

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
FAMILY DIVISION
CIVIL REVISION NO. 09 OF 2022
(ARISING FROM FAMILY & CHILDREN'S COURT OF MAKINDYE
AT MAKINDYE FCC No. 270 OF 2022)

MAKOKHA BENROX DEVON ::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

BLESSING BRENDA NAMATOVU ::::::::::::::::::::::::::::::::::: RESPONDENT

RULING BEFORE: HON. LADY JUSTICE CELIA NAGAWA

1.0. Introduction


1.1. This is an application for revision brought by way of Notice of Motion, under Section 83 and 98 of the Civil Procedure Act, Cap. 71 and Order 52 rules 1 and 3 of the Civil Procedure Rules, Statutory Instrument No. 71-1. The application is seeking the following orders;

- a) This Honourable Court be pleased to call for, revise and set aside the order for DNA scientific test passed by Her Worship Patience Lorna Tukundane, Magistrate Grade 1, in the Family & Children's Court of Makindye at Makindye, Family Cause No. 270 of 2022 dated 14th October, 2022.**
- b) The Respondent's application inter alia maintenance order be struck out for being premature.**
- c) The Costs of this applicant be provided for.**



1.2. This application is based on the following grounds, that;

- a) The respondent filed an incompetent and premature application for inter alia maintenance and custody orders vide: Family & Children's Court Cause No. 270 of 2022, in the Family & Children's Court of Makindye at Makindye, against the applicant. In response, the applicant filed an affidavit in reply denying knowledge of the respondent and the child named therein.
- b) The impugned application was not filed by way of complaint on oath being a mandatory requirement under The Children (Family and Children Court) Rules SI 59-2 and without documentary evidence to substantiate its contents.
- c) On 14th October, 2022, the trial court acted in the exercise of its jurisdiction and illegally issued an order against the applicant for a DNA scientific test to be conducted in respect of the applicant and the named child, then the Court embarked on hearing an application of a maintenance order in the absence of any evidence of legal presumption of paternity against the applicant, without documentary proof that the respondent was the biological mother of the child, any formal nor informal application for a declaration of parentage before the court, and without any evidence of the legal presumption of paternity of the child named against the applicant.
- d) The applicant was ordered to meet the costs of the DNA scientific test and yet he did not allege paternity of the child. Therefore, he believes that his right to a fair hearing under the Constitution was abrogated and it is in the interest of justice that this court be pleased to revise and set aside the orders in the FCC of Makindye at Makindye Vide FCC No. 270 of 2022



and strike out the application being premature and incompetent.

- 1.3. This application is supported by an affidavit sworn by the applicant on 3rd March, 2022.

2.0. The Respondent's Case:

- 2.1 The Respondent did not file an affidavit in reply. On 14th February, 2023 when Mr. Isabirye Isaac appeared in court representing the applicant this Honourable Court directed him to serve the Respondent with the Notice of Motion and a hearing notice scheduled for 14th March, 2023 at 2:00pm. At the time of determination of this revision there was no affidavit in reply on court record.

3.0 Background

- 3.1 The respondent claims that she sired a child with the applicant. The respondent applied for protection, custody and maintenance orders at the lower court.
- 3.2 The applicant claims that he is not the father of the child and that there is no proof that the respondent herein is the mother of the child. The lower court ordered that a DNA test be conducted on 21st October, 2022 at 10:00am at MBN Laboratories to establish parentage and the costs be borne by the applicant in this matter. The Applicant being dissatisfied with the orders issued by the Learned Magistrate Grade 1, Her Worship Patience Lorna Tukundane filed Civil Revision No. 09 of 2022 in this Court.

4.0 Representation and Hearing.

- 4.1 The application was filed by Nagemi & Co. Advocates on behalf of the applicant. On 14th February, 2023 Mr. Isabirye Isaac represented the applicant and the respondent made no appearance. Court adjourned the matter to 14th March, 2023 at 2:00pm in the presence of the applicant's counsel. No appearance was made on



the said date and following which the matter was adjourned to 14th November, 2023. As a policy of this court, the applicant was contacted twice about the next hearing date notifying him about his application which would heard on 14th November, 2023 before the scheduled hearing date on Mobile Number 0773615817 but no appearance was made on 14th November, 2023. Court decided to determine to the matter guided by Article 126 (2) (b) of the Constitution of the Republic of Uganda that, Justice shall not be delayed.

