



MWK v Registration of Births and Deaths & 2 others; JMK (Interested Party) (Miscellaneous Civil Application E003 of 2022) [2023] KEHC 20186 (KLR) (10 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20186 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CIVIL APPLICATION E003 OF 2022**

TA ODERA, J

JULY 10, 2023

**IN THE MATTER OF REMOVAL/RECTIFICATION OF PARTICULARS
IN THE BIRTH CERTIFICATE OF MWK**

AND

**IN THE MATTER OF THE REGISTRATION OF BIRTHS AND
DEATHS DEPARTMENT OF CIVIL REGISTRATION**

BETWEEN

MWK APPLICANT

AND

REGISTRATION OF BIRTHS AND DEATHS 1ST RESPONDENT

DEPARTMENT OF CIVIL REGISTRATION 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

JMK INTERESTED PARTY

RULING

1. MWK applicant herein filed the Notice of motion dated January 16, 2023 herein seeking:-
 - a)spent.
 - b) That this Honourable court be pleased to order the 2nd interested party to rectify the applicant's Birth certificate by inserting the name of the JMK in place of JKM and the name of her mother faith NM (deceased)in place of MKW.



- c) Costs be provided for.
2. The application is based on the annexed affidavit of MWM and JMK the grounds;
 - a) That the applicant, is the daughter to JMK and the late FNM who passed away immediately after the birth of the applicant.
 - b) The said applicant's said father was away during her birth and registration of the said birth and so her uncle JKM and her aunt MKW were registered as her father and mother respectively.
 - c) She later underwent a paternity DNA test and it proved that JMK is her biological father.
 - d) She now intends to travel broad for further studies and the records will be required to process a passport and hence she is seeking the orders for substitution of the names of her parent in the Birth certificate. Also that this will give her a sense of identity and increase the accuracy of her records. She deponed to the facts in her supporting affidavit and annexed a copy of the death certificate of her mother mwk1, her said birth certificate mwk 2, copies of burial permits of her aunt and uncle -mwk3 a & b . DNA test results- mwk 4. She said that it would be in the interest of justice that the orders sought be granted.
3. The said JMK swore an affidavit dated January 16, 2023. He told this court that he is the biological father of the applicant having sired her with the late FNM and unfortunately Faith died immediately after giving birth to the applicant. Further that the family of the applicant's mother took her, named her and brought her up and he was not aware of her whereabouts. Also that he was informed of the plight of his daughter by a good Samaritan while in the United states of America where he relocated to. He further deponed that he got to know of the paternity of the applicant a few years back when she reached out to him after her aunt and uncle informed her of the same and he and the girl later underwent DNA test which turned positive.
4. Gordon Ondego the Civil Registration officer in Bahati Civil Registry filed a replying affidavit dated in which he stated that the registrar of births and deaths is the custodian of the births and deaths records under section 7 of the [Births and Deaths Registration Act](#).
5. Also that the particulars of Births relating to the sex name, names of parents residence and occupation are notified to him. Further that the informant must give correct information to the best of his knowledge and belief and this is what the registrar relies on in issuing the birth certificate. 6. He deponed that the responsibility to give the genuine information is on the person making the declaration not the registrar. He told this court that MWW holder of national identity card no xxxx an aunt to applicant is the one who gave to his officer information which they used to issue birth certificate in birth register Serial number xxxx on August 10, 2021. He said that the name of JKM was entered in the birth register serial No xxxx on satisfaction that the father and the mother were married as required by section 12 of the [Act](#). The respondent said that independent documentary evidence must be produced to support removal of names but in this case it was not done and that allowing the application would open up a doors for a flood gate of applicants seeking to alter their birth registers at their convenience and thus affecting the integrity of the person's identity acquired at birth. Also that the registration of persons prevents potential impersonation and identity theft and that the absence of parents does not warrant substitution of parents and that the registration herein was obtained through giving of false information which is an offence under Section 22 of the [Act](#). Lastly that the application cannot be granted on the basis of assertions by the same people who gave the false information which was used to issue the birth certificate.



