REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO.8 OF 2017 (O.S.)

IN THE MATTER OF AN APPLICATION OF ORDER 37 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF AN APPLICATION FOR A DECLARATION OF PATERNITY

ZAG.....APPLICANT

VERSUS

CM alias CA.....1ST RESPONDENT

BA alias COG.....2ND RESPONDENT

DOG.....3RD RESPONDENT

MB.....4TH RESPONDENT

JUDGMENT

1. By Originating Summons dated 2nd May 2017 and amended on 4th March 2019, the applicant **ZAG**, seeks the following orders;

> **a. THAT this honourable court be pleased to make a declaration that the 1st and 2nd respondents are not the applicant's children nor dependants;**
>
> **b. THAT the honourable court be pleased to declare that no marriage exists between the applicant and the 4th Respondent.**
>
> **c. THAT costs of this application be provided for.**

2. In his affidavits sworn on 2nd May 2017 and on 4th March 2019, the applicant avers that in the year 1975, the 3rd respondent who is his mother imposed upon him the 4th respondent, MB, as his wife. He did not consent to the arrangement and moved to Nakuru in protest. His late father was also opposed to the 3rd respondent's actions and strongly condemned her acts. The applicant avers that he eventually got married to a woman of his choice and they were blessed with five children namely SBA, BA, JMA, VNA and TMA.

3. The applicant deposes that the 4th respondent bore the 1st and 2nd respondent in circumstances unknown to him as he is not their biological father. He avers that in 1991, the 4th respondent filed Divorce Cause No. 13 of 1991 leading to the dissolution of their marriage which had in any case been non-existent. The applicant states that the 3rd respondent took on the 1st and 2nd respondents as her grandchildren in the pretext that they were his biological children. He denies being a father of the 1st and 2nd respondents and seeks a declaration denouncing paternity.

4. The 1st, 2nd and 3rd respondents were personally served with the application and hearing notice while the 4th respondent was served by way of substituted service in the Daily Nation on 8th July 2019. The respondents did not file any response or participate in the proceedings despite being duly served.

5. When the matter came up for hearing, the applicant reiterated the averments in his affidavits and indicated that the second prayer had already been granted.

6. The applicant seeks a declaration that the 1st and 2nd respondents are not his children. He annexed a copy of the judgment in Divorce Cause No. 13 of 1991 where the court observed that the applicant and the 4th respondent had solemnized their marriage in 1975 but the union began breaking down as from 1978 when the applicant herein chased the 4th respondent from the matrimonial home. The court then dissolved his marriage to the 4th respondent and gave custody of the children to the 4th respondent.

7. Section 118 of the **Evidence Act Cap 80 Law of Kenya** provides as follows**;**

> " ***The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten***."

8. My understanding of this section is that there is conclusive proof of legitimacy where a person was born during the continuance of a valid marriage or within 280 days after its dissolution, if the mother remained unmarried. The said section however provides that where one shows that the parties to the marriage had no access to each other when the child was begotten, the presumption of legitimacy is rebutted.

9. It is the applicant's claim that in the year 1975, he moved to Nakuru when the 4th respondent imposed the 3rd respondent on him as a wife. He essentially asserts that there was no contact between him and the 4th respondent when the 1st and 2nd respondents were begotten. His claim that he is not the biological father of the 1st and 2nd respondents stands unchallenged. The respondents were afforded an opportunity to counter to the applicant's case but elected not to challenge it thus the applicant's claim stands uncontroverted. On this, I find useful guidance in the case of ***Cornel Rasanga Amoth v William Odhiambo Oduol & 2 others Civil Appeal No. 32 of 2013[2014] eKLR*** where the Court of Appeal held;

> *In our view, having failed to file a response in accordance with the law, these personalities cannot be heard to protest, and say that they were not given an opportunity to be heard. Furthermore, it is evident that the appellant did not call evidence to rebut the allegations against the mentioned individuals. Consequently, the evidence of the 1st respondent, PW2 and PW8 remained uncontroverted and the burden shifted to the appellant, who by remaining silent, failed to discharge the evidential burden, to their detriment.*

10. Under **section 24** of the **Children Act**, a person who acquires parental responsibility does not relinquish that responsibility at any time. Although it is unknown when the 1st and 2nd respondents were born, it is evident that they are no longer minors therefore parental responsibility does not arise. There is no proof that applicant ever maintained them and it can be surmised that they have nothing to lose if their silence is anything to go by.

11. The court's jurisdiction in granting declaratory orders is provided under **Order 3 Rule 9** of the **Civil Procedure Rules** which stipulates thus;

> *9. No suit shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make a binding declaration of right whether any consequential relief is or could be claimed or not.*

12. The Court of Appeal whilst considering the foregoing provision in the case of ***Johana Nyokwoyo Buti v Walter Rasugu Omariba (Suing through his attorney Beutah Onsomu Rasugu) & 2 others Civil Appeal No. 182 of 2006 [2011] eKLR*** defined a declaration in the following terms;

> *A declaration or declaratory judgment is an order of the court which merely declares what the legal rights of the parties to the proceedings are and which has no coercive force – that is, it does not require anyone to do anything. It is available both in private and public law save in judicial review jurisdiction at the moment. The rule gives general power to the court to give a declaratory judgment at the instance of a party interested in the subject matter regardless of whether or not the interested party had a cause of action in the subject matter.*

13. Further the Court of Appealin ***M'kiara M'rinkanya & Another V Gilbert Kabeere M'mbijiwe Civil Appeal 124 of 2003 [2007] eKLR***held as follows;

> *By Order II rule 7 CPR, an objection to the suit cannot be raised merely because it seeks a declaratory judgment or order. As that rule provides, in a declaratory suit the court can make a binding declaration of right whether any consequential relief is claimed or could be claimed.*

14. My view is that nothing hinders the applicant from obtaining a declaration that the 1st and 2nd respondents are not his children. Consequently, I allow the application in terms of prayer (a). The marriage between the applicant and 4th respondent has already been dissolved and issuing a declaration to that effect would be an exercise in futility. There shall however be no orders as to costs.

Dated, **signed and delivered at Kisii this 8th day of November 2019.**

R.E.OUGO

JUDGE

In the presence of;

Miss Ondego For the Applicant

1st Respondent

2nd Respondent

3rd Respondent

4th Respondent....All Absent

Rael Court clerk