



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 561 OF 2013

BENJAMIN KIBIWOT CHESULUT.....PLAINTIFF

VERSUS

MARY CHELANGAT.....1ST DEFENDANT

WILSON KERICH.....2ND DEFENDANT

RULING

(Application for DNA in course of trial; principles to be applied; when DNA may be allowed; whether in the circumstances proper to issue an order for DNA; application coming after close of both plaintiff's and defendant's case; court of view that circumstances would have allowed for DNA but application coming too late in the day and would prejudice the right to a fair trial).

1. The plaintiff in this case sued the defendants inter alia seeking orders to have the defendants permanently restrained from the land parcel Plot No. 42 Kirobon Farm, Keringet. It is his case that they are strangers to him and have no interest over the suit land. The defendants filed defence, and asserted that the 1st defendant is wife to the plaintiff, whereas the 2nd defendant, is son to the plaintiff. They contended that they have every right to be on the suit land. Before the hearing of the matter could commence, the 2nd defendant died. The 1st defendant moved to inter the body of the 2nd defendant in the suit land which prompted an application for injunction. In lieu of hearing the application for injunction, I directed the status quo to be maintained and the suit itself be heard straight away.

2. The plaintiff testified and closed his case. During defence hearing, in the course of giving evidence, the 1st defendant stated that she would wish to have DNA performed. The same statement was made by the defendant's witness. After the defence had exhausted their witnesses, counsel made an oral application for DNA to be conducted. I directed that a formal application be filed. The application was filed and is the subject of this ruling. The 1st defendant has applied for DNA to be conducted so as to determine whether or not the 2nd defendant (now deceased) is son to the plaintiff. In her supporting affidavit, it is averred that the plaintiff has refused to acknowledge the deceased as his son and it is therefore necessary to do the DNA.

3. That application is strenuously opposed. In his replying affidavit, the plaintiff has contended that the prayers sought will be an intrusion to his fundamentally protected rights to security and integrity as held in the case of ***SWM v GMK Petition No 235 of 2011***. He has averred that the defendants have not demonstrated a prima facie case to warrant this court order a DNA test. It is also his position that the application does not meet the "eminent test" principle as held in the case of ***CMS v IAK Constitutional***

Application No.526 of 2008. It is further his view that paternity is not in issue in this case, since what is the subject for determination, is proprietorship of the suit property which can be proved without recourse to DNA. It is further averred that the issue of DNA was never pleaded and further that this court has no jurisdiction to determine matters of succession and matrimonial property.

4. At the hearing of the application, Ms. Wanjiru Njuguna, counsel for the defendants, argued that a question on whether the plaintiff is father of the 2nd defendant has arisen. She submitted that the case herein meets the threshold of a prima facie case and the eminent test. She submitted that the question is whether the court will be assisted in reaching the truth if DNA is conducted. She submitted that conducting a DNA cannot be said to be in violation of the plaintiff's constitutional rights. On the contention that this court has no jurisdiction to order such test, she submitted that the court has jurisdiction, as the issue has arisen in a dispute before this court.

5. Mr. Biko for the plaintiff argued that the rights of the plaintiff will be infringed, as this is intrusion, and would violate Article 28 of the Constitution. He further argued that the eminent test has not been met as the issue in the suit is about proprietary rights. It was his view that it is irrelevant whether or not the defendants are wife and son of the plaintiff as the question of trespass is not dependent on affiliation. He submitted that even a son can be a trespasser. He further submitted that childhood is to be determined in the Family Division of the High Court and therefore this court has no jurisdiction. He also submitted that issues of burial are only to be tried in the High Court and not this court.

6. I have considered the matter and the rival submissions. The core issue herein is whether given the circumstances in the case, I should order the plaintiff to undergo a DNA test. An issue of jurisdiction has arisen but I do not think it is a serious issue. This court is not hearing a matrimonial or paternity dispute. The matter before court is whether or not the defendants are trespassers in the suit land and whether they have any rights over it. It is squarely an issue related to proprietary rights over the suit land and whether or not the defendants have any rights in the land. The issue of paternity has arisen, because the defence of the defendants is that they are mother and son of the plaintiff, and therefore they have every entitlement to be on the suit land, and that the 2nd defendant (now deceased) ought by virtue of that relationship with the plaintiff to be buried on the suit land.

