



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**PETITION NUMBER 27 OF 2019**

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 26, 27, 28, 29 & 258 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 25, 26, 27, 28, 29 AND 35 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE RECOGNITION OF THE PETITIONER AS THE BIOLOGICAL SON OF THE RESPONDENT**

**BETWEEN**

**FKK .....PETITIONER**

**VERSUS**

**DKC .....RESPONDENT**

**RULING**

On 30<sup>th</sup> August 1984 MCR gave birth to FKK. According to her affidavit sworn on 21<sup>st</sup> November 2019, the child's father was one DKC, a man she had cohabited with as husband and wife between 1980, early 1984, when he had to leave.

It is her affidavit testimony that she and him met when they both worked in Kabarnet, she worked for the then Postal Corporation and then for Kenya Industrial Estates. In 1984, when she was pregnant with FKK, they parted ways, she moved back to her parents' home in Bureti where he FKK was born. When she informed DKC he disputed the paternity. He even refused to be party to the application for the child's certificate of birth as at that time both parents were required to make a joint application, hence his name could not be entered in the certificate of birth.

In 2013, she persuaded FKK's guardian one PMM to make the joint application with her and FKK was issued with a certificate of birth showing that PMM was his father. It is her affidavit evidence that all through the years DKC rejected, refused, disputed that FKK was his biological son.

It is also her affidavit evidence that this state of affairs had affected her son psychologically, as he has been denied his sense of belonging even carrying a name that means "disowned by your father" that her son suffers for lack of proper identity, and she would like to see this settled once and for all.

FKK on his part through his counsel Gordon Ogola, Kipkoech & Company Advocates wrote to DKC vide letter of 5<sup>th</sup> July 2018, placing on record the historical neglect by DKC, the effects that had on him as a minor, the "untold ridicule" he went through as a boy among his peers, the denial of a father to give a fatherly love and lack of recognition as a son, and the totality of the effects of this on him as an adult. It demanded of DKC to recognize FKK as his son. Otherwise he would be sued.

In response to the demand and threat to sue, the firm of Nyai'ngi'ri and Company Advocates, on behalf of the respondent responded vide letter of 20<sup>th</sup> July 2018 in which DKC denied any knowledge of MCR, ever knowing her in any way or having any relationship with her, sexual or otherwise. DKC was categorical that the claims were made by MCR were baseless, malicious inventions peddled with impunity and which would be rigorously opposed, that MCR had deliberately misled the firm of Gordon Ogola, Kipkoech.

With this response, FKK reached the end of that path so he took the next one, filed this petition dated 21<sup>st</sup> November 2019.

In it he states that the DKC who is the respondent has, by continuing to dispute paternity violated his constitutional rights; not to be subjected to any form of torture, **Article 25(a) and 29 (d)**. Why? Because of the psychological stress and torture the respondent's action has put his through and continued to put his through; to access of information vide **Article 35**, that the respondent holds information about his paternity which can only be obtained if a DNA is conducted, and which right goes hand in hand with the right to correct and delete misleading information, here, the entry of his guardian PMM in his certificate of birth as his father; to human dignity, inclusiveness, non-discrimination, equality, equity, social justice, respect for human rights, embodied in the values set out at Article 10. That the effect of all this was the "throwing into thin air" the petitioner's rights under Article 28, 29 and 35; To inherent dignity and respect and protection of that dignity; nondiscrimination under **Article 27** due to the fact that the respondent had recognized all his other children to the exclusion of the petitioner, subjecting the petitioner to cruel and degrading treatment by his categorical denial of him.

