



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

PETITION NO. 33 OF 2019

IN THE MATTER OF: ARTICLE 53 (1) (a) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: BIRTHS AND DEATHS REGISTRATION ACT CAP 149

AND

IN THE MATTER OF: SECTION 23 (2) (C) CHILDREN ACT CAP 141 LAWS OF KENYA

BETWEEN

NTA.....PETITIONER

VERSUS

1. SVK

2. REGISTRAR OF BIRTHS AND DEATHS MOMBASA

3. THE HON. ATTORNEY GENERAL.....RESPONDENTS

JUDGMENT

The Petition

1. By petition herein dated 23/4/2019 the Petitioner prays for the following orders:

- (a) An order against the 2nd Respondent that the minor’s birth certificate be rectified in the father’s name to read NTA instead of SVKK.
- (b) An order against the 2nd Respondent that the minor’s name in the birth certificate be rectified to IW instead of IM.
- (c) An order that the 2nd Respondent do effect the changes and issue a new birth certificate in compliance with the above orders.
- (d) Each party to bear its own costs.

2. The petition is supported by affidavit of the Petitioner sworn on 23/4/2019.

3. The Petitioner’s case is that sometime in the year 2015 he was in a love relationship with one RNL. However, that love relationship was cut short when his lover married the 1st Respondent on 30/5/2015. The said marriage was blessed with an issue IM born on 19/10/2015 whose middle name was the 1st Respondent’s biological mother. Unfortunately, the marriage with the 1st Respondent irretrievably broke down after a paternity test issued on 19/9/2016 indicated that the 1st Respondent was not the biological father of the minor. The 1st

Respondent and RN then divorced on 17/11/2015.

4. After the said divorce the Petitioner married RNL on 21/12/2018. The Petitioner states that despite being in a relationship with RNL, the Petitioner was not aware that the minor IM was his biological daughter. The Petitioner has filed this petition to assert his right as the father of the minor and to have the minor's middle name changed accordingly.

5. The Attorney General filed a response to the petition on 2/9/2019 and states that the petition fails to set out with precision the rights alleged to be fringed. The Attorney General states that the name SVK was entered as father of the minor upon presentation of a certificate of marriage between RNL and the 1st Respondent pursuant to Section 12 of Births and Deaths Registration Act, and that the Petitioner had a two-year period after registration of the child to rectify any errors.

Cross Petition

6. The 1st Respondent filed a cross petition on 25/11/2019. The Cross- Petition is supported by affidavit of the Cross-Petitioner sworn on 20/11/2019.

7. The Cross-Petitioner's case is that at all material times to this petition, the Cross-Petitioner was the husband of one RNL and were living together as husband and wife and out of their co-habitation, or so, the Cross-Petitioner thought, a baby girl was born on 19/10/2015. The Cross-Petitioner therefore as a good and responsible husband cleared the hospital bills and bought clothes and all necessary items required for a new born child leaving hospital. The new born baby girl who was the Cross-Petitioner's pride and joy as a father, and since he comes from the Giriama community, proudly named "his first born daughter" after his mother, IMK. However, the Cross-Petitioner's pride and joy turned to embarrassment, mental anguish and disappointment when his wife RNLeleli on 3/9/2016 while staying at her parents' home called the Cross-Petitioner and informed him that the Cross-Petitioner was in fact not the biological father of the IMK. Shocked, perplexed and angry, the Cross-Petitioner declined to believe the news and in fact demanded that a paternity test be done on the child which the child's mother acceded to. After blood samples were taken to South Africa for examination, results came back and in a report dated 12/9/2016 it was proved that the Cross-Petitioner is not the biological father of IMK. The whole episode having been perpetrated by the Petitioner herein and RNL who has now become his wife has to date caused the Cross-Petitioner untold misery, mental anguish, mental stress, embarrassment and shame. The Cross-Petitioner states that the Petitioner, unbeknown to the Cross-Petitioner, had a sexual relationship with the Cross-Petitioner's wife RNL when the Petitioner knew that RNL was the Cross-Petitioner's wife. As a result of the illicit sexual relationship between the Petitioner and the Cross-Petitioner's then wife RNL, the child was born but they allowed the Cross-Petitioner to go ahead and name the child after his own mother. The Cross-Petitioner therefore holds the Petitioner and his wife RNL as the persons responsible for the embarrassment, mental anguish and stress the Cross-Petitioner has had to go through up until now when it became certain that the Cross-Petitioner is not the one who sired the child even though his marriage to RNL subsisted at the time. The Cross-Petitioner holds the Petitioner responsible for the breakup of his marriage to RNL and the embarrassment and mental anguish that has followed him to date and that the Cross-Petitioner holds the Petitioner responsible for these proceedings and will require therefore that costs be borne by him.

