REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL DIVISION

MISCELLANEOUS APPLICATION 36 OF 2008

J.M.K *(Suing as mother and*

***Next friend to M.G and V.K)*……………………...... PLAINTIFF/APPLICANT**

VERSUS

R.M.N.. …..………. DEFENDANT/RESPONDENT

RULING

The applicant instituted a suit in the Children's Court at Meru being Children's Case No. 9 of 2008 seeking, in the main, orders of maintenance and custody of two children M. G. and V. K. It is the applicant's contention that she got married to the respondent under the Meru customary law in December 1998 and that they were blessed with the said two children, M. G. and V. K.

That the respondent has refused, neglected and/or failed to provide the necessary maintenance of the children. The applicant and respondent have, since April 2006 separated and the latter has abandoned his responsibility to provide for the maintenance of the children, who are living with the applicant. The respondent in his defence has denied the existence of a marriage. He has also denied being the father of the two children. But on a without prejudice basis he admits having had a relationship with the applicant, who subsequently informed him that she was pregnant. Eventually, M. G. was born and although the respondent doubted that he was the father he nonetheless did not deny paternity.

He, however, did not assume any parental responsibility in respect of the child. The respondent avers in the alternative that he later heard that the applicant became pregnant of V. K. by another man. He has denied having sexual contact with the applicant at the time V. K. was conceived.

The applicant moved the children court by an application dated 3rd March 2008 to compel the respondent to submit to a DNA test to ascertain the paternity of the children. That application was dismissed for want of jurisdiction, hence the instant application brought by way of chamber summons for orders compelling the respondent to submit to a DNA test for purposes of determining whether or not he is the father of the children in question and an order that he bears the expenses of that test as well as costs of the application.

The applicant has reiterated that the respondent is the father of the children, and produced their birth certificates in which the respondent is named as their father, a fact denied by the respondent. She argues that it is in the interest of the children to grant the relief sought herein. The respondent filed a replying affidavit in which he reiterated the averments in his defence and specifically denied paternity of the children. He also states that the application is made in bad faith and further that he is not able to pay for

the test. He concludes that the application is incompetent as it is instituted by chamber summons.

The applicant, acting in person and the learned counsel for the respondent canvassed these grounds before me on 30th September, 2008.

I have considered their submissions and authorities cited by counsel for the respondent, save to add that counsel argued that although he did not contest the jurisdiction of this court in this matter, there was doubt as to that jurisdiction in the absence of rules made by the Chief Justice under sub section 3 of the section 22 of the Children Act.

He also submitted that the cost of conducting a DNA test is quite expensive without providing any information regarding the same. He suggested that should the court order the respondent to undergo a DNA test that the cost be borne by the Government.

The application is expressed to be brought pursuant to sections 6 and 22(2) of the Children Act.

The latter states:-

"***6. (1) A child shall have a right to live with and to be cared for by his parents."***

Section 22(1) on the other hand provides that:-

"***22(1) Subject to subsection (2) if any person alleges that any of the provisions of sections 4 to 19 (inclusive) has been, is being or is likely to be contravened in relation to a child, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress on behalf of the child."***

I pause to note that section 6 creates a right of the child to be cared for by his parents. Section 22(1) clothes the High Court with jurisdiction to determine any allegations of breach of any of the rights enumerated in sections 4 to 19 (inclusive). Although the Chief Justice has made regulations regarding the procedures in Part III (Parental Responsibility), rules in respect of Part VIII (Guardianship) and Rules for Part XIII (child offenders), there are no such rules of procedure under Part II dealing with the rights and welfare of the child. So that although the High Court is enjoined by section 22(1) to enforce the right to parental care, there are no rules of procedure as to how the court ought to be approached and the extent of the exercise of that jurisdiction.

The fact that there are no rules does not in itself take away the jurisdiction. A question has arisen in the court below whether or not the respondent should be ordered to maintain the two children herein. Section 73 of the Act confers on the children court the jurisdiction to conduct civil proceedings in respect of Part VII (custody and maintenance). In the exercise of that jurisdiction the Children's Court on, on application by a parent, guardian or custodian of a child determine any question relating to maintenance of the child.

The respondent appears to suggest in his replying affidavit that M. G. was born during the period he had an affair with the applicant. He maintains that V. K. was conceived after that relationship and he believes his father is another man altogether. The applicant on the other hand is adamant and categorical that both children were fathered by the respondent. This is a very difficult question indeed, considering the positions taken by the parties. To determine whether or not a person is the father of a child really depends on the man and woman involved. But thanks to technology. In the early Roman Empire children procreated by incest or born of prostitutes or as a result of adultery could not assert their rights against the father.

In later times evidence of presumable impotence of an alleged father was determined in the most demeaning and embarrassing manner to men. Such a man had to demonstrate his erectile and ejaculatory function before official matrons, surgeons and priests. After centuries of personally based and scientifically incorrect concepts of paternity determination, the discovery of the blood grouping system at

the beginning of the 20th century paved way for sophisticated techniques to prove or rather to disprove paternity. It was in 1921 that Reuben Ottenberg from New York suggested the application of the system to medico-legal questions. But it was not until 1950s that courts in America accepted this method.

I have gone this far to illustrate the past challenges encountered in proving paternity. Today a maternity or paternity identification test by way of DNA analysis (also known as genetic finger printing) has replaced the methods used hitherto its discovery to provide a more reliable means of determining the genetic parent.

Whereas DNA testing is a new phenomenon in the Kenya judicial system, it has been in use in the courts in countries like the United States of America and the United Kingdom. But it is now common to see orders for DNA testing such as in the case of **M.W. vs. K.C.** (2005) 2KLR 246. I have come across at least one criminal case in which a conviction was based on DNA results. See **Lowayakaru Ejuroto Elimlim V. R.** Criminal Application No. 219 of 2006.

The whole purpose of the Children Act is to offer protection to children, hence the paramount consideration in dealing with any dispute or matter involving a child or children is the best interest and welfare of the child or children.

The respondent having admitted albeit half-heartedly that he may be the father of M. G. and allegation being made that he is also the father of V. K. makes it necessary that the paternity of the two children be put beyond question. The applicant, I am convinced, is not actuated by bad faith in bringing this application. Of course in the long run the test is to his benefit and advantage if indeed the children are not his as the applicant's application before the lower court will drop with a thud and he will be entitled to costs.

I come to the conclusion that in the best interest of the two children who found themselves in this world though no fault of their own, are entitled to know their father so that they get all the benefits that flow from having a father.

I allow the application and order that the respondent makes arrangement for the DNA test to be conducted and the results submitted to this court within one month of this order. Thereafter, appropriate order will be made. The respondent will bear the cost of the test and of this application.

Dated and delivered at Meru this 10th day of November 2008.

W. OUKO

JUDGE