It is on the basis of all this that the petitioner seeks the following reliefs:-

- a. An order compelling the respondent to provide DNA samples to be used to ascertain that he is the biological father of the petitioner and to provide such information in his possession regarding the petitioner's paternity.**
- b. A declaration that the respondent has violated the petitioner's right to access to information about his paternity as guaranteed under article 35 of the Constitution of Kenya 2010.**
- c. An order directing the Registrar of Births and Deaths to delete the name of one PMM entered in the register as the father of the petition and correct the same by entering the name of the respondent herein as the father of the Petitioner upon being furnished with DNA results confirming the fact that the respondent is the biological father of the Petitioner.**
- d. A declaration that the petitioner's right to dignify inherent in a human being and to the recognition and protection of his human and legal rights guaranteed under Articles 28 and 29 of the Constitution have been violated by the respondent through his denial of paternity of the petitioner.**
- e. A declaration that the petitioner's right to respect as a person and the free development of his personality have been violated by the respondent herein.**
- f. The Honourable Court be pleased to order for compensation of the petitioner by the respondent herein for violation of his constitutional rights.**
- g. An award of general damages to issue to the petitioner for violation of his constitutional rights and for the losses he has suffered on the failure of the respondent to provide for him throughout his lifetime as a biological father.**
- h. The petitioner be paid costs of this petition with interests at court rates until payment in full.**
- i. Any other orders as this honourable court shall deem just to grant.**

Together with the Petition the petitioner filed Notice of Motion dated 21<sup>st</sup> November 2019 under Certificate of Urgency brought under **Articles 10, 27, 28, 29 and 35 of the Constitution of Kenya 2010 and Rule 13, 23 and 24 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Right and Freedoms of the Individual) High Court Practice and procedure Rules, 2013.**

Seeking orders;

- a. Spent**
- b. That pending the hearing and determination of the main petition this Honourable Court be pleased to issue an order compelling the respondents herein to provide DNA samples to be used to ascertain that he is the biological father of the petitioner.**
- c. That the respondent be ordered to provide the full charges of the DNA profiling exercise.**
- d. That an early date be granted for the hearing inter partes of the Petition.**

The grounds for the application are set out on the face of the application. Thus;

- 1. The respondent is the biological father of the petitioner herein.**
- 2. The respondent has clandestinely refused declined and/or neglected to recognize the petitioner and his son and has declined to have his name registered with the registrar of births and deaths as the father to the petitioner.**
- 3. There is no plausible reason for the refusal to have the respondent's name registered as the father of the petitioner and to recognize the petitioner as his biological son.**

4. The petitioner's mother has constantly assured the petitioner that the respondent is his biological father but the respondent has embarrassingly denounced the petitioner without any further information.
5. The respondent has denied the petitioner critical information which would help him know who his father is to enable him enjoy a sense of identity, belonging to an inherent dignity guaranteed by the constitution but which information is the possession of the respondent.
6. Denying the petitioner the information relating to his paternity by the respondent constitute gross violation by the respondent of the hallowed constitutional right to access to information and protection of the inherent human dignity guaranteed under the Constitution of Kenya, 2010.
7. The Respondent's actions offend the rule of law and the principle of natural justice.
8. The actions of the respondent of denying and denouncing the petitioner, his biological son, are actuated by apparent malice and ill-will contrary to the provision of the law.
9. The petitioner is apprehensive that unless this honourable court grants the orders sought the petition may be rendered an outcast and fatherless.
10. The respondent has no respect for the spirit of Constitution and the rule of law.
11. That the respondent has acted towards the petitioner in a manner that is manifestly irresponsible and inimical to proper parenthood.

These are supported by the affidavits of FKK and MCR annexed to the petition.

In his replying affidavit sworn on 6<sup>th</sup> January 2020, DKC the respondent denies any knowledge or cohabitation with MCR, any knowledge of the petitioner before the demand letter from his lawyers and reiterates to contents of his advocates response to the said demand.

He questions the petitioner's motives to come after thirty-five (35) years to seek these orders, he points out that the petitioner has a certificate of birth with PMM indicated there as his father, and that if the petitioner genuinely believed he was his son, he would have approached him and introduced himself instead of moving to court claiming compensation and general damages.

