



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HC. MISC. CIVIL APPL. NO. 02 OF 2019

WAMBUA MAWEU.....APPLICANT

-VERSUS-

ESTHER WAVINYA NTHIWA.....1ST RESPONDENT

BOG MWAANI AIC PRY SCHOOL.....2ND RESPONDENT

THE MINISTRY OF EDUCATION.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. By Notice of Motion dated 21/01/2019, seeking prayers;

a) Spent.

b) **THAT** the 3rd Respondent be directed to change the names of the minors registered in the National Education Management Information System (NEMIS) as FAITH MWENDE MUTHAMA and VICTORIA MUTHEU MUTHAMA to FAITH MWENDE WAMBUA and VICTORIA MUTHEU WAMBUA respectively.

c) **THAT** costs of this application be provided for.

2. It is based on Section 4, 23 (2) (ii) of Children's Act, Section 3A CPA and Order 51(1) CPR.

3. It is premised on the grounds set out on the face of application, namely:-

1) **THAT** the Applicant is the biological father of the minors herein who were born during his marriage to the 1st Respondent which lasted 10 years.

2) **THAT** the 1st Respondent illegally acquired birth certificates for the minors and used the said certificates to register the minors in the National Education Management Information System (NEMIS) run by the Ministry of Education.

3) **THAT** the minors' names now appear as FAITH MWENDE MUTHAMA and VICTORIA MUTHEU MUTHAMA instead of FAITH MWENDE WAMBUA and VICTOR MUTHEU WAMBUA respectively.

4) **THAT** the minors' names as registered in the NEMIS systems should be rectified to include the name of the Applicant as appearing in the minors birth certificates.

5) **THAT** unless the minor's names are corrected, then the minor's academic documents will not reflect their actual names which include the name of the Applicant .

6) **THAT** it is in the best interest of the minors that this Application is allowed.

4. It is supported by Affidavit of Wambua Maweu sworn on 21/01/2019 reiterating same grounds above and also by Further Affidavit sworn on 05/02/2019.

5. Respondent No. 1 opposes same via Affidavit she swore on 29/01/2019 stating that:-

- 1) **That** she is married to Fredrick Muthama Mutuku. Annexed to this affidavit is a true copy of her marriage certificate marked “EWN1”.
- 2) **That** she has been living with her husband, Fredrick Muthama Mutuku together with their children, Faith Mwende and Victoria Mutheu as a family.
- 3) **That** her husband, Fredrick Muthama Mutuku, has been maintaining their children, Faith Mwende and Victoria Mutheu by paying school fees, feeding them and taking care of their medical expenses.
- 4) **That** At no point in time has she ever delivered the minors in hospital. She has had home deliveries contrary to the Applicant’s assertions.
- 5) **That** early last year, the Government directed that all the pupils should have birth certificates to enable them to be registered in the National Education Management Information Systems (NEMIS).
- 6) **That** she embarked on the process of acquiring the birth certificates at Kibwezi and the birth certificates were duly issued on 21st February 2018. Annexed to this affidavit are true copies of the birth certificates marked “EWN2” and “EWN3”.
- 7) **That** in response to paragraph 2 of the affidavit, she states that the birth certificates attached by the Applicant s are forgeries. The purported birth certificates indicate that she gave birth at Mumbuni Hospital which does not exist.
- 8) **That** she had home deliveries and she has never given birth at the nonexistent Mumbuni Hospital as per the Applicant’s attached birth certificate.
- 9) **That** in response to paragraph 3 of the affidavit, she states that the birth certificates dated 21st February 2018 are authentic and were acquired procedurally.
- 10) **That** the purported birth certificates by the Applicant are dated 13th November 2018, which is 9 months after she was issued with her birth certificates.
- 11) **That** the purported birth certificates by the Applicant contains misleading information, for instance, that she gave birth at Mumbuni Hospital, a nonexistent hospital, and therefore they are forgeries.
- 12) **That** at no point in time has the Applicant ever maintained the minors or paid for their medical expenses.
- 13) **That** the Applicant is a married family man.
- 14) **That** the National Education Management Information System was concluded in March 2018, and registration has already been done and the application is overtaken by time.

6. Respondent No. 2, 3, and 4 responded via grounds of opposition namely:-

- 1) **THAT** orders to compel a public officer to perform his duty are best sought by way of Judicial Review.
- 2) **THAT** both the Applicant and 1st Respondent have annexed four birth certificates, two for each child which do not tally and as such raises the issue of “FRAUD” as suspect in this Application.
- 3) **THAT** the issues raised herein the Application are between the Applicant and the 1st Respondent who were formerly husband and wife respectively. This means that they should first resolve their issues before making the 2nd, 3rd and 4th Respondents parties to this matter.
- 4) **THAT** this matter is best resolved by the Children’s court as there is need to address the best interest of the children.
- 5) **That** the Application should be dismissed with costs to the 2nd, 3rd and 4th Respondents.

7. Parties submitted at length orally in highlighting their positions as set out in their pleadings and affidavits. What emerges as core issue is whether the court is properly moved?

8. The relief sought against ministry of education is b) THAT the same be directed to change the names of the minors registered in the National Education Management Information System (NEMIS) as FAITH MWENDE MUTHAMA and VICTORIA MUTHEU MUTHAMA to FAITH MWENDE WAMBUA and VICTORIA MUTHEU WAMBUA respectively.

9. It is based on Section 4 and 23 (2) (ii) of Children’s Act, Section 3A CPA and Order 51(1) CPR.

Section 4. Survival and best interests of the child.

(1) Every child shall have an inherent right to life and it shall be the responsibility of the Government and the family to ensure the survival and development of the child.

(2) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to:-

(a) Safeguard and promote the rights and welfare of the child;

(b) Conserve and promote the welfare of the child;

(c) Secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.

(4) In any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child’s age and the degree of maturity.

Section 23. Definition of parental responsibility.

(1) In this Act, “parental responsibility” means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the

child and the child’s property in a manner consistent with the evolving capacities of the child.

(2) The duties referred to in subsection (1) include in particular—

.....

(c) the right to—

.....

(ii) determine the name of the child;

.....

10. The dispute herein has been generated by the fact that the Applicant relationship and the first Respondent ended and she entered into another with one Fredrick Muthama.

11. The children of the first relationship have been registered in the names of the Fredrick Muthama as their father in the second relationship thus precipitating the instant dispute.

12. The contest apparently escalated into whether there was any marriage in any of the two relationships in which first Respondent involved her-self in.

13. Meanwhile the children are caught up in the dispute. Of course the emerging issues cannot be resolved via the platform of a miscellaneous application like the instant one before the court.

14. The matter has to be heard via taking evidence in a properly instituted suit. The mix of issues herein range from the existence of marriage in the two relationships aforesaid and the best interest of the children as set out in the cited provisions.

15. Further to seek an order to compel relevant public authority to do registration of the children as prayed herein, can only be done via an application in form and shape of judicial review or constitutional matter.

16. Thus the court declines to grant reliefs sought and make the following order;

- *The Application is struck out with no orders as to costs.*

DATED, DELIVERED, SIGNED THIS 14TH DAY OF FEBRUARY, 2019 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE