

ESTATE LATE ELIAS JONATHAN KANENGONI
and
SARAH S. KANENGONI
versus
FARAI MANYIKA
and
REGISTRAR GENERAL OF BIRTHS AND DEATHS
and
MASTER OF THE HIGH COURT N.O

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 23 June 2016, 2 & 6 July 2016, 1 & 18 November 2016,
21 February 2017 & 9 March 2017

Opposed matter

F Mahere, for the applicants
1st respondent in person
T Thondhlanga, for the 2nd respondent
P Nyamapfene, curator for the minor child

DUBE J: The applicants bring this application in terms of s 27 (4) of the Births and Deaths Act, [*Chapter5:02*], [hereinafter referred to as the Act]. The second applicant was married to the late Elias Jonathan Kanengoni, who for ease of reference, will be referred to as the late Kanengoni. She is the executor of the estate of the late Kanengoni and represents it. The first respondent is the mother of a minor child whose birth certificate is the subject of this application. The said child was represented by Miss *Nyamapfene*, a *curator ad litem* appointed for the minor child. The second respondent is the Registrar General of Births and Deaths, [hereinafter referred to as the Registrar], an authority responsible for registration of births and deaths.

The salient facts of this challenge may be summarized as follows. The first respondent claims that she had an affair with the late Kanengoni, which resulted in the birth of a minor child on 4 October 2004. The first respondent registered the birth and obtained a birth certificate from the office of the second respondent using her maiden surname on 4 November 2010, without the details of the father, as a baby born out of wedlock. The birth

certificate records that she is not married. Subsequent to this and on 22 May 2013, Kanengoni died. On 21 March 2014, nearly a year after his death, the first respondent with the assistance of Douglas Kanengoni, a cousin brother of the late Kanengoni, approached the Registrar and changed the child's surname to that of Kanengoni, added his middle name to the minor child's name and obtained another birth certificate reflecting that the late Kanengoni is the biological father of the minor child. The reason for the re-registration is recorded on the death notice as, 'legitimation.'

Aggrieved by this development, the applicants have filed an application to invalidate the birth certificate and take issue with the fact that the late Kanengoni's middle name and surname were added onto the minor child's birth certificate. They assert that Douglas Kanengoni is a distance cousin brother and not a blood relative of the late Kanengoni. The applicants allege that the first respondent connived with officers at the Registrar's offices to re-register the child as a biological son of the late Kanengoni without following the correct procedures. The applicants aver that the re-registration was maliciously, fraudulently and unlawfully done well after the death of Kanengoni and without the consent of the executrix or the High Court, the upper guardian of all minor children in terms of the law. The applicants contend that by purportedly legitimating the child and re-registering the birth to include paternity details which were absent at the initial registration, the second respondent acted in a manner that is contrary to the law.

The respondents defend the application. The first respondent insists that she was entitled to register the child using the late Kanengoni's names as he was the father of the child. She argued that the birth certificate in issue is above board because the brother of the late Kanengoni confirmed the paternity of the child. Further, that the first applicant is simply bound to disinherit her child. The second respondent's position is that the recording of the alleged father's details on the minor child's birth certificate was lawful because the initial registration of the child was not complete as the father's details were not filled in on the birth certificate. The Registrar obtained information in the form of an affidavit from the deceased's cousin brother which he used to conduct a re-registration of the birth. He contended that there was sufficient proof that the child was fathered by the late Kanengoni and maintained that the Registrar lawfully re-registered the child on information given. He contended that there was no change of name as no notarial deed of change of name was registered nor has it been shown to exist. He denied any allegations of fraudulent conduct on the part of his officers or any connivance with the first respondent.

Miss *Nyamapfene*, investigated this dispute. She interviewed all parties involved. Her report concludes that the deceased and the first respondent had a well-known affair which resulted in the birth of a child. Further, that the term 'legitimation' is an internal administrative term used at the Registrar's offices when the father and mother of a minor child request to register the birth of a child born out of wedlock and that legitimation does not mean that the parents of the child are now married. Her view is that the re-registration was correctly done and in accordance with laid down procedure.