- 4.2 Since the applicant filed this application with written submission this court will consider the submissions for determination of this application.

5.0 Issues for determination by this court

- 5.1. In his written submissions the applicant framed the following issues for the determination by the Court.

(1) Whether this is a proper case for a revision order.

(2) Whether the applicant is entitled to the orders sought in the application.

6.0 Determination of this application by Court.

- 6.1. Revision by the High Court is provided for under Section 83 of the Civil Procedure Act, Cap 71 which states that; “The High Court may call for the record of any magistrate’s court, and if it appears to have-

- (a) Exercised a jurisdiction not vested in it in law.
- (b) failed to exercise a jurisdiction so vested; or
- (c) acted in the exercise of its jurisdiction illegally or with material irregularity or injustice,



6.2. The High Court may revise the case and may make such order in it as it thinks fit; but no such power of revision shall be exercised-

(d) unless the parties shall first be given the opportunity of being heard; or

(e) Where, from lapse of time or other cause, the exercise of that power would involve serious hardship to any person.

6.3. Revision entails a re-examination or careful review, for correction or improvement of a decision of a Magistrate's court, after satisfying oneself as to the correctness, legality or propriety of any finding, order or any other decision and the regularity of any proceedings of a Magistrate's Court. It is a wide power exercisable in any proceedings in which it appears that an error material to the merits of the case or involving a miscarriage of justice occurred.

7.0. Issue 1: Whether this is a proper case for a revision order.

7.1. The legal position is that the High Court may call for the record of any magistrate's court, and if it appears to have acted in the exercise of its jurisdiction illegally or with material irregularity or injustice, the High Court may revise the case and may make such order in it as it thinks fit.

7.2. On 30th November, 2022 the Deputy Registrar of this Court requested for Family Cause No. 270 of 2022 from the Chief Magistrate's Court at Makindye which communication was received by the Magistrate's Court on 2nd December, 2022 and action taken by forwarding the file to the Deputy Registrar on 21st December, 2022 for conclusive determination of Civil Revision No. 009 of 2022.



I perused the court record and observed as follows;

“On 14th October, 2022 before Her Worship Patience Lorna Tukundane, the respondent stated that, “the issue of paternity needs to be resolved first”. In response the applicant stated that; “I have no objection to that”.

Court: Paternity can be scientifically proven through DNA of the samples of the alleged father since the Respondent is not sure whether he is the father of the minor in the issue.

7.3. DNA testing is hereby ordered to establish paternity. The test to be done at MBN Laboratory on 21st October, 2022 at 10:00am. Costs to be borne by the Respondent.


Matter adjourned to 9th November 2022 at 11:00am. Signed by Patience Lorna Tukundane, Magistrate Grade: 1; 14/10/2022

On 9th November, 2022:

7.4. The applicant was present in court who stated that the DNA was not done. Court noted that; in the absence of the Respondent, the matter be adjourned to 2nd December, 2022 at 10:00am.”

7.5. This Civil Revision was filed in this court on 7th November, 2022. Meaning that upon being directed by the trial court to have the scientific DNA test conducted the applicant made this application and never returned to the lower court nor took action as directed and instead he has at the same time failed to expeditiously prosecute this application for revision.

7.6. It is not in dispute that the Magistrate’s Court sitting as a Family and Children’s Court has jurisdiction to determine protection, custody and maintenance matters. The applicant seems not be contented that by the respondent seeking for her remedies, the court



directed that he should meet the paternity test costs. Not forgetting that himself he requested that the, **“the issue of paternity needs to be resolved first”** on 14th October, 2022 before the trial court.

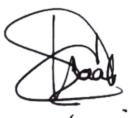
7.7. I have considered the averments of the applicant in his affidavit in support of this application. I hasten to add that Section 69 of the Children Act, Cap. 59 (as amended) subsection (4) states that; “in proceedings for the declaration of parentage, the court may, on the application of any party to the proceedings or on its own motion, make an order, upon such terms as may be just, requiring any person to give any evidence which may be material to the question, including a blood sample for the purpose of blood tests.”

Section 69 (5) provides that; “Any person sought to be tested must be made a party to the proceedings”.

7.8. I find no error in the trial Learned Magistrate ordering for a DNA test. It is a fact that the applicant herein is a party in FC No. 270 of 2022 filed in the Magistrate Court to wit he seeks revision orders. Secondly, the trial court on its own motion has the powers to order that blood samples can be collected to effectively conclude the matter and this is a just cause in the interest of justice for all parties including the child in this matter.