8. The Cross-Petitioner prays for:

(a) General damages for mental anguish, stress and embarrassment caused by the outcome of the paternity test resulting to the Cross-Petitioner having had to give away the child he thought was his.

(b) General damages for breakup of the Cross-Petitioner's marriage.

(c) Costs of the main petition and the Cross-Petition.

9. There was no response to the Cross-Petition.

Submissions

10. Parties agreed to file a DNA Test by the Petitioner to clarify the issue of paternity. Mr. Makuto, learned counsel for the Attorney General submitted that the DNA test result showed that the Petitioner is the father of the minor, and for that reason, the Attorney General did not oppose the petition to the extent that the Petitioner is entitled to correct information for record, under Article 35. The Petitioner and the Respondent did not make any submissions.

Determination

11. I have considered the petition. The Respondent does not deny the petition or that he is not the biological father of the minor. The DNA Tests also shows that the Petitioner is the father of the minor. So, to the extent that the Petitioner seeks rectification of births register, that prayer is granted.

12. However, the 1st Respondent was not the author of the Petitioner's misfortune. Indeed, he took care of the minor's mother during the pregnancy, and birth, believing all along that he was the father of the minor. He was mistaken, but he provided love and care to the mother and child.

13. The 1st Respondent is a honourable man. He took his wife to give birth in a good hospital and paid the bills. But his wife decided soon after giving birth to go back to her father's home, from where she delivered the devastating news to the 1st Respondent that the 1st Respondent was not the father of the minor. For all his troubles, the 1st Respondent is entitled to compensation for the expenses he incurred in caring for the mother and the baby. There is no response to the Cross-Petition which, in my view has been proved.

14. Under Article 23, the court is entitled, after hearing a matter to enforce a Bill of Rights, to give such remedies as may be necessary including damages and compensation.

15. In this matter, the 1st Respondent has not quantified the damages he suffered. However, he took care of both mother and child, and paid delivery costs. These proceedings have also caused him anguish and agony, and he will continue to suffer mental pain and anguish. In that he is entitled to damages and compensation.

Final Orders

16. This court finds that the Petitioner has proved his petition and is entitled to orders sought as follows:

(a) An order against the 2nd Respondent that the minor's birth certificate be rectified in the father's name to read NTA instead of SVKK.

(b) An order against the 2nd Respondent that the minor's name in the birth certificate be rectified to IW instead of IM.

(c) An order that the 2nd Respondent do effect the changes and issue a new birth certificate in compliance with the above orders.

17. The Cross-Petition is allowed as follows:

(i) 400,000/= being general damages for mental anguish, stress and embarrassment.

(ii) 300,000/= assessed for taking care of the mother of minor during pregnancy, and for hospital delivery costs for the minor.

(iii) Costs of the petition and cross petition to be paid by the Petitioner.

Dated, Signed and Delivered at Mombasa this 15th day of July, 2020.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Mr. Makuto for 2nd Respondent

Ms. Mwainzi for Petitioner

No Appearance for 1st Respondent

Mr. Kaunda Court Assistant