The second respondent challenged the *locus standi* of the applicants to bring this application on the basis that the executor is now *functus officio* as the estate was long wound up. The estate was wound up on 19 March 2014. By letter dated 22 June 2015 to the Master of the High Court, the first respondent challenges the liquidation and distribution of the estate and condonation for failure to bring the challenge on time. What this means that the estate is still extant and the second applicant is entitled to continue her role as executor and respond to any issues arising. The applicants also have a direct and substantial interest in ensuring that the records maintained by the second respondent with respect to the late Kanengoni are lawful and accurate and consequently are entitled to bring this application.

The application is brought under the umbrella of s 27(4) of the Act, a section that empowers a court to order the Registrar to rectify his register at the conclusion of criminal proceedings brought against a person who gave false information related to registration of a birth or death or contravening sections of the Act. No criminal prosecution has been conducted. An incorrect section is relied on for basing this application. The fact that the application has been brought in terms of a wrong section does not invalidate the application for the following reasons. The relief sought is in the nature of a *declarator*. Section 14 of the High Court Act, [Chapter 7:06], gives this court the power, in its discretion, to enquire and determine at the instance of any interested person, any existing, future or contingent right or obligation, notwithstanding that such a person cannot claim any relief consequent to such a determination. The applicants do not seek any consequential relief in this application. The court has in its discretion decided to determine the application in the form in which it is. Despite having relied on a wrong section, the application before me remains an application for a declaratory order where the court is requested to declare a birth certificate invalid. The respondents are aware of the case they are required to answer. They are aware of the arguments advanced for the relief sought and have been able to respond to the arguments. All the issues have been adequately ventilated and the respondents and the minor child do not

stand to suffer any prejudice if this court rules on the matter in the form in which it is. This court is the upper guardian of minors and has considered that the best interests of the child will be best served if the validity of his birth certificate is determined once and for all without consideration of trivial legal impediments.

This dispute is not about paternity of the minor child. That dispute is for another day. The applicants' contention is simply that the registration of the birth of the minor child was not done in accordance with procedures laid down in the Act.

A child born to parents that are not married is a child born out of wedlock. The process of legitimization involves the process of making something legitimate. A biological father of a child who subsequent to the birth of the child marries the mother of the child legitimates the child. A father-child relationship is created resulting in the father being able to record the child on a birth certificate as his own. All rights and obligations of a child begin to flow to him as if he was born in wedlock. Legitimation is a term used mainly in the United States of America in States such as Georgia, Atlanta and North Carolina. Legitimation denotes a situation where a father to a child born out of wedlock acknowledges paternity for the child thereby legitimizing him. The father is required to sign a form acknowledging his consent that the child born out of wedlock be deemed legitimate. The acknowledgment creates rights and obligations for both the child and father. The father becomes the legal father of the child and can request custody and access rights to the child. A child who has been legitimated becomes legally recognised as a child of his parents and acquires the right to inherit from the father, and enjoys all freedoms, rights and benefits accorded children born in wedlock. See *Carter v Carter*, 232N.C.614, 616, a decision of a Georgian court for a deeper understanding of the concept. The state of Georgia has moved away from the concept of legitimation. Legitimation law was changed in 2016. A father can now only be declared a legitimate parent where he marries the mother of the child born out of wedlock, by a paternity order or on application to court.

The difference between the two concepts is that with legitimization, the father has to marry the mother of the child in order to legitimize the child. Legitimation on the other hand involves mere acknowledgment by the father of paternity of a child born out of wedlock. The father does not have to marry the mother of the child. Notable is that in both instances the processes have to be carried out by the father of the child.

The concept of legitimation of a child is not provided in our law. It is not defined in the Act. It is a concept foreign to our jurisdiction and is not legally recognized. A re-registration

of a birth done for legitimation purposes is tainted with irregularity and is not procedurally and legally conducted. Such a registration does not render a child born out of wedlock whose parents have not subsequently married legitimate and is null and void. A birth certificate taken for legitimation purposes is not a valid birth certificate.

Registration of children born out of wedlock is provided for in s12 of the Act. Section 12 reads as follows,

“12 Registration of birth of a child born out of wedlock

(1) Notwithstanding section eleven, no person shall be required to give information acknowledging himself to be the father of a child born out of wedlock.

