



**Biwott v Jerotich & 4 others (Petition E010 of 2024)
[2025] KEHC 12005 (KLR) (30 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 12005 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E010 OF 2024**

**J NGAAH, J
JULY 30, 2025**

BETWEEN

KIPCHIRCHIR BIWOTT PETITIONER

AND

RISPER JEROTICH 1ST RESPONDENT

KENYA COMMERCIAL BANK LTD 2ND RESPONDENT

NCBA BANK LIMITED 3RD RESPONDENT

EQUITY BANK KENYA LTD 4TH RESPONDENT

HARAMBEE SACCO SOCIETY 5TH RESPONDENT

JUDGMENT

1. In a suit filed in the Children’s Court at Mombasa as no. 326 of 2015, Risper Jerotich, the 1st respondent in this petition, sued the petitioner for, amongst other orders, a declaration that both the petitioner and 1st respondent share a parental responsibility towards a minor, identified as Seth Kipchirchir (whom I will henceforth refer to as “the child” or “the minor”); that the 1st respondent should have custody of the child; and, that the respondent should be ordered to make a monthly payment Kshs. 33,083/= as his contribution towards the upkeep of the child.
2. The petitioner contested the child’s paternity and, therefore, a DNA was conducted, apparently at the direction of the court after the petitioner had requested for such a test. The test was to be undertaken at a facility referred to as Pathway (K) on 7 February 2018. The petitioner did not appear at the facility on this material date but the test was eventually done on 7 June 2022. The rest results were availed on 30 June 2021 according to which the petitioner was absolved of the child’s paternity.
3. Citing the respondent’s conduct which the 1st respondent was suspicious of and considering how the samples taken for the DNA testing had been handled, the 1st respondent was not satisfied with the



results and, therefore, by an application dated 20 July 2022, she asked the court to order for a second DNA testing.

4. In a ruling delivered on 26 August 2022, the learned magistrate (Honourable V.J. Yator) allowed the application and ordered a second test. In particular, the learned magistrate ordered as follows:

“Considering that concerns have been raised as to the integrity of the DNA results and in the interest of the child, the court orders that a repeat test be done in two different facilities: one to be done at KEMRI Nairobi and the other at Lancet Mombasa.”

5. As far the costs of the DNA tests were concerned, the court ordered:

“The cost of the DNA to be shared between the parties with the defendant catering for the cost at Lancet Mombasa and the plaintiff catering for the cost at KEMRI Nairobi and if possible, the advocates of the parties to accompany the parties.”

6. The petitioner was aggrieved by this decision and, therefore, proceeded to file the instant constitutional petition seeking no less than twelve prayers. They have been couched as follows:

- a) A declaration that the claims, court proceedings, decrees and enforcement thereof, Garnishee proceedings by the cited respondent in the suit in MCCC No 326 OF 2015 contravenes the Petitioner’s rights under Articles 10 (b), 27 (1), 28, 29(ij, 47 and 50 of *the Constitution* and therefore are unconstitutional, illegal, null and void.
- b) A declaration do issue that the Petitioner owes no monetary to the cited 1st respondent in MCCC No 326 OF 2015 and is not bound by the children’s Act to meet any financial or Statutory obligations over the garnishee proceedings.
- c) A Declaration that the sum of Kshs 10,732,610 the subject of the garnishee proceedings before the lower court is erroneous, unsubstantiated, excessive, exaugerated and therefore unlawful, null and void ab initio.
- d) A Declaration that the third DNA test ordered to be conducted at Lancet pathologist Mombasa is illegal as the 1st respondent never pleaded the same in her Application dated 20th July,2022 which application was seeking for a second DNA test and further the 1st respondent having preferred the said facility for a second DNA test and further the petitioner having opposed the said test being conducted at the said facility the lower court ought not to have ordered DNA test to be conducted in the same facility making the said exercise illegal, null and void ab initio.
- e) An Order directing the respondents cited to refund the petitioner all dues received through garnishee proceedings.
- f) An Order of certiorari quashing and or lifting the decrees, Garnishee orders in suit MCCC No 326 of 2015.
- g) A Declaration that the garnishee proceedings before the lower court are illegal, null and void ab initio.



- b) An Order that the respondents has violated the petitioner’s constitutional rights as envisaged in article 10 (b), 27 (1), 28, 29(f), 47 and 50 of the Constitution and therefore are unconstitutional, illegal, null and void.
- i) A declaration that the petitioner is not the father of the minor SETH KIPCHIRCHIR.
- j) This Honorable Court do issue such further orders and give such directions as it may deem fit.
- k) The Respondents and the cited third parties be condemned to pay costs of the Petition to the petitioner.”

7. According to the petitioner, the suit between him and the 1st respondent is still pending for hearing and determination yet the 1st respondent has obtained garnishee orders for the cumulative sum of Kshs. 126,666/= against the petitioner’s bank accounts in Equity Bank Kenya Limited and Fosa Harambee Sacco. The garnishee orders, in the petitioner’s view, are “illegal, null and void ab initio” since there is no judgment for execution.
8. Even then, the petitioner has urged that the funds, to the tune of Kshs. 869,999/= attached in his Equity Bank a/c no. 766942892, are sufficient to cater for the minor’s school fees and other needs for four years, from 2024. He is aggrieved that although the 1st respondent has been obtaining what I understand him to be saying are ex parte orders prejudicial to his interests, he has contested the child’s paternity and the order for a second DNA test.
9. On her part, the 1st respondent has sworn an affidavit and stated that the petitioner has failed to disclose that he filed an appeal in the family Division of this Honourable Court against the very orders he has sought to impugn in this petition. The appeal was registered as civil appeal no. 7 of 2022 but that it was dismissed with costs which the petitioner is yet to settle.
10. According to the 1st respondent, contrary to the petitioner’s allegations, the children’s court never issued orders for release of funds from the petitioner’s Fosa account but that the funds were released upon her application.
11. It is also the 1st respondent’s position that the petition is an abuse of the due process of this Honourable Court because, in her view, it is an appeal disguised as a constitutional petition. The petitioner is effectively appealing against the garnishee orders and the order for the DNA test.
12. As far as the 2nd, 3rd, 4th and 5th respondents are concerned, their role in the petition is rather peripheral for the reason they are merely garnishees in the primary suit between the petitioner and the 1st respondent. As far as the garnishee orders are concerned, Velma Okoth, the 2nd respondent’s senior legal counsel has sworn that although an application was filed in the primary suit seeking to attach the sum of Kshs. 10,732,610/=, the particulars of account numbers were not provided and, therefore, the bank was unable to comply with any orders for attachment. Velma has sworn further that since the dispute is between the petitioner and the 1st respondent and, in any event, the alleged violations of the Constitution have not been attributed to the 2nd respondent, the petition should be dismissed with costs to the 2nd respondent.
13. Similarly, Tikoishi Naikumi Koitaat, the 5th respondent’s legal officer has sworn that the 5th respondent is a stranger to the allegations made in this petition as it is not party to the primary suit in the magistrate’s court. Nonetheless, he has sworn further that the 5th respondent was joined to the suit



as a garnishee and acting upon a garnishee order issued on 16 May 2023, it made payments totalling Kshs. 126,266/=.

14. Koitaat has also sworn that in compliance with the garnishee order and based on the funds accessible to it in the petitioner's FOSA account, the 5th respondent issued two cheques for Kshs.252,352/= and Kshs.617,467/= respectively which cheques were all written in favour of the 1st respondent for the benefit of the subject minor. The 5th respondent reiterates that the petition is between the petitioner and the 1st respondent and, as such, it is unsustainable against the 5th respondent. It should, therefore, be dismissed with costs.

15. Section 99 of the *Children Act*, cap. 141, provides appeals as the only means by which a decision of a children's court in civil or criminal proceedings may be contested. The section reads as follows:

99. Appeals

Unless otherwise provided under this Act, in any civil or criminal proceedings in a Children's Court, an appeal shall lie—

- a. in the first instance, to the High Court on points of fact and law; and
- b. in the second instance, to the Court of Appeal on points of law only.

16. On the face of it, and looking at the prayers sought in the petition, it is easier to conclude that the petitioner's grievances could have been properly disposed of in the context of an appeal. As a matter of fact, a preliminary objection was taken against the petition on, amongst other grounds, that:

“(b) The Suit as drawn and taken is an appeal against the various decisions of the Children's Court in MCC No. 326 of 2015 including the Ruling/Order of the Court made on 26th August, 2022 and 7th February, 2018 guised as a constitutional Petition.

(f) The suit offends the doctrine of exhaustion.”

17. But the petitioner persuaded the court that the petition raises constitutional issues and, therefore, it is a petition that is properly before court. In the ruling rendered by Sewe, J. on 7 November 2024, the court held, inter alia, that: -

“(9) With the foregoing in mind, I have perused the Petition filed herein. It is explicit for, instance at paragraph 26 and elsewhere, that the petitioner alleged infringement of his constitutional rights. The said paragraph reads:

“...the 1st respondent's conduct and/or action of subjecting him further to the garnishee proceedings and subsequent DNA test after the 1st DNA test proved the petitioner is not the father is not only a miscarriage of justice but also an intrusion of his constitutional rights on his privacy contrary to article 10(b), 27(1), 28, 29(f), 47 and 50 of *the Constitution* of Kenya 2010.”

[10] Hinged on that assertion are several prayers, including declaration of unconstitutionality. In the premises, the petitioner had a bona fide complaint falling within the jurisdiction of this Court for purposes of Article 165(3) of *the Constitution*. Whether or not the reliefs sought are merited is another issue altogether and cannot therefore be the subject matter of the Preliminary objection.”



18. Thus, it is clear that the overarching prayer from which the rest of the prayers flow is the constitutionality, or lack thereof, of the subsequent DNA test ordered by the court. It is, to a greater degree, the foundation upon which the petition is built. That being the case, if the court was to come to the conclusion that the order for the subsequent DNA test is unconstitutional, it would effectively mean that the DNA results of the initial test absolving the petitioner, hold and, therefore, the petitioner would automatically be discharged from the burden of parental responsibility towards the child. Consequently, the consideration of any other question, including the question whether execution proceedings, of whatever nature or form, are necessary against the petitioner, to compel him discharge his parental responsibilities would be moot.

19. Turning back to the learned magistrate's order on the need for further DNA tests after she was not satisfied by the results of the initial test, the learned magistrate noted as follows in her ruling:

“From the answers given by the doctor of the facility that took the samples and forwarded to South Africa, it is evident that the facility has not put in place proper measures that ensure that the samples are not tampered with. There is no way of telling whether the signatures appended on the envelope containing the samples are the same that ended up in South Africa.

The envelopes used to forward the samples are not serialized and therefore it is possible for a rogue staff to interchange samples and get another envelop without being noticed. Considering that concerns have been raised as to the integrity of the DNA results and in the interest of the child, the court orders that a repeat test be done in two different facilities: one to be done at KEMRI Nairobi and the other at Lancet Mombasa.”

20. I have not been able to gather from the material before court how the facility that conducted the DNA was identified and whether it was a private or government institution. What is clear, though, is that the order for the initial DNA test was not only given at the instance of the petitioner but at the petitioner also financed the exercise. Nonetheless, for reasons given by the learned magistrate, the DNA results were effectively rejected; the magistrate ordered two further tests by two different institutions one of which is a government institution to ascertain the child's paternity. As earlier noted, this order was made after the 1st respondent made an application for a second DNA test, and it is the order that triggered this petition.

21. Considering that this is a constitutional petition and not an appeal, I may not have the privilege of interrogating afresh the evidence given before the trial court in respect of the rejected DNA report and make my own conclusions. If this was an appeal, I would not just have the opportunity of considering the entire record of the proceedings in exercise of the appellate jurisdiction of this Honourable Court but I would also have been under the legal obligation to interrogate the evidence and reach my own findings of fact.

22. Nevertheless, in assessing whether the order made by the learned magistrate is constitutional or not, it is necessary to go back to the [Children Act](#) to establish whether the order has any legal foundation. The immediate provision in the Act that appears to answer this question is section 97 of the Act which reads as follows:

97. Power of Court to order production of reports

- (1) When considering any question with respect to a child under this Act, the Court may summon and direct any person to prepare and present to it a report or statement containing such information in respect of a child as the Court may direct.



- (2) Without prejudice to the provisions in this Act or any other written law, the Court may take into account— (a) any statement contained in the report referred to in subsection (1); or (b) any evidence given in respect of the matters referred to in the report and in so far as the statement or evidence is, in the opinion of the Court, relevant to any matter in issue before the Court.
- (3) Where the Court orders or summons an expert pursuant to subsection (1), a party to the proceedings shall be given an opportunity to submit their views before the court makes an order.
23. There can never be any doubt that a DNA test is among those questions with respect to a child for which the court may summon and direct any person to prepare and present to court a report on the paternity of the child. Further, the statement in the DNA report and the evidence on paternity of the child are, no doubt, relevant to the matter in issue which is, the father of the child and, therefore, on whom the burden of parental responsibility falls.
24. The question as to when an order for a DNA test can be made and the circumstances under which it can be made is a question that has been addressed in several other cases one of which is *FKW (suing as the mother and next friend of GDW (Minor) v DMM [2015] KEHC 5110 (KLR)* in which I held that conception and the eventual birth of a child may or may not have been the intended consequences of any particular relationship of persons of opposite sex. However, regardless of a couple's intentions, the moment a life is conceived (see article 26 of *the Constitution*) and a child is born, the law steps in to protect the life of the innocent being that has been brought into existence.
25. This, inevitably, imposes a legal obligation not only on the state but also on the parents of the child to ensure that the child is properly cared for, protected, maintained and his general welfare is well catered for. *The Constitution* itself provides under article 53 that:-
- 53.
- (1) Every child has the right--
- (a) to a name and nationality from birth
- (b) to free and compulsory basic education;
- (c) to basic nutrition, shelter and health care;
- (d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;
- (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; and
- (f) not to be detained, except as a measure of last resort, and when detained, to be held –
- (i) for the shortest appropriate period of time; and
- (ii) separate from adults and in conditions that take account of the child's sex and age.



- (2) A child's best interests are of paramount importance in every matter concerning the child. (Emphasis added).
26. And section 4 of the *Children Act*, 2001, reiterates the responsibility of both the Government and the child's family towards a child and states as follows:
4. Survival and best interests of the child
- (1) Every child shall have an inherent right to life and it shall be the responsibility of the Government and the family to ensure the survival and development of the child. (underlining mine).
27. I further noted that the common thread, weaving through these provisions of the law, is the notion of parental responsibility towards children. It is the responsibility of the father and the mother to provide for their child or children regardless of whether they are married or not and regardless of the circumstances under which the child or children may have been conceived and born.
28. It becomes imperative, therefore, that where parentage is contested it has to be established who the parents of the child are before they or any of them is saddled with the burden that parental responsibility entails. This determination is even more necessary because the burden of parental responsibility does not come light; it is almost a lifetime burden and that is why a court of law must be absolutely certain that the person at whose door the buck stops is none other than the parent of the child in issue.
29. I do not see any other way that the court can come to this conclusion than by subjecting the reluctant parent to a scientific examination of his deoxyribonucleic acid (DNA) and determine whether it is consistent with that of the child and, therefore, whether, as the case may be, he is the father of the child. I may be wrong on this, but I suppose that a man who thinks or is certain that he has, for some malicious or mischievous or for any other reason, been implicated into fatherhood that he has nothing to do with, would readily embrace such an opportunity, if not for anything else, to prove his tormentors wrong.
30. The question is, where one is not willing to submit himself to a paternity test, is there any threshold that the plaintiff must satisfy the court to have met before it can grant the order for a paternity test? This question has been asked and answered in several cases where this issue has arisen.
31. In High Court Constitutional Application No. 526 of 2008, CMS versus IAK (suing through mother and the next friend CAO), the petitioner petitioned this court to, inter alia, set aside an order made in the magistrates' court compelling the petitioner to undergo a DNA test on the ground that the order was unconstitutional.
32. In dismissing the petition, Mumbi J. (as she then was), held that in determining such matters, the court must of necessity weigh the competing rights of the child and the petitioner who is alleged to be the biological father. The learned judge further held that the right of the child to parental care takes precedence in light of article 52(2) of *the Constitution* that, in matters such as this, the paramount consideration is the best interests of the child.
33. While citing the decisions in Kakamega High Court Misc. Application No. 105 of 2004, MW versus KC and the Indian case of Shri Rohit Shekhar versus Narayan Dutt Tiwari & Another IA No 4720 of 2008, the learned judge applied the principle that an order for DNA testing should be made if it is in the interests of the child and if a prima facie case has been made to justify the order.
34. In the Nairobi High Court Constitutional Petition No. 138 of 2012 PKM versus Senior Principal Magistrates' Court at Nairobi, a similar order for DNA testing was made in the magistrates' court