7. The applicant filed a further affidavit dated May 3, 2023 in which she stated that the DNA proved her paternity and that the resident has not demonstrated how changing her name will lead to theft of identity cards. She admitted that the registration was achieved by giving false information which she seeks to correct told the court that the respondents arguments herein are baseless. Also that the intended rectification will increase the accuracy of the records and give her a true identity and that unless the application I allowed she will miss a chance to further her education abroad and dim her future prospects.
8. The respondent submitted that the issue for determination is whether the application is merited.
9. Also that Article 53 of the Constitution provides that every child has right to a name. Counsel cited the case of L.N.W v Attorney general & 3 others [2016]eKLR where it was held that ‘all children born out of wedlock shall have the right and liberty to have the names of their fathers inserted in the Birth registers. Further that the court should not deny the applicant this right to a name and that the father has no objection to the same. Also that the applicant has established paternity through DNA test and cited the case of RMK v AKG & another [2013] eKLR. It was submitted the the constitution guarantees the rights to equality, non-discrimination and equal parental responsibility between parents.
10. Counsel also cited Article 35(2) of the Constitution which provides that ‘‘ Every person has the Right to the correction or deletion of untrue or misleading information that affects the person’’.
11. On costs it was submitted that costs follow event and the case of Joseph Oduor Anode vs Kenya red Cross Society Nairobi High court [2012] eKLR and Hint on Civil procedure 2nd edition (Nairobi law Africa pg 94) by RTD Justice Kuloba was cited where it was held that costs follow event unless a good reason is given for not awarding the same.
12. The respondent submitted and listed 3 issues for determination:
 - a Whether the 2nd respondent should rectify the applicant’s birth certificate.
 - b Whether the applicant followed the right procedure in registration of the applicant’ s birth certificate .
 - c Whether the applicant offends the provisions of section 107 of the Evidence act on the burden of proof.
13. On whether the information on the birth certificate should be rectified , the respondent submitted that Mary Wangari Wainaina gave incorrect information under section 10 of the Births and deaths registration Act (cap 149) .
14. I have carefully considered the application the response and the submissions by both counsel herein.
15. The issues arising for determination are ;
 - i. Whether the applicant followed the right procedure in registration of the applicant’s birth certificate.
 - ii. Whether the application offends the provisions of section 107 of the Evidence act on the burden of proof.
 - iii. Whether the 2nd respondent should rectify the applicant’s birth certificate.
16. On whether the applicant followed the Right procedure in issuing the birth certificate, Respondents contend that they complied with section 10 of the Births and deaths registration Act (cap 149) and



relied on the declaration by Mary Wangari Wainaina on the correctness of the information she gave. This is not disputed. Section 10 of the said *Act* provides that

Mode of registration of births

Every person notifying the birth of a child shall, to the best of his knowledge and ability, give the prescribed particulars, which shall be entered forthwith by the registrar in the register, and the person notifying the birth shall certify to the correctness of the entry by signing or, if he is illiterate, by fixing his mark to the register.”.

12. Entry of father in register

No person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or, in accordance with some recognized custom.

[Act No. 7 of 1990, Sch.]

Article 53 (1) of the constitution provides that

(1) “Every child has the right—

(a) to a name and nationality from birth;

17. I find that the respondent relied on the law and information given to them by the informant to register the said birth on August 10, 2021.

18. On whether the application offends the provisions of section 107 of the law of *Evidence Act*, the respondent submitted that the burden is upon the applicant to prove that she is entitled to the orders sought. Sections 107 and 109 of the *Evidence Act* were cited. The said sections provide as follows;

107. Burden of proof.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

109. Proof of particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. Proof of special knowledge in civil proceedings. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

19. It is thus clear that the applicant is the one who is asserting her right to a name and so the burden of proof is upon her.

20. On whether the 2nd respondent should be ordered to rectify the register, applicant contends that the 2nd respondent should be ordered to rectify the register as the same is erroneous as it does not reflect the names of her biological parents but aunt and uncle who brought her up. 2nd Respondent opposed this saying they used information given to them on the believe that it was correct under Section 10 of



the Act and that the entry was final under section 14 of the Act. Also that the father has not adduced any evidence to show that applicant is entitled to rectification of the register. Further that allowing the application would open up a can of worms and here would be a risk of people committing fraud related to identification documents.

Section 12 and 14 of the Act provide that;

12. Entry of father in register

No person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or, in accordance with some recognized custom .

14 Change of name of child after registration

Where the birth of any child has been registered before it has received a name, or where the name by which it was registered is altered, the parent or guardian of such child may within two years of the registration, on payment of the prescribed fee, and on providing such evidence as the registrar may think necessary, register the name that has been given to the child..”

21. A reading of Section 12 of the Act is clear that it is not applicable in this case as the alleged biological parents of applicant were not married as the applicant was born out of wedlock.

Section 14 provides that change of name can be effected any time before a child attains the age of 2 years.

22. The applicant has shown that the DNA report annexed to the application herein ‘‘ MKW4’’ confirms her paternity. The Births and Deaths registration Act does not envisage a situation like in the instant case and thus must be construed in a manner that gives effect to Articles and 27,28 and 53 (1) (a) of the constitution which provide for Equality, freedom from discrimination, human dignity and right to name. Respondent has not shown that denying the applicant the right to a name is reasonable and justifiable under Article 24 of the Constitution. The applicant has demonstrated that allowing the application will uphold her right to a name, and human dignity, Equality and non-discrimination.

23. I find that the application is merited and I make the following orders in the interest of justice:-

- a. The 2nd respondent is hereby ordered to rectify the applicant’s Birth certificate by inserting the name of the JMK(JMK) in place of JKM (deceased JKM)and the name of her mother FNM (FNM)in place of MKW (MKW).
- b. Each party to bear it’s own costs of this application.

T.A. ODERA - JUDGE

10.7.2023

RULING DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF;

Parties absent.

Court Assistant: BOR.

