



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL MISC. APPLICATION NO. 48 OF 2017

LNJ.....APPLICANT

VERSUS

GKM.....RESPONDENT

RULING

1. The Applicant approached this Court by way of Chamber Summons dated the 23rd day of **August, 2017** seeking an order directing the Respondent to submit to a Deoxyribonucleic Acid Test (DNA) to determine whether he is the biological father of a minor, **JCK**.
2. The gist of the matter is that the Applicant sued the Respondent in **Children Court, Case No. 26 of 2016** seeking maintenance following his parental responsibility to a minor. The application is premised on grounds that the Respondent has denied being the father of the minor and without the test the question of paternity may not be determined.
3. The Respondent in reply denied being the father of the minor and argued that prayers should be sought before the trial Court which has powers to make such an order if satisfied following sufficient reasons having been given.
4. The Application was canvassed by way of written submissions that I have duly taken into consideration.
5. The argument of the Applicant is that she moved to this Court so that the Court could conclusively determine issues raised in the Lower Court as the Respondent used to contribute to the upkeep of the child but he has not been consistent as agreed. She called upon the Court to consider the best interest of the child and if a *prima facie* case has been made to justify the order. She cited various authorities in support of the fact of the DNA test done to determine paternity.
6. The Respondent on his part urged that the Applicant is seeking orders directing him to share parental responsibility of the minor but it was not clear why she decided to jump gun and prefer the application in the Appellate Court while the Lower Court has not even given pre-trial directions in the matter. That it means that the Applicant never exhausted all avenues available and/or reached a stage where the request for DNA test would be made or where parties would be ordered and/or requested to agree or be asked to do the test for whatever reasons.
7. Further, it is urged that no constitutional issue has been raised to be determined by the Court therefore, if granted the application would amount to violation of constitutional rights.
8. In concluding the averments, it was urged that decisions that the Applicant relied on emanated from Constitutional Petitions and not Miscellaneous Applications.
9. It is worth noting that the Applicant approached the Court by way of Miscellaneous Application that would result into a final order being granted. Ordinarily, the party would have been expected to approach the Court by way of a Constitutional Petition or Originating Summons seeking declaratory orders instead of the application herein. However, this is a matter that concerns a child below the age of two (2) years. According to **Section 76(1)** of the **Children Act**, a Court in making an order must consider whether the order would be beneficial to the welfare of the child? It is the child's right to be protected from neglect and further, a child has a right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not. **(See Section 53(1)(d) and (e) of the Children Act)**. With the provisions of the law in mind, mere technicalities would not justify the dismissal of the Application. The Court must consider substantial justice.
10. I am also mindful of the fact that in the case **M. W. vs. K. C. (2005) eKLR** and **F. K. W. (Suing as the mother and next friend of G. D. W. (Minor) vs. D. M. M. (2015) Eklr**, the Applicants approached the Court by way of Miscellaneous Application seeking similar orders that were granted.
11. In the case of **MW** (Supra) the Applicant filed in the Children Court a case against the Respondent seeking custody and maintenance of

the child. The Respondent denied paternity. The Applicant therefore, moved to the High Court seeking an order directing the Respondent to attend DNA test. In the case of **FKW (Suing as the mother and next friend of GDW)** (Supra) the Applicant had filed a suit against the Respondent in the Children's Court seeking orders including paying maintenance and the Respondent denied being the father of the minor. An application was filed in the High Court by way of Chamber Summons seeking a DNA test to be conducted and in both cases orders sought were granted.

12. In the case of **MW** (Supra) **GBM Kariuki, J** (As he then was) stated thus:

“... so as to succeed in securing the order sought, the Applicant must show firstly that there is sufficient cause for seeking the order by showing that in the circumstances of the case there is a likelihood that the Respondent could be a father of the child and secondly that the Respondent's refusal to submit to DNA test has violated the child's right to know his father and thirdly, that the Respondent's refusal to take the DNA test is unreasonable because it has deprived the child of the possible enjoyment of the rights and benefits enshrined in Section 4 to 10 of Part II of the Act and fourthly, that the Court has jurisdiction under the Act to compel the Respondent to take the DNA test.”

13. In **FKW** (Supra) **Ngaah J**, was of the view that where it is in the best interest of the child that a paternity test should be undertaken there is no other means of determining the father of a child other than by means of a paternity test and therefore where such a test is necessary in the circumstances and, where, in any event, the Applicant has made out a *prima facie* case for such a test, then the Court of law will ordinarily make such an order for such a test.

14. It is contended that ordering the Respondent to provide a DNA sample would be unconstitutional as held in the case of **Davis Mulinge Mwongela vs. Republic HC Criminal Case No. 145 of 2010** and an intrusion of his rights to bodily security and integrity and also the right to privacy which rights are protected under the bill of rights as held by **Majanja, J.** in **S. WM vs. GMK., Petition No. 235 of 2011.**

15. These two (2) authorities may be distinguished as they were sexual offences cases while the instant case is in respect of a child's paternity where the child's best interest must be taken into consideration.

16. The circumstances in the instant case are that there is a case against the Respondent in the Children's Court where he is being called upon to discharge some responsibility as a parent. The Applicant has relied on affidavit evidence supported by some annexures. The Respondent on his part has denied the allegations and argues that if ordered to undertake the test it will be offending his dignity. This is indeed an outright refusal.

17. The Birth Certificate availed for the minor does not bear the name of the father of the child. Parties herein seem to have presented themselves before the Kitui Community Justice Centre as a result of a dispute over maintenance of a subject child where parties signed what was referred to as a mutual agreement where it was agreed that an individual by the name **Goerge Kyalo Mwalimu** would be providing **Kshs. 3,000/=** during gestation, **Kshs. 8,000/=** during delivery of the child and subsequently he would be providing **Kshs. 5,000/=** per month. It was emphasized that parties involved were not married.

18. There was no application to have the Applicant cross examined to establish the authenticity of the document therefore circumstances may suggest the likelihood of the Respondent being connected to the child. In the circumstances, having the DNA test done will enable the issue to be clarified and if he is the person responsible the child will be able to enjoy the benefits regarding his welfare.

19. This Court is seized of jurisdiction to grant orders sought. In the premises, I grant orders thus:

(i) The Respondent shall submit to a DNA test to be conducted at the Government Chemist Laboratory within **30 days** for purposes of ascertaining if he is the biological father of **JCK.** the subject child.

(ii) Costs of the DNA test shall be paid by the Applicant.

(iii) In the event that the Respondent is confirmed to be the biological father of the child, he shall be compelled to refund the sum paid by the Applicant in full.

(iv) Costs shall abide the outcome of the Children's Matter in the Lower Court.

20. It is so ordered.

Dated, Signed and Delivered at Kitui this 19th day of November, 2019.

L. N. MUTENDE

JUDGE