THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
MISC CIVIL CAUSE NO. 04 OF 2018

KURUTHUM OMARY KAHIMBA.....1ST APPLICANT
REHEMA OMARY KAHIMBA.....2ND APPLICANT
VERSUS
MWAJUMA OMARY KAHIMBA.....RESPONDENT

RULING

Date of last order: *03/07/2020*
Date of Ruling: *29/09/2020*

NDUNGURU, J.

When I was going through this application, I recalled a Biblical verse (John 14:8) when Jesus was in his usual mission to teach gospel, one of his disciples called Philip said to Jesus, "Lord show us the Father, and that will satisfy us, Jesus replied to him that I have been with you all this time and still you do not know me. He continued to tell them that anyone who has seen Me has seen the father, how can you say show us the Father? I am in my Father and my father is in Me.

I have assertively started with this biblical verse as it resembles what I am about to encounter in this eccentric or rather a unique application

that I have ever come across. I said so because the applicants wants this court to compel the respondent who is their biological mother to disclose the identity of their father and there after to compel the putative father who is not part to this application to undergo DNA test in order to ascertain on whether he is their biological father. It appears that the respondent has vowed not to disclose the name of the applicant's father maintaining that they are gift from God. Being denied the right to know their father and after having tried every amicable means, the respondent is not ready to embrace the applicants desire hence this application.

The applicants are trying to move this court under Article 108 (2) of the Constitution of the United Republic of Tanzania Cap 2 of 1977 as amended from time to time and Section 2(3) of the Judicature and Application of Laws Cap 358 (R.E 2002). Later in their submission, the applicants prayed for the court to disregard the application of Article 108(2) in this matter. The chamber summons has been supported by joint affidavit deponed by both applicants.

The applicants are enjoying the legal service of Ms. Jenipher Silomba while the Respondent appeared in person. The parties prayed to dispose application by way of written submissions. Both parties without delay did comply with the schedule. In support of the application. Ms. Jenipher reiterated the prayers made in the chamber application. However, in their

sworn affidavit, the applicants have stated that during their child hood, they have requested the respondent to disclose the name of their father but todate she has refused to mention who is their father. They went on further to depone that they have been considered to be illegitimate children and they have never experienced any kind of love from the Respondent. Far from being enough, the applicant went on to state that they have been discriminated by their own mother and that she has denying their fundamental right of knowing their own father feeling that they are asylum seekers with no proper place called home.

Replying, the Respondent who appeared for herself unrepresented vigorously took the opposite view. She strongly opposed the foregoing arguments by the applicants, that, the application of this nature is what we call ***"The Writ of Mandamus"***. She invited this court to refer **Halsbury Laws of England (3rd Ed Vol. 11, p, 54)**, **Hans Wolfgang Golcher vs. General Manager of Morogoro Canvas Mill Limited [1978] T.L.R 78 HC**) and in **Republic vs. Metropolitan Police Commissioner ex-parte Parker (1953) ALL ER 717, p 717-719** and **John Mwombeki Byombalirwa vs. The Regional Commissioner and Regional Police Commander, Bukoba [1986] T.L.R 73 (HC) 15**.

The respondent went on further to state that the prayers made by the applicants can only be issued by the writ of mandamus. The applicant

must therefore prove that the respondent has refused to perform a demanded performance by the applicant, the applicant must have locus stand, and there should be no other appropriate remedy available to the applicants. The Respondent went on to state that the applicants have not shown enough grounds for the court to act upon.

Having gone through the rival arguments by the parties in respect of the application intimated and the entire record, there is no gainsaying that the applicants want me to persuade the Respondent to name their so-called biological father.

I have gone through the cited provisions of **Section 2(3) of JALA Cap 358 R.E 2002** as the application was filed since 2018. The prayers made by the applicants in their chamber summons seem to motivate me to dwell into the substance of the application. I think the Respondents version that the applicant was required to move the court by a writ of mandamus is not convincing. I say so because the respondent is neither a public officer nor a public body. The Writ of Mandamus is governed by **Article 30 (3) of the United Republic of Tanzania Constitutions and Section 17 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act Cap 300 R.E 2019** and Section 2(3) of JALA. As hinted earlier, I will not agree with the Respondent since for the writ of mandamus to apply, the respondent must be a public officer and

has refused to perform a certain act and that there is no other appropriate remedy.

