicant's desire to know the parentage of the Respondent had the case been filed by his mother and not by the Respondent. The Respondent is an innocent party. It is very harsh, unreasonable and oppressive for the Applicant to demand to enquire into the Respondent's DNA from him when he had no part to play in his conception.

Having carefully considered this application I find no merit in it. I am not satisfied that the applicant deserves the prayers sought, and I find no reasonable grounds upon which I can grant them.

I dismiss the application in its entirety with costs to the Respondent.

DATED, SIGNED AND DELIVERED THIS 10TH DAY OF NOVEMBER, 2011

J. LESIIT
JUDGE