



**DB v JK (Constitutional Petition 10 of 2023)
[2024] KEHC 12796 (KLR) (23 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12796 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CONSTITUTIONAL PETITION 10 OF 2023**

**E OMINDE, J
OCTOBER 23, 2024**

BETWEEN

DB PETITIONER

AND

JK RESPONDENT

RULING

1. The petitioner herein has filed the Petition dated 19th July 2023 against the Respondent seeking the following Orders;
 - a. That this Court be pleased to make a declaration that the Respondent herein is the biological father of the Petitioner
 - b. That upon the grant of prayer (a) above, an order to issue directing the Registrar of Persons to accordingly amend the Petitioner’s details/records in his official documents including but not limited to the Petitioner’s Identity Card, Birth Certificate to reflect the Petitioner’s surname
 - c. The Petitioner prays for costs of the Petition herein
 - d. Any other order that this Honourable Court may deem fit to grant to meet the ends of justice.
2. Subsequent to the filing of the Petition, the petitioner filed an Application by way of a Notice of Motion dated 14th March 2024 seeking the following orders;
 - i. That an order be issued directing the respondent to submit to a DNA test to determine whether he is the biological father of the petitioner herein.
 - ii. That the DNA test be done at a government chemist at a time to be determined by this Honourable Court.
 - iii. That costs of the DNA test be provided for.



3. The application is premised on the grounds on the face of it and more particularly on the ground that the Respondent has denied paternity and denied being the father of the petitioner notwithstanding the fact that the mother of the petitioner insists that the Respondent is his father.
4. The application is also supported by the facts deposed in the Supporting Affidavit of the petitioner sworn on 14th March 2024 as well as the Further Supporting Affidavit of the petitioner's mother one MNN sworn on 19th July 2023 in support of the Petition

Replying Affidavit

5. The application is opposed vide a Replying Affidavit dated 22/08/2023(sic) deposed by JK. The Respondent contends that the applicant is a stranger to him. Additionally, that he has no knowledge of the petitioners' mother and has never been in any relationship with her. He denied ever having supported the petitioner in any way whatsoever. He urged that the fact that the petitioner has taken 21 years to seek the order speaks to his ill motives.
6. He stated that he is married till ENM and their marriage has been blessed with 4 children. Further, that an order for DNA testing is an intrusion into his privacy and the petitioner has not established the rights which have been violated prior to seeking an order for DNA testing.
7. He urged the court to dismiss the application as it is unmerited and an abuse of the court process.

Hearing of the Application

8. The parties prosecuted the application vide written submissions. The applicant filed submissions through the firm of Messrs Onyinkwa & Co Advocates whereas the respondent filed submissions through the firm of Messrs Limo R.K & Co. Advocates.

Applicants' Submissions

9. Learned counsel for the applicant submitted that the petitioner has laid the basis for seeking orders to compel the respondent to submit to a DNA test. Counsel cited the case of *MW v KC (Miscellaneous Application 105 of 2004)* [2005] eKLR where the court identified the conditions that must be satisfied before an order can be made to compel a putative father to undergo a DNA test.
10. In analysing these circumstances, Counsel urged that the petitioner has shown that there is a high likelihood that the respondent is his father. Despite the respondent's denial of knowledge of the petitioner and his mother.
11. That the petitioner's mother in the Further Supporting Affidavit to the petition detailed her relationship with the respondent which resulted to the petitioner's conception.
12. That the petitioner's mother clearly indicated that she was in an intimate relationship with the respondent in the year 2001 and there is evidence that the respondent visited her frequently and cared for her during the pregnancy.
13. Counsel submitted that in his supporting affidavit to the petition, the Petitioner clearly stated that the respondent's constant denial and rejection has affected his psychological well-being and has infringed his right to an identity as his Birth Certificate does not have his father's name. Further, his right to information as to where he belongs has been infringed.
14. Counsel submitted that the petitioner has shown that the respondent's refusal to submit to DNA test will violate his right to know his father. The petitioner stated that he has a right of identity which is



protected under *the Constitution*, which right will not be enjoyed if the respondent is not ordered to submit to a DNA test.