The law about orders of mandamus is quite clear in this country, and I cannot do better than finding an inspiration in the case of **Moris Onyango vs. The Senior Investigating Officer H Customs Department Mbeya Criminal Application No. 25 of 1981** where Samatta CJ (as he was) stated that:

> *" It is entirely correct preposition to say that an order of mandamus is a discretionary remedy. The order is not one of right and it is not issued as a matter of course. The purpose of the order is to supply defects of justice. It will therefore be issued where there is no specific legal remedy for enforcing the specific legal right claimed or where, although there is an alternative legal remedy, such mode of redress is considered by the court to be less convenient, beneficial and effectual. As a general rule the court will refuse to issue the order if there is another convenient or feasible remedy within the reach of the applicant (**Emphasis Supplied**)* (Also see the case **of Lakaru vs. Town Director (Arusha) (1986) T.L.R page 326.) B.**

What can be gleaned from the cited case is that, the court can only issue the order if there is no other convenient or feasible remedy that can be exercised by the applicant. As I said earlier, paragraph 8,9 and 14 of the applicant's affidavit shows that the applicants decided to convene a clan meeting to compel the respondent to disclose their fathers identity but she vowed not to disclose his name or his origin till her death. The applicants were not tired yet, in 2018, they called another clan meeting

but it proved futile as the respondent insisted that they are her *"Gift from God"* hence they are not entitled to know their father during their life time. It seems that even when the matter was reported at the police, the respondent turned her ears deaf.

The vital questions are on whether this court has mandate to compel the respondent to disclose the identity of the applicant's father? If Yes under what law? And why has she refused to disclose who is their father? Is there no any other remedy that can be exercised by the applicants? If the court grants the orders sought, can it be executed? If she discloses can the court compel him to undergo DNA test while he was not a part to the case? There are more questions than answers. In the course of determining this application, such mystery will be solved.

In their affidavit, the applicants have narrated a sequence of events and strong feelings against their own mother that she has refused to name their own father. They feel tormented, discriminated and as asylum seekers in their own land. They have also detailed on how the Respondent has vowed not to disclose the identity of their father. There is no gainsaying that the applicants have tried every means from their clan to police but the Respondent consistently refused to do so.

The applicants who appeared in court were not minor. They are adults with their own families. I have time to observe them during the

hearing of this application. Although they didn't mention their age in their affidavit, I am confident they appeared to be at their early 40's or 50's. There is no dispute that they have been raised by the respondent father during their childhood. They were provided with the essential services as any other child. It appears that the Respondent got married to someone else and left them under the care of their grandfather but with her close assistant.

Before going through the nitty-gritty of this application, I find it prudent to refer to other jurisdictions on how they have dealt with the analogous issues. Commonly, minor may file paternity suits to establish parental support obligations when a father is absent from the child's upbringing. It is quite unusual for a child who has been raised since birth by his biological mother and his legal father to file any paternity action. When courts are confronted with such kind of application, the right to privacy and the best interest of a child are the major things that court must consider when dealing with cases of such phenomena. (See **Washington University Journal of Law & Policy. Volume 26 Law & The New Institutional Economics; http*:/open scholarship.wustl.edu/law-journal-law-policy/vol. 26/iss1/17).***

One of the celebrated case that deals with major privacy concerns when minor sues for paternity is Sutton **ex rel. Minor V Diane J No.**

273519, 2007 Mich. App. LEXIX-754. In this case the minor through the help of his legal father Michael J Michael filed a petition in Michigan to determine the identity of a Minor biological father because of healthy concern in knowing his genetic medical history as he was suffering from asthma. It appears that Michael and Dianne were married at the time of the Minors birth. DNA test reveals that Michael was not a biological father to the Minor. A minor's mother revealed the name of another man she thought could be the minor's biological father but when DNA test was conducted, it appears that he was not the biological father. Ms Dianne was adamant that Michael is the Minors biological father as well as legal father. The above cited case presents the balance courts must strike in determining paternity suits by assessing the interest of parents' right to privacy against the child's interest in knowing his or her biological father. In our case at hand, as I have hinted inter-alia, the applicants are not minors. They are adults. They are not covered under the **Law of the Child Act (Cap13 R.E 2019)**.

