



**JNM v MMG & 3 others (Environment and Land Appeal
E003 of 2022) [2022] KEELC 2511 (KLR) (18 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2511 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND APPEAL E003 OF 2022**

JM KAMAU, J

JULY 18, 2022

BETWEEN

JNM APPELLANT

AND

MMG 1ST RESPONDENT

VMG 2ND RESPONDENT

RKG 3RD RESPONDENT

DAB 4TH RESPONDENT

*(Chief Magistrate’s Court number 20 of 2020, the
Respondents (Plaintiffs) in a Complaint dated 27/2/2020)*

JUDGMENT

1. In Nyamira Chief Magistrate’s Court number 20 of 2020, the Respondents (Plaintiffs) in a Complaint dated 27/2/2020 sought for the following Orders:
 - (a) An order directing the Appellant (Defendant) to carry on a DNA together with the 3 issues of the marriage.
 - (b) The Defendant to allow the 2nd, 3rd and 4th Plaintiffs to proceed constructing their houses on parcel of land North Mugirango/ Bonyarorande/xxxx.
 - (c) Costs of this suit, interest at Court Rates.
 - (d) Any other relief this Honourable Court may deem fit and just to grant.”
2. The order sought directing the Appellant to submit and subject himself to a Deoxyribonucleic Acid Test (otherwise commonly known as DNA Test) is effectively for the purposes of ultimately



determining whether the Appellant is the 2nd, 3rd and 4th Respondents' biological father. This order was then sought at an interlocutory stage through a Motion taken out by the Respondents after 2 of the Respondents' witnesses had been heard. The prayer was granted on 9/3/2022.

3. The effect of the Application is that in the event the DNA test establishes that the Appellant is indeed the biological father of the 2nd, 3rd and 4th Respondents, prayer (a) of the Plaint which also seeks orders for a DNA test and in effect a declaration of paternity would have been issued.
4. In the Plaint the 1st Respondent alleges that in 1980 the Appellant married her under Kisii customary law and as a result the 2nd, 3rd and 4th Respondents were born. But that on 6/1/2020 the Appellant chased the 2nd, 3rd and 4th Respondents away and claimed that he would allow them back only upon a DNA Test confirming that they are truly his biological children.
5. Following the granting of the Application, the proceedings in the lower Court were muted until the DNA results are submitted to the Court.
6. It is indeed true that a DNA test would bring to rest the question whether the Appellant is the biological father of the 2nd, 3rd and 4th Respondents. The test would also vindicate the Respondents' position that in refusing them to construct a house on his parcel of land North Mugirango/bonyarorande/xxxx the Appellant's actions were illegal, malicious and ill-intended and inhumane.
7. On her part Ms. Bundi for the Appellant questioned the Order saying it was effectively seeking to determine the Suit at an interlocutory stage. Counsel pointed out that an order for DNA test would effectively equate an intrusion into the Appellant's privacy. The court also heard that the orders were not merited in the interim.
8. The issue for determination before me is not whether the Respondents have made out a case for the Appellant to undergo a DNA test but whether or not it was right to make such an order at the interlocutory stage and before full Hearing.
9. Courts must indeed restrain themselves at the interlocutory stage to make definitive and final findings especially on any disputed facts especially where the same or similar orders are sought in the main Suit. Courts must exercise caution and especially when the orders sought are mandatory in nature and where they may also end up being an intrusion on another individual's constitutionally guaranteed rights or freedoms. Caution must be taken here since compulsory DNA testing is a violation of a person's bodily integrity as well as his privacy.
10. I wish to borrow heavily from the case of *DNM v JK* [2016] eKLR Nairobi Constitutional & Human Rights Division Petition No. 133 of 2015 where Justice J. L. Onguto had this to say:

"The approach by the court when faced with an application for a mandatory interlocutory order ought to be that the court prior to granting such an order must be satisfied that there are special circumstances, which warrant such an order being issued. Additionally, the court must be satisfied that the case is a clear and straightforward one, which ought to be dealt with at once, and that at trial the court would be vindicated for having issued the order in the first place. Where there is any slight doubt then such an order ought not to be issued. The standard would therefore certainly not be the equivalent of a prima facie case being established. The rationale must be that acts performed pursuant to mandatory orders may not be easily remedied if the claimant's case is ultimately a flop at trial. I would consequently conclude that mandatory orders may be issued by this court at an interlocutory stage even where it appears to fragment the Petition and deal with or grant only one or some of the reliefs sought in the main."



11. Although this was in a constitutional Petition where the parameters are slightly different the principle is still applicable here.
12. In *RMK v AKG & another (supra)* the court stated that the applicant was under a duty to discharge the burden of first establishing a nexus between the applicant and the respondent in relation to the alleged paternity as well as the allegedly violated rights to persuade the court to grant the order for DNA testing.
13. In *PKM v Senior Principal Magistrate Children's Court at Nairobi & another* [2014] eKLR, the court adopted the test developed by the Supreme Court of India in *Bhabani Prasad Jena v Convener Sec Orissa*, Civil Appeal Nos 6222-6223 of 2010. According to the court, the question was whether the test was “eminently needed” to establish the truth and reach a just conclusion in the matter absent any other form of evidence and a prima facie case warranting the order ought to have been established first.
14. I am afraid that this test was not applied by the lower Court.
15. I am not satisfied that at the interlocutory stage of the proceedings the Respondents had established the necessary biological and factual nexus with the Appellant to warrant an intrusion of the Appellant’s right to bodily integrity and privacy for the lower Court to make an order that the Appellant submits to DNA testing at this stage.
16. The matrix of the competing interests which involve the right to have the parties’ dispute adjudicated fairly and the Appellant’s interests to have his constitutional rights to bodily integrity and privacy protected, would dictate that the level of certainty to be achieved is not simplified.
17. Other than the few circumstances when the Court can decide a case without the necessity of a full Hearing such as in the case of Summary judgment, striking out of pleadings or when a preliminary objection is raised where the Ruling on the same brings the case to an end, Courts need to be very cautious of summarily granting final orders at interlocutory stage.
18. Having said so, this Appeal is allowed with costs and the case in Nyamira Chief Magistrate’s Court number 20 of 2020 shall proceed to full trial in disregard of the order of the said Court dated 9/3/2022 which I hereby set aside.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 18TH DAY OF JULY 2022.

MUGO KAMAU

JUDGE

In the Presence of:

Court Assistant: Sibota

Appellant: Mr. Mulisa holding brief for Ms. Bundi

Respondents: Mr. Mong’are