15. Further, that every child/person has a right to know his father and this right is part of the human rights of every individual, consequently, it is only through a DNA test that the petitioner will know whether or not the respondent is his biological father. The applicant thus submits that if a DNA test is not carried out, his rights to identity, heritage and all other rights that pertain to paternity will never be realized which is likely to interfere with his life forever.
16. Counsel submitted that the respondent's refusal to take the DNA test is unreasonable and unjustifiable. He stated that the respondent has not shown how his right to privacy will be infringed if he submits to a DNA testing. He cited the case of C.M.S vs I.A.K suing through mother and next friend C.A.O (2012) eKLR. In support of these submissions.
17. Additionally, he urged that the respondent's refusal to submit to a DNA test on grounds of alleged infringement of his right to privacy is not sufficient to override the petitioner's right to identity and heritage.
18. Counsel urged that the DNA test is necessary to the proceedings in the Constitutional Petition as it is not possible for the court to reach the truth without the use of the DNA test. The application seeks orders appropriate to determine the substantive issues in controversy in this matter. He contended that the refusal by the respondent to submit to DNA test may be borne out of fear that he could be the father of the petitioner.
19. On whether the orders sought herein will prejudice the respondent, counsel submitted that the respondent will not suffer any undue prejudice if the orders sought herein are granted. Having established that the respondent's rights will not be violated in any way by the DNA test, it follows that no prejudice will be suffered. He reiterated that it is the petitioner who will suffer prejudice if an order for DNA is not granted as his rights to identity and heritage will forever remain violated.
20. Counsel maintained that the petitioner has satisfied all the conditions for the grant of an order of DNA test and therefore, the application herein is merited. He urged the court to allow the application as prayed.

Respondent's Submissions

21. In his submissions, counsel for the respondent reiterated the contents of the replying affidavit to the application. He urged that the only issue arising for determination is whether the Petitioner/applicant has established a prima facie case to warrant the order for DNA testing in an interlocutory stage.
22. On this issue, he urged that the duty to convince the court on the need to order the test lies squarely on the petitioner/applicant and the standard is on a balance of probabilities. The Petitioner needs to prove to the satisfaction of the court that there is eminent need to establish paternity at this interlocutory stage which order is akin to a mandatory injunction.
23. Counsel submitted that an analysis of the Petitioner/Applicant's application does not provide any reason justifiable enough to warrant the grant of the sought orders. He further submitted that the applicant has not established the necessary biological and factual nexus between himself 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.



24. Counsel submits that the applicant's only claim is that he wants to know his paternity. That this is a case of an adult seeking an order of DNA against another adult without a justifiable cause whatsoever hence intruding into the Respondent's privacy, right to bodily integrity and Constitutional rights.
25. Counsel submitted that in our jurisprudence, it is not a well-trodden path when it comes to an order for DNA on non-consenting adults. He cited the case of JNM vs. JK [2016] eKLR where Onguto J (as he then was) expressed himself thus:

“The law on the topic of compulsory blood or DNA testing in paternity disputes is yet to be completely and satisfactorily developed locally. There is no express legislative framework which specifically regulates the position in civil cases. The few judicial pronouncements on the topic do not appear unanimous in approach or principle. Whereas in relation to the child the courts have occasionally been quick to act in the child's best interest and ordered DNA testing, with regard to adults the jurisdiction has been left lazy”
26. Counsel submitted that it is to be noted that the Petitioner/Applicant herein is 22 years of age. At this age, he is an individual who has already attained the age of majority and he therefore ought to sufficiently demonstrate reasons to warrant issuance of such orders of DNA at an interlocutory stage against the Respondent.
27. The Respondent having indicated that the Petitioner is a total stranger to him and his mother, such orders sought by the Petitioner will therefore be an intrusion into the Respondent's privacy and violation of his constitutional rights.
28. The Respondent maintained that the Petitioner has failed to demonstrate on a balance of probabilities that there should be a grant of the orders for a DNA test sought at an interlocutory stage. He relied on the case of Nakuru High Court Petition Number 27 of 2019 FKK v DKC (2020) eKLR where the circumstances pertaining to the application were exactly similar to the circumstances of this Petition to wit an assertion made by the applicant by way of an affidavit supported by an affidavit deposed by his mother, a vigorous denial by the respondent and that is all.
29. Counsel therefore urged that the citation is fully in tandem with the instant claim by the Petitioner in that he has not established a nexus between him and the respondent nor the alleged rights violated. That just as in the cited case, the petitioner herein also only relies on his and his mother's affidavits which affidavits don't bear any tangible evidence demonstrating the nexus between him and the Respondent.
30. Counsel therefore submits that the petitioner has not established a prima facie case to warrant grant of the orders sought at an interlocutory stage. Counsel additionally cited the cases of BKC vs MC & Another [2015] eKLR, S.W.M vs G.M.K [2012] eKLR, R.K vs. J.K & Another [2016] eKLR, and Petition No.133 of 2015 D N M v J K [2016] eKLR

Analysis & Determination

31. Having considered the submissions by Counsel as herein above summarised, it is my considered opinion that the following issue is the only issue that arises for determination;

Whether the petitioner/applicant has established a prima facie case to warrant the order for DNA testing to issue at an interlocutory stage.