As a result of the orders sought by the respondent in the lower court, parentage would be declared and this will have an effect to determine custody and maintenance of the said minor.

7.9. Section 72(1) of the Children Act, provides that; “A declaration of parentage by a court shall have the effect of establishing a blood relationship of father and child or of mother and child and, accordingly, the child shall be in same legal position towards the father or the mother as a child actually born in lawful wedlock”.



Section 73 (1) Custody of children-the court may, on application by a sole applicant or joint applicants, grant custody of a child on such conditions as may be determined by the court.

7.10. Without going into the merits of Family Cause No. 270 of 2022 following the request by the applicant to establish paternity, the trial court seeks to know who is responsible for taking care of this child and determining a child's father is potentially more complicated. Yet, children need to know and be cared for by their parents or those entitled to bring them up and this is a Constitutional right provided for under Article 34 (1), the same Article, under clause (7) provides that the law accord's special protection to orphans and other vulnerable children. This child in this application is vulnerable and that is why court has to determine this matter.

8.0. The court order of the Learned Magistrate is to establish a couple of issues including genetic parenthood and parental responsibility. Section 6 (1) of the Children Act, Cap. 59 (as amended) provides that, *"every parent or guardian shall have parental responsibility for his or her child"*.

Matters concerning children must be handled expeditiously. It is important to conduct a paternity test for the purpose of determining the Family Cause. This scientific exercise will aid in proof of paternity and parental responsibility.

8.2. In the case of **Sserunjogi Charles Musoke & Katamba John Ssemakula Versus Tony Nkuubi Originating Summons No. 07 of 2019 Hon. Lady Justice Ketrah Kitariisibwa Katunguka** citing the case of **MW V KC Kakamega High Court Misc. Application No. 105 of 2004** stated that; "Courts have held that in exercising its discretionary power to grant or not to grant the relief (DNA testing),



court should be convinced that the application is in good faith, and that it not actuated or designed to economically exploit or embarrass or is otherwise an abuse of the process of court”.

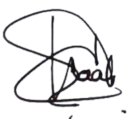
8.3. Section 98 of the Civil Procedure Act, Cap. 71 and Section 33 of the Judicature Act, Cap.13 provides this court with unlimited powers but these inherent powers should not be used as an abuse to the court process. The court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, a DNA is eminently needed. It is against that background in as much as litigants seek justice that it should be determined in accordance with the law.

8.4. The trial magistrate exercised court’s jurisdiction so vested and acted in the exercise of court’s jurisdiction legally without any material irregularity of injustice to either party in this application. The trial court will get to the gist of this application upon obtaining the results for DNA testing. Therefore, the Applicant is ordered to adhere to the directives of the lower court and have the blood samples collected from him and results forwarded to the trial Magistrate within a period of one (1) month from the date of this Ruling.

8.5. The Respondent should as well avail the child for the DNA exercise. Since the order was time bound and the timelines have since expired. I will set fresh timelines.

8.6. The parties should meet the officials of MBN laboratories for directions within 7 days from the date of this ruling and have the DNA tests concluded and results transmitted to the trial court within one (1) month.

8.7. I therefore find that this is not a proper case for a revision order and the applicant is not entitled to the orders sought.

A handwritten signature in black ink, appearing to be 'D. O. O.', is located in the bottom left corner of the page.

9.0. Conclusion

1. Civil Revision No. 009 of 2022 is dismissed.
2. Family Cause No. 270 of 2022 Blessing Brenda Namatovu Versus Makokha Benrox Deveon is referred to the Chief Magistrate Court for determination.
3. A Deoxyribonucleic (DNA) sample shall be collected from the applicant and the child (Devon Moses Makokha) and the DNA test conducted by MBN Laboratories.
4. Considering a pending matter in the Chief Magistrate's Court at Makindye Family Cause No. 270 of 2022 the samples should be collected within 7 days from the date of this ruling, not later than 27th November, 2023 and DNA test results submitted to the Chief Magistrate Court of Makindye not later than 20th December, 2023.
5. The Costs of the DNA test shall be borne by the Applicant (Makokwa Benrox Devon).
6. The applicant will meet the costs of this application.

Dated, signed and delivered by email this 20th day of November, 2023



**CELIA NAGAWA
JUDGE**