



**PK v BG (Miscellaneous Criminal Application E077 of 2022)
[2023] KEHC 39 (KLR) (16 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 39 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS CRIMINAL APPLICATION E077 OF 2022**

EM MURIITHI, J

JANUARY 16, 2023

IN THE MATTER OF THE CHILDREN ACT

AND

IN THE MATTER OF DK (A MINOR)

BETWEEN

PK APPLICANT

AND

BG RESPONDENT

RULING

1. By Originating Summons dated November 28, 2022, the applicant principally seeks an Order for DNA testing to determine the paternity of the child subject of the Child Maintenance case in Meru Chief Magistrate’s Court No. E049 of 2022, and an order for stay of the said proceedings in the lower court pending hearing and determination of the Originating Summons.
2. The basis of the application is that prior to the respondent’s filing of the upkeep and maintenance suit before the Chief magistrate’s Court, by consent of the parties, at the Children Officer Meru, a decision had been reached that the parties take a DNA test on the child and the parties but the respondent had allegedly failed to pay her share of the Test cost, while the applicant duly paid his 23,000/- share of the Cost.

The facts of the case

3. The respondent opposes the application by a replying affidavit of 5/12/2022 indicating willingness to undergo DNA test for the minor but pleading inability to pay the cost “as she is currently unemployed, facing medical challenges and maintaining two (2) other children single handedly.” The respondent



further opposes the application as prejudicial to the minor who is expected to commence school early 2023.

4. In a supplementary affidavit of 9/12/2022 the applicant alleges untruthfulness on the part of the respondent as to her employment status and reiterates that the decision for DNA testing was made about one year ago at the County Children Officer, Meru where the respondent had reported the matter “and after the case was heard, the Children Officer concluded that a DNA test was important so that the paternity issue can be settled once and for all.” Significantly, the applicant admits sexual intercourse with the Respondent but laments –

“9. That I had only a one night stand with respondent and while protected with condoms and I am highly suspicious that the respondent is just out to fix me so that I can help her in the herculean baggage of maintaining her three (3) fatherless Children.

10. That it will only be fair therefore if the said paternity is determined first through a DNA Test so that I don't get forced to maintain a child that is not mine.”

5. It is further urged that the respondent as the one alleging paternity should cater for her bill for the DNA test.

Burden of proof and incidence on cost of DNA testing

6. The court would accept that, generally, a party who sues bears the burden of proof (see ss.107, 108 and 109 of the *Evidence Act*) and as such the respondent who contends that the applicant is the father of the child ought to meet the cost of the paternity test. However, the applicant admits sexual liaison with the respondent, never mind his language that it was “one night stand.” In these circumstances, with the applicant asserting that he suspects that he is not the father of the child, the applicant does share an interest in the proof of paternity.
7. The decisions of the Children Officer, Meru that each party shares the costs of the DNA testing is a fair one, as the parties are both interested for different reasons in the establishing paternity of the child subject of these proceedings. However, on the undenied obligation on the respondent to cater for two other children, the court on a balance of probabilities accepts that the respondent may not afford presently to pay for the DNA test.

Article 53 Best Interest of the child

8. However, the upkeep and maintenance of the child, including school fees due in January this year, is a daily ongoing need which cannot wait for the DNA testing to which the respondent agrees but pleads impecuniosity. In accordance with article 53 Constitutional imperative to give paramount consideration to the welfare of the child, the court cannot stay proceedings through which the child's upkeep is sought to be recovered to await the DNA testing. Such maintenance monies are recoverable from the Respondent but the daily sustenance needs of the child cannot be suspended!

DNA Cost in the first instance

9. Considering the mutual interest of the parties for a DNA test determination, the court will order that the applicant who seeks to avoid meeting the upkeep of the child meets the DNA testing cost in the first instance, subject to recovery thereof from the respondent if the DNA shows that he is not the father of the child.



10. Additionally, if the DNA test establishes that the applicant is not the father of the child but, in the meantime, he has been made to pay for upkeep and maintenance of the child under the Chief Magistrate's Court Children Case NO. E049 of 2022, the same may be recovered from the respondent by order of the Children Court or this court.

Orders

11. Accordingly, for the reasons set out above, the court makes the following Orders:
 1. The prayer for stay of proceedings for the upkeep and maintenance of the child in the Chief Magistrate's Court Children Case NO. E049 of 2022 is declined.
 2. The respondent shall avail the child for DNA testing to determine her paternity at the DNA testing facility to be agreed by consent of the parties, within thirty (30) days.
 3. The Applicant shall meet the cost of the DNA testing at first instance, subject to recovery thereof from the Respondent if the test determines the applicant is not the father of the child.
 4. For that purpose and for final orders, the matter shall be mentioned on a date to be fixed within sixty (60) days.
 5. There shall be liberty to apply for the applicant for further relief should the respondent fail to present herself and the child subject of these proceedings for the DNA testing within the 30 days from the date hereof period as directed herein.
12. There shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED ON 16TH DAY OF JANUARY, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances

M/S Kitheka & Ouma Advocates for the Applicant.

M/S Maitai Rimita & Co. Advocates for the respondent.

