



**ZW v MGW (Miscellaneous Case 108 of 2013) [2014] KEHC 5318 (KLR) (9 May 2014) (Ruling)**

*ZW v MGW [2014] eKLR*

Neutral citation: [2014] KEHC 5318 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
MISCELLANEOUS CASE 108 OF 2013**

**WM MUSYOKA, J**

**MAY 9, 2014**

**BETWEEN**

**ZW ..... APPLICANT**

**AND**

**MGW ..... RESPONDENT**

**Paternity must be established before subjecting a putative father to pay child maintenance**

*The applicant moved the court on an application and her principal prayer was that the respondent be ordered to submit to a DNA test so as to determine whether he was the father of the minor applicant. The court held that the spirit of the Children Act was that parents had to care, protect, and provide for the children that they were responsible for bringing into the world. The court further held that in order to determine whether the respondent (the alleged father of the minor) could be ordered to maintain the subject child, it was imperative to determine first whether the respondent was the father of the minor and the most modern and effective way for doing so was to subject the putative father to a DNA test. The court thus ordered the respondent to submit to a DNA test.*

Reported by Andrew Halonyere & Anne Mbuthia

**Family Law** – children – child maintenance - principal consideration in determining children’s cases - whether it was imperative to determine the paternity of a child before subjecting a putative father to pay child maintenance - Children Act (cap 141), sections 4(2), 4(3) and 90.

**Statutes** – interpretation of statutes – interpretation of the Children Act (cap 141) - the broad objective of the statute and the paramountcy principle - what was the broad objective of the Children Act, 2001 with regard to parental responsibility for children born out of wedlock - Children Act (cap 141), sections 4(2), 4(3) and 90.

**Brief facts**

The applicant moved the court on an application and her principal prayer was that the respondent be ordered to submit to a DNA test so as to determine whether he was the father of the minor applicant. The applicant disclosed that there was a children’s case pending before the children’s court where she was seeking maintenance orders for the minor. The respondent had in that cause denied paternity and consequently the primary court could not proceed further with the matter before the issue of paternity was determined.



The respondent filed grounds of opposition and stated that the applicant had not met the three conditions for saddling parental responsibility. In his view the orders sought could not be granted in a vacuum.

### **Issues**

- i. Whether it was imperative to determine the paternity of a child before subjecting a putative father to pay child maintenance
- ii. What was the broad objective of the Children Act with regard to parental responsibility for children born out of wedlock?
- iii. What was the principal consideration in determining children's cases?

### **Relevant provisions of the Law**

#### **Children Act (cap 141)**

#### **Section 4 - Survival and best interests 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*

### **Held**

1. The spirit of the Children Act was that parents had to care, protect and provide for the children that they were responsible for bringing into the world. The broad objective of the Act was not that protection was to be afforded only to those children born within wedlock, or where the father had assumed parental responsibility, as adopting such an approach to the matter would be discriminatory of children born outside wedlock, where the putative father declined to assume parental responsibility.
2. The “paramountcy principle”, provided under section 4(2) and (3) of the Children Act, had to be the principal consideration in determining children's cases. The matter was one involving a child and had to be looked at from that perspective.
3. In order to determine whether the respondent could be ordered to maintain the subject child, it was imperative to determine first whether the respondent was the father of the said child. The most modern and effective way for doing so was to subject the putative father to a DNA test.
4. [*Obiter*] “I am conscious of the conditions stated by GBM Kariuki J. in *MW v KC*. That is a decision of [a] court of concurrent jurisdiction. The decision is persuasive but not binding on me. In my view, and with utmost respect, the said decision to the extent it sets out the conditions to be met in determining whether to order a DNA test or not, gives undue focus on the interests of the putative father as against those of the child. Yet Section 4 of the Children Act makes the welfare of the child the principal consideration.”

