REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISCELLAENOUS APPLICATION NO. 7 OF 2016

M M M……APPLICANT

VERSUS

E N W…….RESPONDENT

RULING

1. Before me is a Chamber Summons application dated 15th February, 2016 brought in by **M M M**, the applicant herein under **Sections 4, 6** and **22** of the **Children's Act** and **Rule 4** of the **Children's (Practice and Procedure Parental Responsibility) Regulations, 2002**. The applicant has made the application against E N W – his wife and the respondent herein seeking the following reliefs namely:-

i. ***That the respondent be ordered to submit to a Deoxyribonucleic Acid Test (D.N.A.) with the minor, E M.***

ii. ***That the cost of the Deoxyribonucleic Acid Test (D.N.A.) be shared equally by both parties.***

iii. ***That in the event the test confirms that the applicant is not the biological father of E M, the respondent be compelled to refund the applicant's cost of the Deoxyribonucleic Acid Test (D.N.A.)***

iv. ***That costs be provided for.***

2. The application is premised on the following grounds:-

a. ***That the applicant has filed for divorce at Baricho Principal Magistrate's Court Divorce Cause No. 1 of 2014 seeking a dissolution of his marriage with the respondent herein.***
b. ***That his wife has also cross-petitioned for divorce and is further seeking for custody of the minor and maintenance.***
c. ***That in the petition for divorce, the applicant has accused the respondent of adultery and getting a child out of wedlock.***
d. ***That the applicant has also denied parental responsibility.***
e. ***That only a D.N.A. test will lay the matter to rest.***
f. ***That it is in the best interest of the child to know who his biological father is for parental responsibility.***
g. ***That the paternity will enable the trial court to conclusively and effectively determine the matter before it.***
h. ***That the applicant has denied paternity and therefore the issue is contested.***
i. ***That it is in the best interest of the minor if the issue of paternity is determined expeditiously.***

3. In his supporting affidavit sworn on 15th February, 2016 the applicant has deposed that he is not the father of E M and that it will be grossly unfair for him to assume parental responsibility over the child. He has further added that the divorce petition pending in the lower court will be easier to be determined once the D.N.A. test confirms that the child was born out of wedlock.
4. In his submissions made through Magee Wa Magee Advocates the applicant states that the lower court declined to grant the reliefs sought here for want of jurisdiction and hence the reason why he has moved this Court pursuant to **Section 22** of the **Children's Act**. He has also submitted that the respondent is seeking custody and maintenance order of herself and the child in the divorce proceedings pending in the lower court.
5. The applicant has cited an authority in the case of **2W -VS- MGW [2014] eKLR** and **R M-VS- J M (unreported – Civil Application No. 2 of 2009 Nairobi)** to buttress the position that where a respondent is being ordered to maintain a child, it is imperative to subject him and the child to a D.N.A. test and that it would be in the best interest of the child for a D.N.A. to be conducted.
6. **E N W**, the respondent herein has opposed the application through a replying affidavit sworn on 4th April, 2016. She has accused the applicant for not taking any step to prosecute the divorce petition despite the close of pleadings in 2014. She denies that the child was gotten out of wedlock and maintains that the allegations of adultery and getting a child out of wedlock were denied in her answer to the petition for divorce and that she should not be ordered to assist the applicant in his petition for divorce pending in the subordinate court.
7. The respondent has accused the applicant for engaging in fishing expedition to get support or evidence in his divorce petition pondering why he filed the petition and came to this court for assistance him in gathering evidence to prove his case. She maintains that the issue of paternity will not arise as the certificate of birth of E M indicates that the applicant is the father.
8. It is further contended that the issue of parental responsibility will not arise given the fact that she had cohabited with the applicant for more than three years after the birth of the child and in her view **Section 25 (2)** of the **Children's Act** presumes that the applicant has parental responsibility in law over the minor.
9. The respondent through submissions done through learned counsel Mr. P. M. Muchira Advocate, has also contended that the application now before court is improper and bad in law. The respondent has submitted that pursuant to the **Children (practice and procedure Parental Responsibility) Regulations 2002**, the applicant ought to have commenced this proceedings by plaint and not Chamber Summons and that because the rule is couched in mandatory terms, the application before court is incompetent as it has neither been originated by a plaint or originating summons as provided by law.
10. It is further submitted that because the applicant and the respondent were living together when the child was born and when the birth certificate was issued, the applicant assumed parental responsibility by virtue of **Section 24 (1)** of the **Children's Act**.
11. The respondent has distinguished the two cases cited by the applicant by contending that the two cases represented different scenarios which were that the parents were unmarried and there were no birth certificates issued. She has also pointed out that the underlying dispute here is the divorce cause pending in the lower court at Baricho. In her view relevant authorities which relates to the present application are:

i. **M W -VS- K C (unreported Kakamega High Court Misc. No. 195 of 2004).**

ii. **Z.M.S. & M.W.S. -VS- DPP & 2 Others (unreported Nairobi High Court petition No. 529 of 2012.**

iii. **P K M -VS- S.P.M. Children's Court Nbi & Anor (unreported Pet. No. 138/12).**

iv. **S. W. M. -VS- G. M. K. [2012] eKLR.**

From the above cases the respondent has contended that the courts expressed that restrain and caution should be exercised when ordering for a D.N.A. test and that sufficient cause must be shown because ordering a D.N.A. or blood test is an intrusion of someone's rights to privacy and an applicant had the burden to vindicate or show that she had overriding rights for a test.

