



**AMM v Registrar of Births and Deaths Department of Civil Registration  
Attorney General Office & another (Miscellaneous Application  
30 of 2021) [2021] KEHC 9799 (KLR) (12 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 9799 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS APPLICATION 30 OF 2021  
JN ONYIEGO, J  
NOVEMBER 12, 2021**

**BETWEEN**

**AMM ..... APPLICANT**

**AND**

**REGISTRAR OF BIRTHS AND DEATHS DEPARTMENT OF CIVIL  
REGISTRATION ATTORNEY GENERAL OFFICE ..... 1<sup>ST</sup> RESPONDENT**

**REGINA KAVINUD MBUSIA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Through a Notice of Motion dated August 25, 2021 and filed in court on August 30, 2021, the applicant herein moved this court pursuant to section 14 of the *Births and deaths registration Act* Cap 149 , article 53 (2) of the *Constitution* , section 1 A, 3 and 3A of *Civil Procedure Act* seeking orders as follows;
  - (1) That this application be certified as urgent and service be dispensed with in the first instance following orders;
  - (2) That this court be pleased to direct the 1<sup>st</sup> and 2<sup>nd</sup> respondents to remove and strike out the name of Alberto Mutuweta Mgharo from the birth certificate of Alphan Paul Ishara (the child)
  - (3) That the child be issued with another birth certificate which does not bear the names of AMM
  - (4) That costs of the application be borne by the respondent.
2. The application is premised on the grounds set out on the face of it and an affidavit sworn on the August 25, 2012 by the applicant.



3. It is the applicant's case that from June 2019 to October, 2020 he and the 4<sup>th</sup> respondent cohabited as husband and wife. That during that period, a baby by the name of API was born. He averred that although aware of the 4<sup>th</sup> respondent's extra marital affairs, he continued taking care of the baby as the father.
4. That upon realizing his wife's infidelity, they parted ways. He subsequently proceeded to conduct a DNA test at KEMRI which revealed that he was not the biological father to the baby. That he took the DNA test report together with the child's birth certificate to the registrar of births and deaths to remove his name from the birth records of the said child. That he was advised to seek a court order hence this application. He attached the said DNA report marked annexure ANM-3 and birth certificate as annexure AMN-2.
5. Despite service of the application upon parties, none of the respondents ever filed a response. The 4<sup>th</sup> respondent did not turn up in court despite service of hearing notice. The application proceeded ex parte for hearing with the applicant urging the court to allow the application as unopposed. He basically relied on the content contained in the affidavit in support.
6. I have considered the application herein and the affidavit in support. The application was duly served but there is no response. Hearing notice was also served but the 4<sup>th</sup> respondent the key prayer did not attend as well.
7. It is trite that the fact that an application is not opposed does not mean that it will be allowed automatically. See *Gideon Sitelu Koncellab v Julius Lekakeny Ole Sunkuli and 2 others* [2018] eKLR.
8. I have perused the Notice of Motion herein. The orders sought are substantive and permanent in nature. It is trite law that substantive orders cannot issue on an application. The best the applicant would have done was to file an Originating Summons seeking similar orders but in a substantive form.
9. For the above reasons stated, the application herein is incompetent and the same is dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 12TH DAY OF NOVEMBER, 2021**

**J N ONYIEGO**

**JUDGE**