*Application allowed.*

### **Orders**

- i. *Respondent to submit to DNA test to determine paternity of the child.*
- ii. *Test to be conducted at the Government Laboratory within thirty (30) days of the date of the ruling.*
- iii. *Both the applicant and the respondent to meet the cost of the DNA test equally, but in the event of a positive result the respondent to refund the applicant's costs, and in the event of a negative result the applicant to refund the respondent's costs*
- iv. *Matter to be mentioned after thirty (30) days to monitor compliance.*



v. *The costs of the application to abide the results of the DNA test.*

## Citations

### Cases

#### Kenya

1. *MW v KC* Miscellaneous Application 105 of 2004; [2005] KEHC 3172 (KLR) - (Explained)
2. *PM v JK* Miscellaneous No 159 of 2009 - (Explained)
3. *ZAK & another v MA & another* Petition 193 of 2011; [2013] KEHC 6007 (KLR) - (Explained)

### Statutes

#### Kenya

1. Children Act (cap 141) sections 4(2)(3); 6-19; 22; 90(a)(c) - (Interpreted)
2. Constitution of Kenya articles 27(1)(2)(3); 53(1)(c) - (Interpreted)

### Advocates

*Mr Makumi* for the respondent.

## RULING

1. The applicant in this matter moved the court on an application dated October 25, 2013. Her principal prayer is that the respondent be ordered to submit to a DNA test so as to determine whether he is the father of the minor applicant, LWG. She would also like an order that the cost of the test be shared equally, and in the event the test confirms the respondent to be the biological father of the subject – child, the respondent be compelled to refund the applicant’s costs of the DNA test in full.
2. In an affidavit sworn on October 25, 2013, the major applicant discloses that there is a children’s case pending before the Children’s Court being Children Cause No 842 of 2013, where she seeks maintenance orders for the minor, LWG. The respondent has in that cause denied paternity and consequently the primary court could not proceed further with the matter before the issue of paternity was determined.
3. When the application was served on the respondent, filed grounds of opposition dated November 8, 2013. His case is that the applicant has not met the three conditions for saddling parental responsibility. In his view the orders sought cannot be granted in a vacuum.
4. The application was canvassed on November 14, 2013. Counsel for both parties made oral submissions. For the applicant, it was argued that the lower court had no jurisdiction to order a DNA test, hence the filing of the current application before the High Court. Sections 4,6-19 and 22 of the *Children Act* were cited to aid the argument that the High Court has jurisdiction to resolve issues of this nature. Counsel cited *MW v KC* Kakamega High Court Misc Application Number 105 of 2004, where GBM Kariuki J stated the conditions to be met before the order sought can be granted. It was submitted that it is stated in that case the court had taken into account the fact that the parties had cohabited for some time. Counsel submitted that the refusal by the respondent to submit to the DNA test has had the effect of denying the child her rights.
5. In reply, it was argued for the respondent that the three conditions set out in the Children Act must be met. The three conditions were said to be that the parties must have been married at the relevant time, the father must have assumed parental responsibility and the father must have accepted parental responsibility and assumed it. The decision of Kasango J in *PM v JK* Meru High Court Misc No 159 of 2009 was cited to buttress the respondent’s case. It was stated that the court in that case had identified the three conditions that must be proved before a DNA test is compelled by the court.