That any alleged violation of the petitioner's rights could only have happened if he was aware of his existence, something he denied, he also denied having ever been approached by anyone to have his name inserted in the petitioner's certificate of birth or even by the petitioner's mother during his schooling days, for any support in the form of maintenance. That he has been married since 1985 to his present wife, with whom they began cohabiting in the early 80s and he can only read malice and an effort to wreak havoc in his family by the petitioner and his mother. That before he was served with the court papers he was not aware of any dispute and that the best would be for the petitioner to establish his allegations during the hearing of the main suit, which he intends to strenuously defend. That the Petition be set down for hearing.

Parties agreed to deal with the Notice of Motion through written submissions.

I have read the submissions and authorities cited.

I arrive at the conclusion that the only issue for determination is whether the applicant has established at this preliminary stage, a prima facie case to warrant the order for DNA testing.

At the centre of it all, is the apparent innate desire for a child to know his father, and for that father to pay for the sin of rejecting and neglecting him as a child.

From the authorities cited by both parties, and those within the authorities cited, it is evident that the issue of paternity disputes in our jurisprudence is not a well-trodden path when it comes to non-consenting adults. In his analysis of the case law then in JNM vs JK [2016] eKLR Onguto J (as he then was) expressed himself thus:

**“The law on the topic of compulsory blood or DNA testing in paternity disputes is yet to be completely and satisfactorily developed locally. There is no express legislative framework which specifically regulates the position in civil cases. The few judicial pronouncements on the topic do not appear unanimous in approach or principle. Whereas in relation to the child the courts have occasionally been quick to act in the child's best interest and ordered DNA testing, with regard to adults the jurisdiction has been left lazy.”**

In Benjamin Kibiwott Chesulut vs Mary Chelangat & Another [2015] eKLR *Sila Munyao J* expressed a similar view.

**“There have not been many cases where requests for DNA have been made outside child maintenance cases. The few that I have seen actually inclined towards not granting the order for DNA”**

The judge proceeded to carry out an analysis of the cases he had come across on the subject.

A perusal of the Court of Appeal case **EMM vs IGM & Another [2014] eKLR** and in particular the submissions by counsel therein on the subject of DNA testing further demonstrates the fact of the lacuna on a legal or policy framework on the subject.

Be that as it may courts have come up with some principles to balance the obvious intrusion of the respondent's right and the violated rights or threat to violation of the rights of the applicant seeking redress.

The prayer for DNA test in the interlocutory is a kin to seeking a mandatory injunction. Once given the order is nor reversible. To borrow the words of the judge in **DNM vs JK [2016] eKLR** in order to issue a mandatory interlocutory order;

**“The court prior to granting such an order must be satisfied that there are special circumstances which warrant such an order being issued, that the court must be satisfied that the case is clear and straight forward one which ought to be dealt with at once and that at trial the court would be vindicated for having issued the order in the first place.”**

I am in agreement. For me to issue the mandatory injunction, I would have to have established before special circumstances, supported by evidence so weighty, that there was a more than a chance of me making the same orders after the full trial.

Is that the case here?

What are these special circumstances that the applicant must satisfy the court with?

A certain thread runs through the authorities, that the applicant must establish a nexus between him and the respondent in relation to the alleged paternity as well as the allegedly violated rights to persuade the court to grant the order of DNA testing.” **RMK vs AKG & Another [2013] eKLR**.

So from the evidence placed before me, can it be said that this is a clear and straight forward case to grant a mandatory order in the interim?

The only evidence before me are the averments of the petitioner and his mother as made in their respective affidavits. These are supported by the letter of demand and the rigorous denial in response. Nothing else.