7. I have looked at the statutes and I have not come across any explicit provision touching on DNA and when it can be ordered or when it should be disallowed. A lot of cases where DNA has been applied for, have been cases relating to the maintenance of children. This is not surprising as parenthood is at the core of such cases. In these category of cases, courts have been fairly liberal in directing that DNA be conducted. The reasoning has been that this would be in the best interests of the child and that this need outweighs the constitutional right to privacy and dignity. Thus in the case of **C.M.S v I.A.K Constitutional Application No 526 of 2008 (2012) eKLR**, Mumbi J was of the following opinion :-

“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 interests of the child.”

In the case of **ZW v MGW (2014) eKLR**, Musyoka J, stated as follows :-

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.

8. There are numerous other decisions in which DNA has been ordered in child maintenance cases. These include the cases of **M.W v Kakamega HC Misc No.105 of 2004 (2005) eKLR**, **ZAK & Another v MA (2013) eKLR** and the case of **PKM v Senior Principal Magistrate Children's Court at Nairobi**, which case has been relied upon by counsel for the applicant. The jurisprudence in so far as the matter relates to children demonstrates an inclination towards making the order for DNA. Although DNA was denied in **P.M v J.K, Meru High Court, Misc case No.159 of 2009 (2010) eKLR**.

9. There have not been many cases where requests for DNA have been made outside child maintenance cases. The few that I have seen actually incline towards not granting the order for DNA. In **Solomon Kiromo Mbugua v Virginia Murugi Kariuki & Another Nairobi HCCC NO.100 of 2011 (2011) eKLR**, the plaintiff sued the defendants to compel them to stop spreading rumours that they are his wife and son. The defendants filed defence in which they denied spreading such rumours. The plaintiff later filed an application to compel the defendants to undergo a DNA so that the issue whether he was father to the 2nd defendant could be settled once and for all. Hatari Waweru J, dismissed the application partly on the reasoning that paternity was not an issue in the case.

10. In the case of **SWM v GMK (2012) eKLR**, the petitioner filed a Constitutional petition in which she wanted settled the question of whether or not she is the child of the respondent. Within the petition she applied for a DNA test to be conducted. Majanja J was not convinced that the matter raised any constitutional issue and proceeded to strike it out. In the course of his ruling, the judge stated as follows :-

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.

11. Neither did the applicant succeed in the case of **R.M.K v A.K.G & Another (2013) eKLR** which again was a matter before Majanja J. This was a Constitutional Petition in which the petitioners inter alia sought orders for a declaration that the 1st respondent is the petitioner's biological father. An application for DNA was made. The judge was of the opinion that the assertions that the respondent was the biological father were threadbare, in essence, that there had not been tabled through pleadings and evidence sufficient nexus between the petitioner and respondent in order to persuade the court to grant the orders sought. The judge relied on his previous decision in **SWM v GMK**.

12. Lenaola J in the **PKM** case did not seem to entirely agree with the dictum of Majanja J in **SWM v GMK**. He expressed himself as follows :-

While I am in agreement with the learned Judge, to my mind, there must always be a balance between the right to the privacy of a person not to submit himself forcibly to medical examination and the right of a child to know its parents. That balance is delicate and must be looked at in the specific circumstances of each case.

He quoted with approval the Supreme Court of India decision in the case of **Bhabani Prasad Jena v Convener Sec Orissa, Civil Appeal Nos 6222-6223 of 2010** where it was stated as follows stated as with regard to forced DNA testing;

“The Court must reach the truth, the Court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for 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 strong prima facie case and court must carefully examine as to what would be the consequence of ordering the blood test.”

13. I think this is where Ms. Wanjiru has obtained her "eminent need" test from. I interpret this test to mean that, DNA ought only to be permitted where it is necessary for the determination of the issue before court. Where it is not going to determine a key issue in the case, then DNA ought to be denied. This is because DNA is seen as an intrusive procedure that has the effect of invading one's right to privacy. That is probably why DNA is applied for in child maintenance cases, for one of the important matters to be determined in such cases, is whether or not the child in issue is affiliated to the parties in the suit. That will also explain why DNA is more readily ordered in such cases.

14. There is also what Ms. Wanjiru termed as the "prima facie" test case (although I would on my part be hesitant to use the term "prima facie" case in the circumstances of our country for it is a term commonly used in criminal cases). Again this test, the "prima facie" test, is mentioned in the dictum of the **Bhabani** case. It would appear that courts need to be convinced through some cogent evidence that the DNA is necessary. It could be, as Majanja J stated in the case of **R.M.K v A.K.G & Another** (2013) eKLR, that there needs to be "*sufficient nexus between the petitioner and respondent in order to persuade the court to grant the orders sought*". But on my part I appreciate that it can at times be difficult to table facts going beyond the mere statement that the respondent is a parent. I find it hard to insist on a wealth of other supporting material, for in some instances, there may be none at all, and there is possibility of the truth being lost by insisting that material be tabled, when the applicant does not have any such material. At times all that one has, is the inner knowledge that "*so and so is parent to my child*" and if DNA is denied, the truth may be lost forever.