6. In *MW v KC*, the applicant had sought for an order that the respondent be compelled to take a DNA test. The court in that matter identified the conditions that it felt must be satisfied before an order can be made to compel a putative father for undergo a DNA test. The conditions as identified by GBM Kariuki J are that there is likelihood that the respondent could be the father of the child, that the respondent's refusal to submit to the DNA test has violated the child's right to know his father, that the refusal to take the test is unreasonable and that the court has the jurisdiction to order of the test. In allowing the order for the conduct of the test, the court stated that it should be considered whether the application is made in good faith, that sufficient cause has be shown for it and that the application is not actuated my malice or designed to economically exploit or embarrass or otherwise is an abuse of the process of the court.
7. In *PM v JK*, Kasango J stated three circumstances under which a father may be saddled with parental responsibility where the mother and father of the child are not married. The first is where the father applies to court for parental responsibility, the second is where the father and mother of the child enter into an agreement recognising the father's parental responsibility, while the third is where the father either acknowledges paternity of the child or where has maintained the child. Parental responsibility, according to the court, can only be ordered in cases where it fails under any of the three circumstances.
8. There is also the decision by Mumbi Ngugi J in *ZAK and another v MA and another* Nairobi High Court Petition No 193 of 2011, where the court declared unconstitutional section 90(a) and (c) of the *Children Act* on the grounds that they violate articles 27(1)(2)(4) and 53(1)(c) of *the Constitution*.
9. The decision in *ZAK and Another v MA and another* appears to be inconsistent with that in *PM vs JK* section 90 appears to limit parental responsibility by a father to cases where parents of the child were married to each other at the time of the birth of the child and where the parents of child were not married to each at the time of the birth of the child and have not subsequently married, but the father of the child has acquired parental responsibility for the child. The declaration of these provisions unconstitutional would mean that for a father to be compelled to assume parental responsibility, he need not be married to the mother of the child nor need he have assumed parental responsibility.
10. The Children Act was designed to afford protection to children, whether born within or outside marriage. The spirit of the Children Act is that parents shall care, protect and provide for the children that they have been responsible for bringing into this world. The broad objective of the Act is not that protection should be afforded only for those children born within wedlock or where the father has assumed parental responsibility. Adopting such an approach to the matter would be discriminatory of children born outside wedlock where the putative father declines to assume parental responsibility. Even children who are products of what is called "a one night stand" deserve protection.
11. Section 4(2)(3) of the Children Act states the principle that ought to guide the courts in determining matters where the welfare of children is concerned. The said provision states as follows

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- (2). In all actions concerning children whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the 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.
12. What is stated in section 4(2)(3) of the Children Act is what is called the paramountcy principle. In children's cases this ought to be the principle or paramount consideration. The position is that these cases are not about the parents, but the children. In determining the cases the courts ought to give prominence to this consideration. The matter before me is a children's case brought under the provisions of the Children Act. I am therefore bound to look at it from the perspective section 4(2)(3) of the Children Act.
  13. The case in Children's Case No 841 of 2013 is for the maintenance of the minor the subject of these proceedings. To determine whether the respondent can be ordered to maintain the subject child it is imperative to determine first whether the respondent is the father of the said child. The most modern and effective way for doing so would be to subject the putative father to a DNA test.
  14. I am conscious of the conditions stated by GBM Kariuki J in MW v KC That is a decision of court of concurrent jurisdiction. The decision is persuasive but not binding on me. In my view, and with utmost respect, the said decision to the extent it sets out the conditions to be met in determining whether to order a DNA test or not, gives undue focus on the interests of the putative father as against those of the child. Yet section 4 of the Children Act makes the welfare of the child the principle consideration.
  15. I am persuaded that there is merit in the application dated October 25, 2013. I shall allow the same and make the following orders:-
    - (a) That the respondent shall submit to a DNA test so as to determine the paternity of LWG;
    - (b) That the said test shall be conducted at the Government Laboratory in the next thirty (30) days of the date of this ruling;
    - (c) That both the applicant and the respondent shall meet the cost of the DNA test equally, but in the event the test turns out to be positive the respondent shall refund the applicant's costs, and should it turn out negative the applicant shall refund the respondent's costs;
    - (d) That the matter shall be mentioned after thirty (30) days to monitor compliance; and
    - (e) That the costs of the application shall abide the results of the DNA test; so that in the event of a positive test the respondent shall bear the costs of the application but a negative test shall mean that the applicant bears the costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF MAY 2014.**

**W. MUSYOKA**

**JUDGE**

No appearance for the applicant.

In the presence of

Mr. Makumi advocate for the respondent.

