



REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

MISCELLANEOUS APPLICATION 184 of 2006

**FREDA GAKII NATHAN (Suing as the mother and next friend of
SHAROMKETH MUTEMBEI APPLICANT**

VERSUS

RICHARD KINYUA KARANI RESPONDENT

RULING

This is a matter which was heard and determined in the court below – Maua PM Court where the issue, as can be gleaned from the annexures, was the maintenance and custody of a child alleged to be the son of the respondent.

The lower court after hearing evidence from both sides found that the applicant had failed to prove her claim against the respondent and dismissed the suit.

It is confirmed that an appeal against the decision of the lower court has been preferred to this court. The applicant has applied in the present application for orders to compel the respondent to submit to a DNA test, among other prayers. The applicant argues that the respondent denied paternity of the child in the court below and that it is the child's right to be cared for by both parents and also to know his father. That the subordinate court lacks jurisdiction to order DNA test. The respondent in his replying affidavit argues that the application lacks merit and ought to be dismissed.

That the subordinate court having dismissed the suit after being satisfied that he had no relationship with the child, that issue cannot be the subject of this application. That this application is *res judicata*. The respondent denied, once again, paternity of the child in question. The applicant filed a supplementary affidavit in which she states that the matter is not *res judicata*.

I have carefully read the application and considered the submissions by counsel and the single authority cited by counsel for the applicant, Mary Wambui V Kiarie Chege. HCC (Kakamega) No.105 of 2004.

From the out set I need to declare that this is not an appeal against the decision of the subordinate court. I will therefore avoid the merits or demerits of that decision.

The application is by way of Chamber Summons. There is no suit pending and also it is not an originating summons. However, these are matters that are neither here nor there in view of the position I have taken in this matter.

The orders sought before the subordinate court were maintenance and custody of the child the subject of this application.

Those prayers were grounded on the premise that the respondent was the husband to the applicant and the father to the child. That being the father of the child he was bound to provide maintenance. It was also alleged that the respondent has been demanding the custody of the child from the applicant. For this the applicant prayed that she be granted custody. Both maintenance and custody connote parental rights and duties in respect of a child under the Children Act.

For a party to be ordered to maintain a child, it must be shown that the party is either a parent, custodian or guardian appointed under the Act.

The term “parent” is defined in Section 2 of the Children Act to mean;

“..... the mother or father of a child and includes any person who is liable by law to maintain a child or is entitled to his custody”

This is what was before the subordinate court. It found that the applicant had failed to prove that the respondent is the father to the child. That decision has been challenged an appeal. For me the issue of DNA is evidence that ought to have been sought in the subordinate court. It is clear from the judgment that the request for DNA test was raised in written submissions. The court observed that it was too late in the day to seek the order as the matter had already been concluded.

The Children Court has jurisdiction under Section 73 of the Act to hear civil suits relating to parental responsibility, custody and maintenance, among other matters.

Counsel for the respondent submitted that the applicant is fishing for evidence by filing this application. With respect, I could not agree more.

In the result I find that this application has no merit and is dismissed with costs.

DATED AND DELIVERED AT MERU THIS 7th DAY OF May, 2007.

W. OUKO

JUDGE