15. I do not see why a respondent should use the position that there may not be additional facts to his advantage at the risk of concealing the truth. Justice thrives in the establishment of the truth and I can put it no better than was put in the Indian case of **Re G (Parentage: Blood Sample) [1997] 1 F.L.R. 360** cited in the case of **Rohit Shekhar vs Narayan Dutt Tiwari & Anr on 27 April, 2012, High Court of Delhi, IA No.10394/2011 in CS(OS) No. 700/2008**, where it was stated as follows :-

"Justice is best served by truth. Justice is not served by impeding the establishment of truth. No injustice is done to him by conclusively establishing paternity. If he is the father, his position is put beyond doubt by the testing, and the justice of his position is entrenched by the destruction of the mother's doubts and aspersions. If he is not the father, no injustice is done by acknowledging him to be a devoted stepfather to a child of the family. Justice to the child, a factor not to be ignored, demands that the truth be known when truth can be established, as it undoubtedly can. Whilst, therefore, I do not in any way wish to undermine the sincerity of the father's belief that contact is of a continuing good to the child and that it will be reduced if the mother's beliefs prevail, that contact is best when taking place against the reality of fact, and fact can be established by these tests being undertaken."

16. What is important in my view, is for the applicant to give cogent reasons for the DNA, and the court must assess that request in light of the surrounding circumstances while, at the same time taking into consideration the rights of the respondent. If the court is convinced that given the surrounding circumstances, it will be fair, just and proportionate to have the DNA conducted, then I do not see why DNA should be denied. I wouldn't want to place the bar too high, or else, all applications for DNA testing will be bound to fail and this will make litigants lose out on the benefits of this test. The end result will be a failure of justice.

17. I think the core, though not in any way sole, impediment to giving an order for DNA for purposes of establishing paternity is where the paternity of a person cannot be an issue in the case, i.e paternity is irrelevant, or where the issue of parenthood in the circumstances of the case, can be proved by other less intrusive methods.

With the utility of my own sentiments, I will first ask myself whether it is necessary for paternity to be established before a just decision can be arrived at in this matter.

18. The case of the plaintiffs is that the defendants are complete strangers to him. In his evidence, he denied having known them. He categorically denied that he had any sort of union with the 1st defendant, leave alone, her being his wife. He also categorically denied that the 2nd defendant was his son. According to him these two are strangers who have continuously trespassed into his land and that is the reason he wants them permanently restrained. The defendants' case, as I pointed out earlier, is that they are wife and son. In their pleadings they averred that the plaintiff voluntarily settled them on a portion of 5 acres of the suit land. They have a counterclaim for a perpetual injunction to restrain the plaintiff from harassing or evicting them. It will be seen that their claim rests entirely on the ground that the 2nd defendant is son to the plaintiff.

19. I am of the opinion that the fact of paternity is an important issue to be determined in this case. I am

of the view that given the circumstances of this case, it will be just, fair and proportionate to order it. I would not have hesitated to allow for DNA testing but only for one issue. The application to test for DNA has come after the close of the hearing of the defence case. DNA was not one of the documents or evidence that the defendants proposed to rely on when preparing their case. When the plaintiff testified and tabled his case, he was never put on notice that an application for DNA would be made. He proceeded to close his case without any knowledge that a DNA would be applied for. He may not have given any evidence in contemplation of any DNA application. It is now a cardinal principle of a fair trial in Kenya that a party needs to present his evidence to the opposing party in advance. These fair trial principles are laid down in the Civil Procedure Act and Civil Procedure Rules. Therein lay the rules of the engagement in so far as civil litigation is concerned. True, the Rules should not be an impediment to do justice to the parties, but it must be understood that justice is a sword that cuts both ways. Every individual, however undeserving he may be adjudged by the common man, deserves a fair trial. The elements of a fair civil trial as spelt out in the Civil Procedure Rules require a party to table his evidence in advance to the other, so that the other is put on notice, and prepares himself to face this evidence.

20. The Rules provide that the plaintiff is to present his evidence and documents together with the plaint. This is contained in Order 3 Rule 2 which provides as follows :-

Documents to accompany suit [Order 3, rule 2.]

