

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Miscellaneous Civil Case 28 of 2010

S.K.M..... PLAINTIFF/APPLICANT

VERSUS

E.N..... DEFENDANT/RESPONDENT

RULING

The application before court is by way of Chamber Summons brought under Sections 6 and 22 of the Children’s Act and is dated 19th February 2010. The application is brought by S.K.M whereby he seeks that the court would order the respondent E. N to attend *Deoxyribonucleic Acid Test (D.N.A.)*. The application is supported by the affidavit of M. He stated that he had instituted before the Children’s Court an action No. 30 of 2009. He sought before the Children’s Court an order for E to submit herself to D.N.A. test for the purpose of determining the paternity of the child G.M. The said E filed an affidavit where she alleged that M was the child’s father but at the same time refuse to undergo the D.N.A. test. The Children’s Court lacked jurisdiction and hence why he has approached this court for the similar order. He stated that E had left the child with his elderly parents on the allegation that the child was his. M said that there is a likelihood that he is the child’s father but that he desired for the same to be confirmed scientifically by D.N.A. analysis. He is prepared to pay for all the costs of such tests and also to pay for E’s transport and subsistence to and from Nairobi. He finally stated that if the D.N.A. tests were to reveal that he is the child’s father, he was prepared to take up all the parental responsibilities towards that child. E filed a replying affidavit in opposition to the application. In her affidavit, she confirmed that she is the mother of the child and therefore she was of the view that there is no need for her to undergo the D.N.A. test. She further stated that she was certain without doubt that M was the father of the child. She finally stated that M was unreasonably bothering her with unnecessary applications. The refusal by the respondent to undergo the DNA test in my view is unreasonable and without basis. After all, it takes two to have a baby. It therefore follows that the two will be needed to confirm the parentage of the child. Since E has confirmed she is the mother of the child, she would suffer no prejudice if the orders that are sought are granted. After all, M will undertake all the costs involved in such testing. Such a test will enable all a sundry to know who the father of the child is. Since M would be

the one to suffer prejudice if the tests confirmed he is the father, then there is no basis for E to refuse to undertake the same. Such tests, once they prove M is the father of the child would render him liable to maintain the child. The Court of Appeal in the case **Royford Murithi Nyamu Vs. Joyce Muthoni Kaburu** Civil Application No. Nai. 2 of 2009 considered an application for stay of D.N.A. test by a presumed father pending appeal. The High Court had ordered that he undertake such tests and that he pay for the same for the purpose of determining paternity of the child. The presumed father had admitted just like the case here that he had a relationship with the mother of the child. In the Court of Appeal, however, he sought stay on the basis that if the tests were to be negative, the mother of the child would be unable to refund him the costs of the D.N.A. test which were estimated to be Kshs. 30,000/=. The Court of Appeal stated **thus:-**

“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 too in this case would pose the same question to E. If the applicant is willing to pay for the D.N.A. test, what prejudice will E suffer? The application is merited and I grant the following orders:-

- 1. E.N is hereby ordered to submit to the Deoxyribonucleic Acid Test (D.N.A) for the purpose of determining the paternity of the child D. M. alias G. M. and the costs thereof shall be met by S K M’A.***
- 2. There shall be no orders as to costs in respect of the Chamber Summons dated 19th February 2010.***
- 3. At the reading of this ruling, a mention date will be given in order for the court to confirm compliance.***

Dated and delivered at Meru this 26th day of July 2010.

MARY KASANGO
JUDGE