



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 22 OF 2018

IN THE MATTER OF: THE JUDICIAL REVIEW ORDER OF PROHIBITION

AND

**IN THE MATTER OF: NYALI POLICE STATION CRIMINAL INVESTIGATION NO. 56/26/12/16 AND 19/02/02/17
INVESTIGATING THE ALLEGED RAPE AND SEXUAL ASSAULT AND ABDUCTION OF THE APPLICANT BY THE
INTERESTED PARTY**

AND

**IN THE MATTER OF: THE ALLEGED CONCEPTION THROUGH INCAPACITATION AND RAPE OF THE APPLICANT BY
THE INTERESTED PARTY**

AND

IN THE MATTER OF: THE INTERESTED PARTY'S CLAIM FOR CUSTODY AND ACCESS OF THE MINOR LM

AND

IN THE MATTER OF: MOMBASA TONONOKA CHILDREN'S COURT CASE NO. 438 OF 2016

RILI

VERSUS

LKN

BETWEEN

LKN.....EX PARTE APPLICANT

VERSUS

THE RESIDENT MAGISTRATE,

CHILDREN'S COURT MOMBASA.....RESPONDENT

AND

DR. RILI.....INTERESTED PARTY

RULING

1. The Notice of Motion before the Court dated 29/3/2018 prays for one main prayer as follows:

4. THAT an order of prohibition directed at the Resident Magistrate at the Mombasa Children Court from issuing any interim or final orders of custody or access in favour of the Interested Party herein in Children Case No. 438 of 2016 Dr. RILL v LKN does issue.

2. The motion is premised on grounds set out therein and is supported by affidavit of **LKN** sworn on 29/3/2018.
3. The *Ex parte* Applicant's case is that Section 42 of the Sexual Offences Act provides that a person consents to sex if he or she agrees by choice and has the freedom and capacity to make that choice; that lack of consent in sexual relations is an essential element for the offence of rape and sexual assault; that Section 4 of the Children Act provides for the best interests of the Child; that in all actions concerning children, whether undertaken by public or private or social welfare institutions, courts of law, and so on, the best interest of the child shall be the primary consideration. Therefore, it is against public policy and against the best interest of a child for a suspect of an alleged rape or sexual assault to be granted orders of access or custody of a minor conceived through the unlawful act.
4. The Applicant avers that she is an accomplished nurse while the Interested Party is an accomplished medical doctor. They both work for a reputable Hospital in Mombasa. The Applicant states that she conceived to bear the minor LM born on 15/10/2014. That the said conception was as a result of rape by the Interested Party, and that there are criminal investigations pending at Nyali Police Station against the Interested Party arising out of the Applicant's complaint that disclose the offence of rape and sexual assault. The Applicant's criminal complaint against the Interested Party is that the suspect spiked her nonalcoholic drink, rendering her incapacitated, took her to his residence, and introduced his semen into her vagina, either by inseminating instrument or by penile penetration, causing the Applicant to conceive the subject minor. The Applicant denies consenting to having sexual relations with the Interested Party at any time within the approximate period of conception of the minor. The Applicant states that there is evidence of a short message dated 14/11/2014 sent by the Interested Party to the Applicant whereby the Interested Party confirms that indeed there had been no sexual relations between the Applicant and the Interested Party in the 3 years before that sms and especially not within approximate period in which the minor was conceived. The Applicant states that the Interested Party being a medical doctor is a person not only with high access to stupefying drugs but also with expert knowledge in attaining crude artificial insemination in a person.
5. It is however, the Applicant's criminal complaint that the Interested Party, who is of advanced age, unfortunately suffers from serious erectile dysfunction that has rendered him incapable for years of getting a child or maintaining a relationship with anyone hence the possible motive for the criminal offence alleged.
6. On 9/12/2016, the Interested Party filed proceedings before the Children Court at Mombasa being **Case No. 438 of 2016 Himself v the Applicant** herein in which he seeks interim and final orders of custody and access to the Minor. The Applicant avers that the effect of the grant of such interim orders will have the effect of granting parental rights to the party under suspicion of a grievous alleged criminal offence. The Applicant avers that the best interest of the child clause under the Sexual Offences Act, and public policy, demand that parental rights are denied to a father who is convicted of or pleads guilty to sexually violent crimes resulting in the victim conceiving a child.
7. The Applicant believes that on a night in February 2014, the Interested Party incapacitated her by using a stupefying drug, took her to his house, introduced his semen into her vagina by actual penetration and/or crude artificial insemination, in order to have the Applicant conceive; that after that unfortunate night, the Applicant learnt later that she had conceived. The child was born in October of that same year and has been in the Applicant's actual physical custody ever since. (The Applicant *attached and marked "LKN 1" a copy of the minor's birth certificate*).
8. The said criminal complaint is still under investigation by Nyali police under O.B. No. 56/26/12/16 & 19/02/02/17.
9. The Applicant states that the child custody case at the Children's Court in Mombasa should not be allowed to proceed until the criminal investigations are complete and the Interested Party charged appropriately. Otherwise the Children's Court may unlawfully grant the Interested Party custody and access to the minor, since the Children's Court is not aware of the criminal issue. The Applicant avers that if custody and access is granted to the Interested Party, the same amount to "second rape" for its traumatic effect; that on a preponderance of evidence, the Respondent cannot determine whether the Interested Party is culpable for the offence of sexual assault/rape. The Applicant states that this application is made for the best interest of the minor, and should be granted also in the interest of justice.