Whether the petitioner/applicant has established a prima facie case to warrant an order for DNA testing to issue at an interlocutory stage

32. Whereas in the case of MW vs KC(2005)eKLR, the Court identified the conditions to be satisfied before an order can be made to compel a putative father for undergo a DNA test let it be noted however that this test is only applicable to cases involving the rights of minors as opposed to adults as is the case here. The Court rendered itself as follows:

“there is likelihood that the respondent could be the father of the child; that the respondent’s refusal to submit to the DNA test has violated the child’s right to know his father; that the respondent’s refusal to take a DNA test is an unreasonable because it deprives the child of the possible enjoyment of the rights and benefits of enshrined in sections 4 to 19 of Part II of the Children Act and that the court has the jurisdiction to order of the test.”

33. In the case of S.W.M vs. G.M.K [2012] eKLR, the court in deciding on who as between a Petitioner and a Respondent bears the burden of demonstrating to Court that a DNA test is warranted in a case where the Court in no uncertain terms held that no matter the circumstances, such an order would infringe on a Respondent’s right to bodily security and integrity and privacy which are protected under the Bill of Rights stated as follows:-

“The petitioner bears the burden of demonstrating to the court the right she seeks to assert or vindicate and which the court would consider as overriding the respondent’s rights”.

34. Overall, Courts have been reluctant to grant such orders which by their very nature are not only akin to an order of mandatory injunction as has already been pointed out in the above summary but are also final in nature as was held by the Court in the case of R.K vs. H.J.K & Another [2013] eKLR, the court held;

“...an order of such finality should not be made at this stage of the proceedings particularly where the evidence does not surmount the threshold necessary to interfere with the 1st Respondent’s rights. The necessity or otherwise of granting this order will become evident once the petitioner has established the breach of constitutionally protected rights and fundamental freedoms...”

35. As I have already stated herein, the only evidence on record that the applicant has proffered in seeking to have the respondent subjected to a DNA test is affidavit evidence supported by the affidavit evidence of his mother.

36. The said affidavit evidence is comprised mostly of assertions without any other tangible evidence annexed thereto in support of these assertions. In other words, it is the assertions of the petitioner versus the vigorous denials of the respondent.

37. Further to the above, the applicant has not at all laid out any special circumstances that would call for a special consideration of his case so that notwithstanding the fact that he is an adult, the Court can safely and reasonably deduce that the guidelines set out in the case of MW vs KC(2005)eKLR(supra) can also apply to him given the unique and special circumstances of his case, if he had demonstrated any such.

38. In addressing my mind to the reasons advanced by the petitioner in seeking to know his paternity as already herein above summarised, I am of the very well-considered opinion that there is nothing urgent in what he seeks to warrant the respondent being subjected at the interlocutory stage to what would



most definitely amount to an intrusion to his right to right to bodily security and integrity and privacy which are protected under the Bill of Rights.

39. In this regard, I find the holding of the Court in the case of R.K vs. J.K & Another [2016]eKLR, which I associate myself with full to be relevant. The Court held thus;

... a DNA test will not be ordered unless there are clear circumstances that justify the making of such an order. It calls for a balance to be made in the circumstances of each case between the needs of a child and the emphasis is on “child”, and the rights of the alleged father to privacy, bodily security and integrity. If the facts and circumstances of the case lead the court to believe that a prima facie case has been made out that the alleged father of the child in respect of whom orders of DNA are sought, as was the case in MW vs KC [2005]eKLR relied on by the petitioner, where the mother of the child and the alleged father had been cohabiting, then the constitutional imperative in Article 53 demand that the best interests of the child should be the paramount consideration, and would override the right to privacy of the putative father”

Taking the above factors into consideration in the present case, I am constrained to find that a case has not been made out by the petitioner that would justify the grant of the orders that she seeks. As noted before, she is an adult of 35, so the constitutional dictates of Article 53 do not apply with respect to her. Secondly, she has not , on a prima facie basis established any biological relations with the 1st respondent to warrant the grant of the orders for DNA testing that she seeks against him.”

For the above reasons, I find that the applicant’s application is misconceived and lacks merit. The same is therefore dismissed in its entirety with costs to the respondent.

READ DATED AND SIGNED AT ELDORET ON 23RD OCTOBER 2024

E. OMINDE

JUDGE