against the petitioner. Just like in the CMS case, the petitioner sought to have the order set aside on the ground that it was unconstitutional. The learned judge, Lenaola, J. (as he then was) cited with approval the decision of Mumbi, J.(as she then was) in the CMS case (supra) and dismissed the appeal. The learned judge held:

“...there must always be a balance between the right to privacy of a person not to submit himself forcibly to medical examination and the right of a child to know his parents. The balance is delicate and must be looked at in the specific circumstances of each case.”

35. The learned judge further quoted the Indian case of Bhabani Prasad Jena versus Convener Sec Orissa, Civil Appeal Nos. 6222-6223 of 2010 where the issue of forced DNA was addressed in the following terms: -

“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 a strong prima facie case and court must carefully examine as to what would be the consequence of ordering the blood test.”

36. Again, in the Nairobi High Court Miscellaneous Application No. 108 of 2013 ZW versus MGW, an application for an order for DNA test was allowed and in allowing the application Justice William Musyoka said that DNA test is imperative and is the most modern and effective way of determining whether one is a father of a child and, therefore, whether he should be ordered to maintain the child.

37. The application for a DNA test was again allowed in Kakamega High Court Misc. Application No. 105 of 2004, MW versus KC where Justice G.B.M Kariuki (as he then was) set down the conditions which he thought one must satisfy before a DNA test is ordered; these conditions are: -

- a) The applicant must show that there is sufficient cause for seeking the order and there is a likelihood that the respondent could be the father of the child;
- b) The respondent’s refusal to submit to the DNA test violates the child’s right to know his father;
- c) The respondent’s refusal to take a DNA test is an unreasonable because it deprives the child of the possible enjoyment of the rights and benefits of enshrined in sections 4 to 19 of Part II of the *Children Act*;
- d) The court has jurisdiction to compel the respondent to undertake a DNA test.

38. Of all the decisions I can readily find, the only decision in which the application for an order for a DNA test was refused was in SWM versus GMK (2012) eKLR where the late Justice Majanja held that subjecting the respondent in that case to undertake a DNA test, for whatever reason, was 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.

39. The learned judge could probably have arrived at that decision because the circumstances in that case were somewhat peculiar. The petitioner in that case was not a child but an adult aged 33 who thought



the respondent could be her father and, therefore, sought to have him subjected to the paternity test to ascertain her inclinations. At the age of 33 years, she certainly could not plead that her quest for a paternity test was ‘in the child’s best interest.’