Response

10. The motion is opposed by the Interested Party vide a Replying Affidavit sworn by **Dr. RILL**, the (Interested Party herein) but filed herein on 9/8/2018.
11. The Respondent's case is that the Applicant and the Interested Party have been cohabiting since the year 2011. That in early January 2014 after they had some misunderstanding, the Applicant asked for forgiveness and soon thereafter moved out of his house before the forgiveness could happen. In early February 2014 the two met at an hotel, talked, and later on the same day and got intimate and after a month the Applicant found out she was pregnant. The Interested Party states that the Applicant had a difficult pregnancy and gave birth through cesarean section in Mombasa Hospital. She was attended to by a doctor Kibwana Abdalla (an obstetrician) who was a friend and colleague to the Interested Party.
12. The Interested Party states that he was active in parenting and that the minor was attended to by Dr. Alim a Pediatrician at Mombasa Hospital, after birth and soon thereafter. That in the year 2016 the Applicant was sick and got admitted at Mombasa Hospital where she signed admission forms indicating the Interested Party as her husband. (Annexure marked "RILL 3" is a copy of admission forms dated 8/4/2016 disclosing this fact). The Interested Party avers that he has been maintaining the minor since his birth, and the Applicant since they met. The Interested Party annexed evidence of treatment for the minor on various occasions as marked "**RILL 7 (a) and (b)**".
13. The Interested Party also demonstrated evidence of support for the Applicant and her mother, including rent payments for the two, and furnishing their apartments. He leased a property in the name of the Applicant from Midlord Investments Ltd (see annexure **marked**

“**RILL 8a & 8b**) and that they lived together as man and wife and brought up their son together.

14. Further, the Applicant used to send love messages through text messages to the Interested Party. They also celebrated the minor’s birthday together on 15/10/2016 at Koroga Club Nyali.

15. The Interested Party states that the Applicant consented to all sexual relations they ever had and that was because they were a couple and used to send each other love messages.

16. The Interested Party states that the Applicant has since denied him access to the minor without due regard to his welfare and the best interest of the child to be taken care of and to have the love of both parents. Further, that the Applicant has for a long time been planning to deny him access to his son by failing to register their son in the Interested Party’s name and always avoided that topic. The Interested Party states that the Applicant filed Criminal Case No. 702 of 2017 against him for the offences of assault causing actual bodily harm, attempting to kidnap her, with the aim of denying access to his son.

17. The Interested Party states that parental rights are prohibited to a father who is either convicted or pleads guilty to sexual violent crimes; that he has never been convicted and has never pleaded guilty to any sexual violent crime.

18. The Interested Party states that neither the father nor the mother shall have superior right or claim against the other in exercise of such parental responsibility; that he is concerned about the welfare and safety of the minor who is his biological son under the care of people unknown to him. He avers that he is a doctor who is guided by the laws of this country and principles and regulations of his profession and that he cannot use stupefying drugs. The Interested Party avers that he separated from the Applicant in 2016 on account of infidelity, and that this application is a waste of court’s time and should be dismissed as the same is causing him delay of access his biological son.