Despite family and parental privacy, minors have practical interests in knowing their biological parents in order to obtain support from their father since minor rights are fundamental regardless of their parents' marital status. Their immediate rights include, maintenance, Medical support and biological identity as it is extremely important to children in

case they suffer from hereditary confusion. Being denied this right, they may become aggressive, disorderly and intensely angry causing tension on the entire family. The children may also face societal pressure.

In most of our African traditions, children are regarded as the properties of their patrilineal side and not on their matrilineal side save for few tribes. Hence a child whose father is unknown is raised by his/her matrilineal side and are named after their uncle's clan. This is what has happened to the applicants. They were raised by their grandfather until their adult hood. Reading from their application, they are much stressed and they feel to be regarded as outcasts or an ossu (a Nigerian term for children's born out of wedlock). Courts may intrude on the family to protect children's best interest, namely to ensure their safety and well being if there are proofs that they are unable to care for themselves. The intrusion by the court is mainly to favour the child welfare and to establish support obligations. Doing this, courts must also take into consideration the mothers right to privacy. A mother may have authentic reason not to unveil the identity of the child's biological father. **First** where she may not know the distinctiveness of the child's biological father because she engaged in sexual intercourse with numerous partners near the time of the child's conception. **Second**, she does not remember who she had sexual intercourse with at the time of the child's conception. **Third**, the child

could have been conceived through anonymous donor insemination and the mother may not have access to sperm donor records. **Fourth**, the child may be the product of rape a mother wants to remain in private. Sometimes it may appear that a mother is a victim of domestic violence, may fear abuse from her husband, from her child's biological father, or from another abuser if she discloses the identity of her child's biological father. **Fifth**, the child could be a product an extra marital affair that the mother does not want to unveil. Reading from the foreign context, the argument is between a child and mother. Adults are not mentioned.

I am alive that the High Court has an inherent power to deal with matters that has been filed so that justice can be served. The applicants have mounted their application under Section 2(3) of JALA. The applicants have come to this court after having tried to exhaust their remedies from their clan members and at the police. No one can deny that this court is the vehicle of which justice lay its root. Tanzania being a sovereign state, has ratified diverse international instruments that particularly deals with people's rights. The same are enshrined in our constitution under Article 13. The right to know one's parent is unalienated right that has to be observed by any organ. For example, the **Convention on the Rights of Child** which come into force on 2/09/1990. **Article 7 provides that:**

The child shall be registered immediately after birth and shall have the right rom birth to a name, the right to acquire a nationality and as far as possible, ***the right to know and be cared for by his or her parents. (emphasis added)***

Likewise, Article 8 provides that:

Article 8 (Preservation of identity): Children have the right to an identity – an official record of who they are. Governments should respect children's right to a name, a nationality and family ties.

The Law of the Child Act, Act No. 21 of 2009 recognizes that a child has the right to know his biological parents. I am aware that the applicants are not children, they didn't disclose their age. For the basis of this application, I have tried to find an inspiration under Section 6(2) which states as follows:

6(2) A person shall not deprive a child of the right to the name, nationality and to know his biological parents and members of extended family subject to the provision of any other written law.

It is without objection that every child has the right to know their biological parent. Any attempt to hide the truth of the matter may cause a great deal of grief and anger. They may sometimes feel discriminated and or illegitimate. The larger the truth is suppressed, the deeper the anger is against the people who withheld their vital information about their truth identity.

Our constitution provides for the basic rights of every individual. There is no specific provision that deals with this right. But in the absence of such specific right, it does not mean that this court is not empowered to formulate a jurisprudence that can serve the country in case arguments of this nature are canvased. This court being the foundation and industry of justice is duty bound or mandated to determine the fate of the parties in this case. I think and I must admit that, this application has greatly exercised my mind. Any order that will be issued may injure the feelings or cause anger and grief to any parties. But since my duty is to decide the matter, I must act accordingly. No one can deny that children have the right to know their biological parents and enjoy their love as any other human being. The law is silent on adults if they deserve such right or not.

Despite that the respondent has insisted that she does not know the whereabouts of the applicants' biological father, she has vowed not to mention or disclose his identity to the applicants. Maybe be she has a strong reason as woman who has raised the applicants with the aid of their grandfather in the absence of their father. Natural laws require every child to know his/her parents. It is now time to ask our self, does the Law of the Child Act and the International Instruments that has been ratified covers the applicants.