12. I have considered this application and submissions made by both parties through learned counsels which I must say were well presented. This application in my considered view has raised two main issues for determination by this Court.

i. Whether the respondent and the child (I M) should be compelled to undergo a D.N.A. test to confirm paternity of the child.

ii. Whether the application herein is competent or properly before this Court.

13. As I consider this issue it is important to note that the overriding factor in determining any issue involving a child, is the best interest of that child. **Section 4 (3)** of the **Children's Act** provides as follows:

> ***"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."***

This is the beginning point at which this Court shall determine the issues in this application.

14. The first question which this Court has to ponder is the reasons underpinning the prayers sought by the applicant. Why is the applicant interested with the D.N.A. test and the results? The applicant has filed a petition for divorce at Baricho Law Court seeking dissolution of his marriage to the respondent. The respondent on the other hand has also cross-petitioned for divorce and also sought for orders of custody of the minor and a maintenance order. Among the grounds for divorce cited is that the respondent committed adultery and got the child out of wedlock. The applicant therefore wants to have this issue sorted out scientifically through D.N.A. to establish paternity of the child in order to assist the lower court determine the divorce cause pending there.
15. The respondent on the other hand has faulted the applicant's intention and says that the applicant should not use this Court to assist him gather evidence against her but perhaps more fundamental issue raised by the respondent is the question of parental responsibility. In her view the applicant having been cohabiting with her as husband and wife when the child was born, he assumed parental responsibility of the child between 29th April, 2011 when the child was born to 16th January, 2013 when the parents separated virtue of the provisions of **Section 24 (1)** of the **Children's Act. Section 24 (1)** of the **Children's Act** provides as follows:-

> ***"Where a child's father and mother were married to each other at the time of his birth, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility."***

16. The petition for divorce filed at the lower court shows that the couple were married on 28th August, 2010 and as per the pleadings at the lower court, stayed together at their matrimonial home at[particulars withheld] for more than two years. This therefore shows that the law presumes that the applicant has some parental responsibility and even if it was to be argued that applicant may not be the biological father and cannot assume parental responsibility by virtue of that section, the provisions of **Section 25 (2)** of the same Act in my view puts the matter to rest. It provides as follows:

> ***"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 12 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……..".

The use of the conjunctive word "or" connotes, that any of those variables described above qualifies if established for a presumption of parental responsibility to be made. This therefore means that D.N.A. test *per se* is not the only determinant in law of parental responsibility. There are other factors as seen above which determine parental responsibility and therefore this Court finds that the applicant is not justified in asking for a D.N.A. test purely for purposes of determining the question of child maintenance/support or parental responsibility. It is also my belief that because this issue is still pending in the lower court for determination, the less said the better.

17. A cursory look at the petition before the lower court clearly shows that the fight or tussle is between man and wife. The child should not feature and it would amount to a miscarriage of justice if this Court was to allow the child to be used as a pawn in their fights. I consider that it would be in the best interest of the child if he is kept off from the fight as this in my view is the spirit and the letter of **Section 4** of the **Children's Act**. I have considered the authorities cited by the applicant and agree with the respondent that *ratio decidendi* in those cited decisions does not apply here because the circumstances are different. In the case of **S. K. M. -VS- E. N. [2010] eKLR**, the father of the child was not staying with the child and the mother wanted him to be compelled to maintain the child but was reluctant for a D.N.A. test. The court found that D.N.A. test was necessary to determine the contested issue of paternity and that the mother would suffer no prejudice if the D.N.A. test was done. In this instance the parties were married when the child was born and the reasons for the D.N.A. test are different. The respondent has faulted the applicant for engaging in fishing expedition for evidence that will assist him in the divorce proceedings. I must say that this contention is not far-fetched. One of the grounds in the petition for divorce is that the respondent had committed adultery and so it follows that a favourable D.N.A. results to the applicant will obviously support that proposition. It is also important to note that the intention and purpose of a party in cases involving children must be viewed in the lens of **Section 4** of the **Children's Act** and **Article 53 (1)** of the **Constitution**; and using this lens to consider the prayers sought in this application it is difficult to discern what best interest of the child will be served by allowing the application. I am not convinced that compelling the respondent and the minor to undergo a D.N.A. test will be in the interest of the child as contended by the applicant. If anything the effect of allowing the application may not serve any interests of the minor at all but will certainly affect the interests of both the applicant and the respondent in the divorce cause. This explains my finding above that the child here if not accorded protection of the law will end up being used as a pawn by either of the parties depending on the outcome of the D.N.A. Since this application was made by invoking the best interests of the child, I must find that none has been established to warrant subjecting the minor and the respondent to the D.N.A. test.
18. My position in this regard is persuaded by the decision in the cited case of **Z. M. S. & Another - VS- Director of DPP & 2 others [2014] eKLR** where Hon. Majanja J., quoted with approval the decision of the Supreme Court of India in the case of **B P J -VS- C S Civil Appeal Nos. 6222 – 6223 of 2010** where the following observations were made:

"……..the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether a just decision in the matter, DNA is eminently needed. DNA in a matter 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 to 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 a strong prima facie case and court must carefully examine whether as to what would be the consequences of ordering the blood test."

This Court is persuaded by these observations as I consider them relevant to the issues at hand in this application. I also find the decision of Hon. G.B.M. KARIUKI Judge (as he then was) in the case of **M W –VS- K C (Kakamega High Court Misc. app. No. 105 of 2004)** guiding in this regard. The judge made the following observations:-

> ***"In exercising its discretionary power to grant or not to grant this relief, the court will not lose sight of the fact that there is real likelihood of abuse and must therefore guard against it but always ensure that the imperative need is to see that the best interest of the child is secured and is not relegated."***

The judge went on to set the following parameters in granting an order for a DNA test as follows;

1. ***"That the application under Section 22 of the Act must be in good faith.***
2. ***That there are good grounds for making it, that is to say, sufficient cause must be shown.***
3. ***That the application is not actuated by malice or designed to economically exploit or embarrass or is otherwise an abuse of the process of the court."***

If the above parameters were to be applied in this present application on their own, even without considering what I have already found above, I am not convinced that the application can pass the test. The applicant has not demonstrated any sufficient cause that is in tandem with **Section 4** of the **Children's Act** to persuade me to exercise my discretion in his favour.

19. Now turning on the competency of the application now before court, is that the jurisdiction of this court under the law to entertain this application was invoked by the applicant in approaching this Court for the reliefs sought under **Section 22 (1)** of the **Children's Act**, the jurisdiction of this Court can be invoked when a party is seeking to enforce any of the rights of a child envisaged under **Section 4** to **19** which are *inter alia* right to life, non discrimination, right to parental care, health care, education, name, nationality, and protection. It is also true that the procedure provided by the **Children (practice and procedure Parental Responsibility) Regulations 2002 rule 3** requires an application to be commenced by a plaint. This however, in my view relates to matters that are purely filed in Children's court to determine issues concerning children and their rights. This is not the case here but this Court has jurisdiction to entertain the same. It was also unlikely that I would have closed out the applicant from the seat of justice purely on technical grounds because the same would violate the constitutional provisions under **Article 48** and **159 (2) (d)** of the **Constitution**. This Court therefore finds that the application before court cannot be rendered incompetent merely by operation of **rule 3** of the cited regulations under **Children (practice and procedure Parental Responsibility) Regulations 2002.**
20. This Court nonetheless is not satisfied with the propriety of the application being brought to court in the first place. This is because though the application has invoked **Section 22** of the **Children's Act** which does invoke this Court's jurisdiction in enforcing and securing various rights as contained in Sections 4 to 19 of the Act, the basis of the application as I have found out is not to effectively secure any of those rights but to secure his own cause in the divorce proceedings pending in the lower court. This is in my view an abuse of court process. Applications made under **Section 22** should exclusively be made to further the interests and the rights of a child and certainly not to further interests of the parent or any other person whether directly or indirectly.

This Court finds that the application now before court is apparently aimed at tilting the scales in favour of either party in the divorce cause pending in the lower court and in view of the fact that the primary consideration under **Section 4** of the **Children's Act** is the best interest of the child, I find that his interests will not be addressed and catered for by this application.

In the end I find that the Chamber Summons application dated 15th February, 2016 lacks in merit due to aforesaid reasons. The same is dismissed with costs.

Dated and delivered at Kerugoya this 12th day of July, 2016.

R. K. LIMO

JUDGE

12.7.2016

Before Hon. Justice R. Limo J.,

Court Assistant Willy Mwangi

Kiragu for Applicant

Muchira for Respondent

COURT: Ruling signed, dated and delivered in the open court in the presence of Kiragu advocate for Applicant and Muchira for the Respondent.

R. K. LIMO

JUDGE

12.7.2016