There is no evidence placed before me that prior to 5<sup>th</sup> July 2018 the petitioner and the respondent had any relationship. There is no evidence placed before me that before 5<sup>th</sup> July 2018 the petitioner's mother and the respondent had any relations. Every fact deponed in their affidavits is equally contested in the respondent's affidavit. The respondent depones that he had never been approached by the applicant, in any way at all to introduce himself as his son and he refused to listen. The petitioner nowhere in his affidavit does he say he personally or through 3<sup>rd</sup> parties as an adult approached the respondent to introduce himself and seek clarity. He speaks about his mother and what his mother did. Even at 19, when the name of PMM was entered in his certificate of birth as his father, neither he nor his mother demonstrate that the respondent was approached and refused. No explanation is given as to why PMM's name had to be entered in the applicant's certificate of birth, what was the occasion, why it could not wait, if as MCR and FKK state, she was certain that the respondent was the applicant's father? Of course it would not have been possible for MCR to enter DKC's name in FKK's certificate of birth before the case of **LNW vs AG & 3 others [2016] eKLR** in which *Mumbi Ngugi LJ* declared the provisions of **Section 12 of the Registration of Births and Deaths Act**, which required the consent of the father to have the name entered in the Register of births.

In considering the nexus between the applicant and the respondent, the paternity issue and the violation of rights, the court must balance the rights of the applicant and those of the respondent. *Lenaola J* in **PKM vs SPM's Children's Court** at Nairobi softened the stance taken by *Majanja J* in **SWM vs GMK [2012] eKLR** when he stated that;

**“... there must always be a balance between the right to the privacy of a person not to submit himself to forcibly to medical examination and the rights of a child to know its parents. That balance is delicate and must be looked at in the specific circumstance of each case.”**

It is noteworthy that the case before him was about the dispute of paternity of a child, but the case cited from the Supreme Court of India was also cited in **Benjamin Kibiwot Chesulut** where the judge quoted with approval the decision in the case of **Bhabani Prasad Jena vs Converner Sec Orissa, Civil Appeal Nos 6222-6223 of 2010** where it was stated as follows stated as with regard to forced DNA testing.

**“The court must reach the truth, the Court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA is eminently needed. DNA in a manner relating to paternity of a child should not be directed by court as a matter of course or in a routine manner, whenever such request is made. The Court has no consider diverse aspects... pros and cons of such order and the test of “eminent need” whether it is not possible for the court to reach the truth without use of such test...it has been laid down that courts in India cannot order blood test as a matter of course and such prayers cannot be granted to have a roving inquiry, there must be strong prima facie case and court must carefully examine as to what would be the consequence of ordering the blood test.”**

The search for the truth; - the Supreme Court of India stated:

**“... Justice thrives in the establishment of the truth and I can put it no better than was put in the Indian case of Re G (Parentage: Blood Sample) [1997] 1 F.L.R. 360 cited in the case of Rohit Shekhar vs Narayan Dutt Tiwari & another on 27 April, 2012, High Court of Delhi, IA No. 10394/2011 in CS (OS)No. 700/2008, where it was stated as follows:**

**“Justice is best served by truth. Justice is not served by impeding the establishment of truth. No injustice is done to him by conclusively establishing paternity”**

While it is true that the truth, and the establishment of the truth would serve justice, in seeking to establish the truth, there must be a prima facie case. This because it is not just the truth for the applicant, but the truth for the respondent as well. Hence the need for that delicate balance to the peculiarity of circumstances of this case.

I have considered with great anxiety the Notice of Motion, the supporting affidavits, in search of the persuasive circumstances that would lend a hand to the issue of mandatory orders sought, and I have found none.

It is only fair that the applicant gets the opportunity to establish the facts at the hearing and for the disputed facts to be tested.

The application for mandatory interlocutory order for DNA samples from the respondent is denied. Costs to the respondent.

The parties to fix the main petition for mention for directions.

**Delivered and Signed at Nakuru this 2<sup>nd</sup> September, 2020.**

**VIA Email**

Court Assistant Edna

**To be sent to:**

Gordon, Ogola, Kipkoech & Company Advocates for the petitioner

M/s Mutai Kipkemoi Advocates for the respondent

**Mumbua T. Matheka**

**Judge**

**2<sup>nd</sup> September, 2020.**