40. What all these decisions point to is that where it is in the best interests of the child that a paternity test should be undertaken; that, where there is no other means of determining the father of a child than by a paternity test and, that where, in any event, the applicant has made out a prima facie case for such a test, then a court of law will ordinarily make an order for such a test.
41. Considering 1st respondent’s case in its entirety, there is no doubt that it is in the best interests of the subject child that the DNA test should be taken. It is the child’s constitutional right and he is better of growing up with the knowledge of who his parents are. The petitioner must have been alive to this truth and that is why he took the initiative to have a paternity test taken. If it were not for the reservations expressed by the learned magistrate on the results of the initial DNA test, the matter would have been concluded with that test.
42. Although the crux of the petitioner’s petition is the constitutionality of the order of two other separate DNA tests, the first test results having been rejected, it is apparent from the submissions filed on his behalf that he has no serious objection to a second DNA test. It is submitted that:
- “We submit that the petitioner is not opposed to the 2nd DNA test being conducted at a government chemist save to state that the 1st respondent should be compelled to shoulder the costs of the said test.”
43. In view of this submission, I am unable to find the basis for questioning the constitutionality of the learned magistrates’ order for the petitioner to be subjected to other DNA tests at two different facilities. I suppose the rationale behind the tests being conducted at two different facilities is for consistency and to dispel any doubt the child’s paternity. It must be noted that in exercising its discretion under section 97 of the *Children Act* to call for expert opinion in a matter affecting a child, the court is not limited to any particular number of reports it may receive in this regard. The magistrate’s order was well-meaning, considering the reservations she expressed on the initial DNA test results. The order cannot, therefore, be faulted as being unconstitutional merely because the petitioner will be subjected, not to one, but to two further tests albeit at different facilities.
44. The purpose of a DNA test, as has been noted, is to establish paternity and, as a consequence, the person to whom the burden of parental responsibility falls. What this implies is that where, in a relationship, a man has assumed parental responsibility as the father of the child in issue, a paternity or DNA test for purposes of assigning this obligation would be unnecessary. The pleadings filed by the petitioner in family appeal no. 7 of 2022 to which reference has been made by the 1st respondent, show that at some point in time, the petitioner assumed parental responsibility of the minor. In the memorandum of appeal against orders made in the same proceedings that are the subject of this petition, the petitioner pleaded as follows:

- “1. The honourable learned magistrate erred in fact and in law in finding that 1/3rd of the defendant’s salary be attached while ignoring the facts and evidence on record that the appellant herein was and has been providing for the upkeep of the minor (Seth Kipchirchir) throughout the subsistence of the suit in the children’s court.



2. That the honorable learned magistrate erred in fact and in law in ignoring the fact that providing for the up keep of the minor (SETH KIPCHIRCHIR) is a shared responsibility and should not be vested on the appellant alone.
- 3 ...
4. That the honorable learned magistrate erred in fact and in law when she failed to consider the fact that the appellant was and has been faithfully paying school fees and school related expenses and for the up keep of the child before and after dismissal of the respondent's suit for want of prosecution and in the prosecution and in the premises, there was no reason for the reinstatement of the suit.
5. That the honorable learned magistrate erred in fact and in law in finding that the respondent has been single handedly taking care of the child without the support of the appellant.
- 6 ...
7. That the honorable learned magistrate erred in fact and in law in failing to consider the fact that the respondent had not exhibited any evidence that she has been supporting the minor.
8. ...”

45. These grounds would suggest despite the issue of paternity having assumed the centre stage in the dispute between the petitioner and the 1st respondent both in the magistrate's court and in this petition, the petitioner had assumed parental responsibility over the minor, with or without the suit in the children's court. I need not say more on this considering that the suit between the petitioner and the 1st respondent is still pending for determination.

46. On the whole, I am not persuaded that the proceedings initiated in the magistrate's court against the petitioners and the orders given in those proceedings, subject to the petitioner's right of appeal under section 99 of the *Children Act*, are unconstitutional. And, again, subject to the evidence before the children's court, the extent to which petitioner would be liable in discharge of his parental responsibility shall be determined by the children's court which, in any event, is competent and is seized of the requisite jurisdiction to determine such issues.

47. For the reasons I have given find no merit in the petitioner's petition. It is hereby dismissed with costs to the 1st respondent.

SIGNED, DATED AND DELIVERED ON 30 JULY 2025

NGAAH JAIRUS

JUDGE

