



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISCELLANEOUS CIVIL APPLICATION NO.41 OF 2014

S. W. APPLICANT

VERSUS

D. N. RESPONDENT

RULING

S. W., (the applicant), has moved this court by way of an originating summons dated 13th January 2014 and filed in court on 22nd January 2014 against **D.N.** (the respondent, seeking the following orders:-

- 1. THAT a DNA test be conducted to determine the paternity of one TGD alias B a minor at a place and within the time to be specified by this court.*
- 2. THAT the respondent be ordered to co-operate and avail the said TGB for purposes aforesaid.*
- 3. THAT costs of this application be provided for.*

The application is based on the grounds appearing on the face of the summons and on the affidavit by **S.W.**, the applicant, sworn on 13th January 2014. The applicant's grounds as stated in the summons are that the parties herein are married, that paternity of the said minor has been in doubt and the subject of a dispute between the parties to this application since their marriage and birth of the minor, that it would be fair and just for the doubts raised to be cleared by ordering a paternity test, that the applicant has no access to the minor because they have separated leaving the custody of the minor to the respondent.

In supporting his application, the applicant has sworn that he and the respondent were married on 13th December, 2008 and in the course of the marriage, the minor was born to them on 25th January 2011 but the paternity of the minor has been a subject of dispute due to what the applicant says are the minor's physical features. Due to this, the applicant avers that they have separated and he now wants to know who the real father to the minor is through the DNA test.

The respondent has opposed this application and filed two affidavits sworn on 12th May 2014 and 3rd December, 2014 respectively. The respondent dismisses the application as one that lacks in merit and that it was filed in bad faith. The respondent admits to having been married to the applicant on 13th December, 2008, but says that the minor was born on 25th January 2012 and not on 25th January, 2011 to both the applicant and herself. She denies there being doubts about the paternity of the minor or that they are separated.

The respondent states that she has since the celebration of the marriage fulfilled her marital obligations and blames the applicant for not being candid as to the real underlying issues in their marriage. According to the respondent, the applicant is out to intimidate and embarrass her for undisclosed reasons. She denies that the applicant has no access to the minor and says that subjecting the minor to a DNA test will be a de-humanising, and agonizing act which is likely to cause him mental anguish. The respondent concludes by saying that she is neither ready for a DNA test nor interested in any maintenance from the applicant on behalf of the minor who has in any event abandoned the same minor since he was seven (7) months old. According to the respondent, she is content with both maternity and paternity of the minor.

Counsel for the parties have filed written submissions which are on record and which the court has considered. They have largely taken the respective positions of the parties herein while the applicant's counsel has maintained that the DNA test will assist in settling any doubts about the paternity of the minor. The respondent's counsel says that it is unconstitutional to subject the respondent to a DNA test. Counsel maintains that since there is no demand for parental responsibility from the applicant, there is no reason to order a DNA test.

The present application is peculiar in the sense that it has been instituted by the applicant who says he wants to know whether he is the biological father to the minor in these proceedings. He therefore prays that this court do order both the applicant and the respondent together with the minor, to present themselves at a facility within a given time for purposes of conducting a DNA test in order to determine whether or not the applicant is the biological father to the minor. The respondent has opposed this saying that she is not interested and that it is against the wish. The parties herein are husband and wife and are not divorced. The applicant says they are separated but the respondent denies this. The applicant's position is that he wants to know if he is the biological father to the minor and therefore decide whether or not to assume his parental responsibility to the minor. The respondent, the biological mother, maintains that she knows the applicant is the biological father to the minor but she is not willing to subject herself and the minor to a DNA test. She also says that she is not interested in burdening the applicant with obligations over the minor which he has, in any event, failed to meet.

I note from the materials before me that at this point in time there is no dispute in any court regarding parental care or responsibility of the minor. There are no any proceedings before any court seeking any form of relief involving the parties herein on behalf of the minor. That is why I called this application peculiar from the outset. In the case of S.W.M. vs G.M.K. Petition No.235 of 2011 where taking of a DNA test was at the centre, *Majanja, J.* held:-

“ordering the respondent to provide DNA for whatever reason is an intrusion of his right to bodily security and integrity and also the right to privacy which rights are protected under the Bill of Rights. The petitioner bears the burden of demonstrating to the court the right she seeks to assert or vindicate and which the court would consider as overriding the respondent's rights.”

Yet in another case involving the same issue of a DNA test, that is CMS vs IAK Constitutional Application No.526 of 2008, *Mumbi Ngugi, J.* stated as follows:-

“In determining a matter such as this, the court must of necessity weigh the competing right of the child and the petitioner who is alleged to be the biological father. The right of the child to parental care takes precedence, in my view, particularly in light of the cardinal principle set out in Article 53(2) that in matters such as this, the paramount consideration is the best interest of a child.”

And in the case of P.K.M. vs Senior Principal Magistrate Children's Court at Nairobi & Another [2014] eKLR, *Lenaola, J.* pronounced himself as follows:-

“There is no doubt in my mind that between the petitioner's inconvenience at being subjected to DNA testing and the need to conclusively determine the paternity of the child, in the child's interest and certainty in the petitioner's interest, the child's interest must prevail that for the petitioner.”

I am in agreement with both *Mumbi Ngugi, J.* and *Lenaola, J.* that when it comes to the interest of the

child, an order for DNA should be made if in the end that order will promote, enhance, safeguard and protect the welfare of the minor. In that regard, a petitioner should not be shielded from his legal obligation as a parent to that minor, by declining to order a DNA test because of alleged breach of his constitutional rights. If that were to happen, the minor's constitutional rights would themselves have been violated contrary to *Article 53(2)* of the Constitution.

The common denominator in all the decisions cited above is that there had been disputes before various children's courts where those courts had made orders for a DNA test for purposes of determining paternity for the interest and benefit of the minors. That was also the case in the decision cited by the applicant herein (*Misc Appl. No.105 of 2004 Kakamega*). But that is not the case in the matter before me.

In the present case, there is no suit pending in any court filed for or on behalf of the minor. The applicant has alleged that he has been denied access to the minor but has not taken any steps to have his right of access restored. The on her part, respondent has argued that the applicant has abandoned the minor since he was seven months old, but the applicant has said nothing about this. I am not satisfied that the applicant has moved this court with a view to promoting, enhancing, safeguarding, and protecting the interests and welfare of the minor. The applicant appears to have abandoned the minor and I am not persuaded that his plea before this court is actuated by his wish to provide for the interests and welfare of the minor. That not being the case, I would agree with *Majanja, J's* holding in *SWM vs GMK*, (supra), that ordering the respondent to conduct a DNA test will be an intrusion of her right to bodily security and integrity since the order sought is not for the benefit of the minor. The applicant has not laid a basis for the DNA test other than to satisfy himself that he is the "real" father to the minor, and I am satisfied that it will not be beneficial to the minor. The test is meant for self satisfaction rather than the interests and needs of the minor.

For the above reasons, I am not persuaded that the applicant's application is merited. Consequently, the Originating Summons dated 13th January, 2014 is declined and is hereby dismissed. Parties being a couple, there will be no order as to costs.

Dated and delivered at Kakamega this 13th day of October, 2015.

E. C. MWITA

J U D G E