As I have said above, the applicants are not children; they are aged

between 40's or 50's. They are therefore not covered with these above cited laws. There is no gainsaying that the applicants were raised and treated as normal children with their own grandfather with the close aid from the Respondent. In our African society, if a father is unidentified, the children are not thrown to the evil forest; they are raised at their maternal side and named after their uncle's clan. The applicants are not suing the respondent for parental support or medical support but rather their inquisitiveness is to know their father. Since they are no longer children, they are not covered by the cited laws. They did not establish they have medical interest in finding for their father to reveal any medical disorders or genetical disorder which might have been inherited from paternal line.

I am alive that this court has the duty to strike the balance between the interests of the parent's right to privacy against the applicants' interest in knowing their biological father. Most of the foreign states have established laws for the purpose of establishing paternity in order to determine support obligations of the biological father. If the child receives financial support from his/her legal father, there is no need to establish biological paternity under the statute. Basing on this aspect, I think there is need to protect the respondent's privacy. It is my view that the respondent has a legitimate reason not to disclose the identity of the applicants' biological father. Compelling the respondent to disclose the

identity of her former partner could fulfil her children's genuine curiosity to learn where they came from, but categorically it would be unfair to the respondent. There could be very good reasons why the respondent has opted to keep her child's biological father identity private, her privacy should be protected.

No one can object that a mother can be mutually a mom and a dad. As hinted above, when I gave an example when Philip asked Jesus to reveal who is the Father, Jesus was keen enough to declare that, since they have seen him, they have inevitably seen the Father. The same applied to this application. Single mothers or all mothers who raised their children alone, in the absence of their father must be respected and honored. They are everything to their children. The child who received all the required support from his/her mother needs not to awaken the healing wounds of his mother who worked hard day and night to ensure that the child is safe and sound. Even if the court could compel the respondent to name the identity of the applicants' father, the execution of the order could be very difficult.

Many years have passed, the applicants may have difficult time locating their biological father who might be in different geographical location or living in a condition that does not allow him to have contact with the applicants. The respondent is unaware that their so-called father

is alive or not hence it will be very difficult to execute the application if granted because of the underlined impediments detailed above.

If the court allows this application, and taking into consideration that the applicants are not children, the court would not escape floodgates of litigations. It will open a pandora box to those children who were raised with a single mother to sue someone they think could be their father with regard to his financial capabilities or during probate issues. This will allow any child or adult to sue one parent to disclose the identity of an absent parent. This could also include children received through anonymous donor insemination which may violate the donor's right to privacy as well as the privacy of the branded parent. Basing on this scenario, and since it is the somehow new encounter since I have been in bench, I have the courage to state that cases of this nature, the court should strike a balance between the child's best interest and the parents' right to privacy.

All said, the applicants are no longer children; they are adults with children and grand ones. They are no longer indeed of financial support from their parents. At their age, the court is not moved to weigh their physical, mental and emotional needs if any. Their interest cannot be entertained by this court. Since the respondent has been there for them when they were children, and taking into consideration that the respondent appears to be old, the court will not intrude on her privacy at

this moment. The respondent has to be privileged as a heroic woman who acted as a mother and a mother to the applicants. This court will therefore respect her vows. Regrettably, this application cannot be granted as it is unviable.

The applicants being adults who can express themselves are advised to use other means which cannot humiliate or injure the respondent to trace their father. Such means include media which has such helpful programs like **Namtafuta** which is broadcasted by ITV and Radio One and **Marafiki** aired by Radio Free Africa and others.

Basing on the nature of this application, and for interest of promoting tranquility and stability and bond of the family I will not make order as to costs.

Each to bear her own costs.

It is so ordered.

THE HIGH COURT OF TANZANIA

D. B. NDUNGURU
JUDGE
29/09/2020

Date: 30/09/2020

Court: D. B. Ndunguru, J

1st Applicant: Absent

2nd Applicant: Present

For the Applicants: Ms. Jenipher Silomba – Advocate

Respondent: Present

B/C: M. Mihayo

Ms. Silomba – Advocate:

The matter is for ruling we are ready the 1st applicant is sick. We are ready for ruling.

Respondent:

I am ready.

Court: Ruling delivered in the presence of Ms. Jenipher Silomba advocate for the applicants and 2nd applicant and the respondent who has appeared in person. This **30th** day of **September, 2020**.

THE HIGH COURT OF TANZANIA

D. B. NDUNGURU
JUDGE
30/09/2020

Right of Appeal explained.