All suits filed under rule 1(1) including suits against the government, except small claims, shall be accompanied by—

(a) the affidavit referred to under Order 4 rule 1(2);

(b) a list of witnesses to be called at the trial;

(c) written statements signed by the witnesses excluding expert witnesses; and

(d) copies of documents to be relied on at the trial including a demand letter before action:

Provided that statement under sub rule (c) may with leave of court be furnished at least fifteen days prior to the trial conference under Order 11.

21. The rule is the same with regard to defendants. They are supposed to table their evidence while filing their defence. This is contained in Order 7 Rule 5 which provides as follows :-

Documents to accompany defence or counterclaim [Order 7, rule 5.]

The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—

(a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;

(b) a list of witnesses to be called at the trial;

(c) written statements signed by the witnesses except expert witnesses; and

(d) copies of documents to be relied on at the trial

22. This is not to say that leeway may not be employed to allow a party to present evidence that he inadvertently left out of his list, or which may have come to his attention after the prescribed period. But courts have to be careful so that the other party is not prejudiced by the late introduction of evidence, and as the trial progresses, so too the difficulty in being allowed to rely on additional evidence.

23. The evidence now being sought to be introduced is coming after the plaintiff has already testified and closed his case. The application for DNA is also coming after the defendants have already called all their

witnesses, tabled their evidence and basically closed their case. In my view, given the lateness of the application, it will be greatly prejudicial to the plaintiff to allow it at this stage, when he will not have an opportunity to comment or give evidence after the DNA test comes forth. To me it appears as if the defendants are fishing for evidence to the prejudice of the plaintiff.

24. The situation herein is not too different from that which ensued in the case of **Johana Kipkemei Too vs Hellen Tum, Eldoret E & L No. 975 of 2012 (2014) eKLR**. In the matter, the defendant sought to introduce new evidence at the defence stage. I had this to say:-

There is no provision in the rules that permits the court to accept a list of witnesses or documents filed outside the time lines provided in Order 3 Rule 7 and Order 7 Rule 5. The provisions of Order 3 and Order 7 are meant to curb trials by ambush. The objective is to make clear to the other party, the nature of evidence that he will face at the trial. There is however no clear cut provision setting out the consequences of failure to comply. The Rules do not state that such party will be debarred from relying on witnesses or documents which were not furnished at the filing of the pleadings, or later filed with the leave of the court. But the Constitution under Article 50 (1), provides that every party deserves a fair trial, and it is arguable, that a trial will not be a fair trial, if a party is allowed to hide his evidence and ambush the other party at the hearing.

*The court has a constitutional mandate to ensure that a trial will be fair and therefore retains the power to disallow one party from tabling evidence that was not provided to the other party as contemplated by the rules. This was indeed the reasoning of the Supreme Court in the case of **Raila Odinga & 5 Others vs IEBC & 3 Others, Supreme Court of Kenya, Petitions Nos. 3,4 and 5 of 2013 (2013) eKLR**, where in a presidential electoral dispute, the Supreme Court declined to allow additional evidence filed outside the contemplation of the rules.*

This however is not to say, that the court can never under any circumstances, permit a party to adduce additional evidence, that was not furnished to the other party as provided under the rules. The court as a shrine of justice, has a mandate to do justice to all parties and not to be too strictly bound by procedural technicalities. This flows from the provisions of Article 159 (2) (d) of the Constitution. Where such evidence can be adduced, without causing undue prejudice to the other party, the court ought to allow the application, so as to allow such party, the opportunity to present his case in full. The court may consider various factors including, but not restricted to, the earlier availability of the witness, the discovery of a new document, and the stage of the proceedings at which the additional evidence is sought to be introduced. If for example, the trial has not started, little prejudice may be caused to either party if one is permitted to introduce additional evidence. The prejudice to the other party no doubt increases as the trial progresses. But it is up to each court to weigh the surrounding circumstances of each case, and determine whether it will be in the interests of justice, to allow such evidence to be tendered, though outside the time frame provided by the rules.

25. I see no need to depart from the above reasoning. The defendant always had the right to seek intervention of the DNA test, but she slept on those rights until too late in the day. I am of the view that introducing the new evidence at this very late stage of the proceedings will greatly prejudice the plaintiff's constitutional right to a fair trial. I think this right far outweighs the need to have a DNA conducted.

It is for this reason that I have to dismiss the application for DNA testing with costs.

It is so ordered.

Dated, signed and delivered in open court at Nakuru this 18th day of March 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

AT NAKURU

In presence of : -

Mr Morintat present for applicants/defendants

Mr Aim Yoni present for respondent / plaintiff

Emmanuel Maelo : Court Assistant

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

AT NAKURU