Viva Voce Evidence

19. On 17/10/2018 the application was heard *viva voce*. In the process of the hearing it became apparent to the Court that the matter would take a predominantly different trajectory if the Tononoka Children Court File No. 438 of 2016 Dr. RILL v LKN was brought to this Court. Further it became evident that the issue of who was the father of the minor child herein needed to be determined so that the Court would know whether or not the Interested Party had the locus to maintain the above Tononoka children matter. All parties therefore agreed that a DNA be carried out to determine the fatherhood of the minor herein. Consequently, this Court directed that a DNA be carried out.

20. A DNA was carried out under the direction of Dr. Kishorchandra N. Mandaliya, and forwarded to this Court in confidence, through the Office of the Attorney General. The said Report is dated 14/11/2019. This Court shared with all the parties the results contained in the said Report. According to the said DNA Report, it shows that the Interested Party herein is **not** the father of the said minor. In light of that report, parties herein filed submissions in this application to dispose off the same in light of that report. The *viva voce* hearing therefore collapsed.

Submissions

21. **Dr. Khaminwa, SC**, on behalf of the Applicant, submitted that in light of the said DNA Report which shows that the Interested Party here is not the father of the minor, this Court, with supervisory jurisdiction to make final order, should make final order declaring that the Interested Party herein has no *standi* whatsoever to continue pursuing the Children Court Case as he is not the father or guardian as set out under Section 82 of the Children’s Act Cap 141.

22. Counsel submitted that it would be a waste of judicial time for parties to go back to the Children Court when this Court can infact make final orders.

23. **Miss Kipsang**, learned counsel for the Interested Party on the other hand submitted that this is a matter concerning a minor child. In every matter pertaining a child the interest of the minor child should be of paramount importance as opposed to the interests of any other party. Counsel submitted that this application be dismissed with costs and that the Tononoka Children’s Court No. 438 of 2016 between DR. RILI V LKN be reinstated in the Tononoka Children’s Court for fair determination in the court that has jurisdiction.

Determination

24. I have considered the application and submissions. The only issue for determination is whether or not this Court should make final order in this matter.

25. In my view, and as correctly submitted by Ms. Kipsang, the Children Court is a special Court tailored to take care of the interests of the child. That is so regardless of who the father of the child is. There is already a case in the Children Court. That case is brought for the interest of the child regardless of who the father of the child is. I have noted that even before this Court ordered for a DNA, the Children Court had already done that, although this Court was the first to receive the report. There was a reason why the Children Court had directed that a DNA be availed. The Court, with the results of the DNA being out, should be in a position to proceed and conclude the matter before that Court without any interference from this Court.

26. Secondly, and this is also important, this Court should not make a final order. It is important for the matter to be ventilated procedurally. This Court may be called upon to determine any issues by way of appeal from the Children Court.

27. It is however, clear from the evidence before the Court that the Interested Party has severally referred to the minor herein as his biological son, and he has, in fact, stressed the phrase “*biological father*”. However, the result of the DNA shows the exact opposite. This finding

gives credence to the testimony of the Applicant herein that the conception of the minor was stage managed through what may amount to a criminal process. It is in this light that this Court recommends a thorough re-investigation of the complaint by the Applicant and to bring to justice anyone found culpable.

28. In the upshot I make the following orders:

- (i) The Mombasa Children Court Case No. 438/2016 shall proceed in the Children Court in Tononoka until it is fully determined.
- (ii) The Children Court shall take cognizance of the results of the DNA report dated 14/11/2019 and determine its place in the proceedings before that Court.
- (iii) In the meantime the custody of the minor herein shall remain with the mother until the Children Court concludes and determines the issue of custody.
- (iv) Due to probable criminal culpability surrounding the conception of the minor herein, this Court recommends a thorough investigation of the matter, which was reported at Nyali Police Station under O.B. No. 56/26/12/16 and 19/02/02/17 and possible prosecution of those culpable should an offence be established.
- (v) Parties shall bear own costs.

Dated, Signed, and Delivered at Mombasa this 3rd day of June, 2021.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Ms. Kinara for Interested Party

Ms. Njau for Respondent

Dr. Khaminwa for Applicant

Ms. Peris Court Assistant