



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAPENGURIA**

**CIVIL APPEAL NUMBER 6 OF 2016**

**S. M.....APPELLANT**

**VERSUS**

**S. C.....RESPONDENT**

**JUDGEMENT**

In Children's case number 2 of 2016 of which is pending hearing and determination, N. R, a minor sued through his mother S.C.N, the defendant by the name of S.M, for provision of maintenance of the said minor.

In paragraph 2 of the plaint, the mother avers that the defendant is the biological father of the minor. The subsequent paragraphs reveals that the mother and the defendant cohabited from April 2016 as husband and wife, and out of the said relationship on 10<sup>th</sup> June 2015 were blessed with the issue namely N.R. The mother alleges that since then the defendant has never taken care of the said minor in terms of medical care, food, shelter and clothing. He is a business man and very able. The mother on the other hand is jobless and is experiencing difficulties in maintaining and providing for the said minor single handedly, leading to them been sheltered by a relative. She demanded in paragraph 8 of the plaint Kshs 5,000/= for a house girl and Kshs 20,000/= per month for medical care, shelter, food and clothing.

The defendant in his defence alleges that the mother of the said minor is a stranger to him. He further avers that he never cohabited with her at any given time as husband and wife, and they never had the alleged minor together. In his filed statement he denies that he had sexual intercourse with her. In paragraph 10 of the plaint he indicates he will seek leave of the court for a DNA test to be carried out to establish paternity.

There was an application filed together with the plaint on 11/02/2016, of which outcome is the subject of this appeal. The application sought for orders that:

1. The application be certified urgent and be heard on priority basis.
2. The applicant be granted full legal custody of the minor herein.
3. The defendant to provide for the basic needs of the minor including the minor's shelter, food and clothing needs and caregiver's salary.
4. The cost of the application be provided for.

The defendant/respondent opposed the said application on the very same grounds he had raised in his defense to the suit.

The trial magistrate made a finding in the said application in favour of the applicant, and ordered the respondent to remit to the applicant a sum of Kshs 5,000/= every month. His decision was heavily influenced by a birth certificate which was annexed to the application by the applicant, of which was obtained on 8<sup>th</sup> February, 2016, and shows S. M. as the father of one N.R. In regard to this the trial magistrate held:-

“The birth certificate shows that the applicant and the respondents are the biological parents of the minor.

In my view that is prima facie enough that the respondent is the father of the minor. There being no other evidential proof to the contrary and on a balance, the applicant has demonstrated her case with a chance of success. In the inference therefore I direct that the respondent do remit a sum of Kshs 5,000/= to the applicant effective the date of delivery of the ruling up till the case is heard and determined.”

Article 53 (i) (e) of the Constitution of Kenya 2010 reads:-

53 (i) – every child has the right –

(e) – 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:

This provision of the constitution is clear that the father and the mother of a child have equal parental responsibility whether they are married to each other or not.

The other legal provisions relied upon by the trial magistrate are not clear on the point especially where the parents were not married to each other at any given point, never cohabited after the birth of the child for a period of not less than twelve months, have not made a parental responsibility agreement, or where the father has not acknowledged paternity of the child or maintained the child. This is so in relation to section 24 (3) (a) and (b) and section 25 (1) (a) (b) and (2) of the children Act No. 8 of 2001. The section reads as follows:-

***24 (3) Where a child’s father and mother were not married to each other at the time of the child’s birth and have not subsequently married each other –***

***(a) The mother shall have parental responsibility at the first instance,***

***(b) The father shall subsequently acquire parental responsibility for the child in accordance with the provisions of section 25.***

***25 (1) Where a child’s father and mother were not married at the time of his birth-***

***(a) The court may, on application of the father, order that he shall have parental responsibility for the child; or***

***(b) The father and mother may by agreement (“a parental responsibility agreement”) provide for the father to have parental responsibility for the child.***

***(2) Where a child’s father and mother were not married to each other at the time of his birth but have subsequent to such birth cohabited for a period or periods which amount to not less than twelve months, or where the father has acknowledged paternity of the child or has maintained the child, he shall have acquired parental responsibility for the child, notwithstanding that a parental responsibility agreement has not been made by the mother and father of the child.***

Ignoring for the purpose of this case the provisions of the Children Act and considering the provisions of the constitution, it is not disputable that parental responsibility is acquired by virtue of a person been the

father or mother to a child. In this suit and the application, the allegation by the applicant that the respondent is the father to the child, one N.R is unequivocally disputed.

The respondent has stated clearly that the applicant is a stranger to him, they have never had a relationship, sex or even cohabited. He expressed that he will seek leave of the court for a DNA examination. The produced birth certificate was obtained on 8<sup>th</sup> February, 2016 while the suit and the application were filed on 11/02/2016. It is therefore clear that the birth certificate was obtained for the purpose of filing this suit and the application.

The respondent stated that he did not give consent for his name to be indicated as the father of the child in the birth certificate, and the said birth certificate was fraudulently obtained. I wish in that regard to state here that appearance of a person's name as a parent of a child in the birth certificate, where the authenticity of such birth certificate is not established and where a party disputes parenthood, the birth certificate cannot safely be held as prima facie evidence that the person named is the child's parent.

Given the circumstances of this case where the applicant in the plaint does not disclose where they allegedly cohabited and lived as husband and wife, and for how long, and where the only witness is the applicant; It was unsafe to make the order on an application, and without hearing the evidence, for the child's provision.

The respondent was said to be a business person. No details were availed of the business he does, where he does it and his income or profit. No basis were laid for the indicated monthly contribution of Kshs 5,000/=. The applicant says she is not employed, have no income and they are housed by a relative. There is danger in the order made because if the suit is heard and the court happens to find that the respondent does not have parental responsibility, recovering the amount wrongly paid will be a problem. Such an order is only safe if made in matters where parental responsibility is settled and the question is to what extent each party should meet it.

On the grounds I do find that the orders granted were not warranted given the evidence and the circumstances of both the suit and the application. I accordingly set aside the said ruling with costs to the appellant.

Madam Chebet holding brief for Mr. Chebii for the appellant. Court judgment read in the open court in her presence this 2<sup>nd</sup> day of March 2017.

**S. M. GITHINJI**

**JUDGE**

**2.3.2017**