(2) A registrar shall not enter in the register the name of any person as the father of a child born out of wedlock, except—

(a) upon the joint request of the mother and the person acknowledging himself to be the father of the child; or

(b) if the mother of the child is dead or has abandoned or deserted the child, upon the request of the person acknowledging himself to be the father of the child; or

(c) if the alleged father of the child is dead, upon the joint request of the child’s mother and a parent or near relative of the alleged father.

(3) A request in terms of subsection (2) shall be made in the form and manner prescribed.”

A mother of a child born out of wedlock, who wishes to register the birth of the child is required to do so in terms of s12 of the Act. The provision does not place any obligation on the father of the child to give information acknowledging that he is the father of the child born out of wedlock. The child may be registered in the name of the mother in which case he assumes her surname. Section 12 lays down three scenarios where births of children born out of wedlock may be registered under the name of the father. Section 12 (2) (c) in particular, permits the mother jointly with a parent or near relative of the alleged father, where the father is deceased, to request the Registrar to register a child in the name of the father. A child registered in terms of s 12 (2)(c) remains a child born out of wedlock and is not legitimized by such a registration. The procedure provided for in this section is akin to legitimation except that the father is not involved in the registration and the registration has no consequence of legitimizing the child. The Registrar submitted that the word “legitimation” is an internal administrative term used at the Registrar’s offices. The Registrar has imported the concept of legitimation and improperly so. The registrar purported to be acting under s12 and yet the section does not provide for legitimation. The difficulty is that the concept is not supported by any provisions of the Act.

The procedure in s12 can only be invoked upon initial registration of the minor child. Because s 12 provides for an initial registration only, a relative can only be involved in a registration of a birth at the outset. It was never the intention of the legislature that when a

father denying paternity of a child dies, his near relatives come forward acknowledge paternity on his behalf and legitimize the child and re-register the child's birth. There is no suggestion in the provision that it applies to a re-registration of the birth of a child born out of wedlock. Re-registration of births is only permissible under s 19 of the Act. Section 19 stipulates as follows:

“19 Re-registration of births of persons born out of wedlock.

(1) Where any person has been registered as born out of wedlock and evidence is presented to the Registrar-General satisfying him that, by operation of any law, the person must be regarded as born in wedlock, the Registrar-General may on application authorize the re-registration of the person's birth, and such re-registration shall be effective as though the person had been born in wedlock at the time of the initial registration.

(2) An application for re-registration in terms of subsection (1) may be made by either of the parents of the person concerned, whether or not he has attained the age of eighteen years, or, if either or both of his parents are dead, by his nearest relative or legal guardian.”

Section 19 provides for a scenario where a person who has previously been registered as having been born out of wedlock may upon production of evidence that he must be regarded as born in wedlock, is re-registered. Section 19 has the effect of legalizing persons born out of wedlock where the child's parents subsequently marry, thereby legitimizing the child. Re-registration of a birth in terms of this section can only be conducted in a case where the status of the child is to be changed from being “born out of wedlock” to “born in wedlock” and the parents approach the court for a re-registration of the birth resulting in another birth certificate being taken in the father's name. Section 19 does not allow a re-registration for any other purpose. A child re-registered in terms of s19 acquires the same rights as children born in wedlock. Section 19 does not provide for legitimation of a child born out of wedlock whose parents never married and whose father is late.

A person may also acquire his father's surname if a change of his name is done in terms of s18 of the Act. See *Katedza v Chunga and Anor* HH 05/03. A notarial deed must be shown to have been executed or registered and the change of name published in the Gazette.

It is the second registration that is in contention. A birth is required to be re-registered in accordance with laid down procedures and for good cause shown. Any birth registered outside the four corners of the Act is invalid. There was no proof of a notarial deed executed or registered in the Deeds Registry for change of the child's surname when the second birth certificate was taken. The Registrar did not employ the provisions of s18 of the Act. At the time of the first registration, the father was available and did not cooperate in this respect.

The Registrar re-registered the child as the biological son of Kanengoni and purported to be legitimating the child. The act of re-registering the child and endorsing the name of the late Kanengoni as the biological father of the child on the birth certificate was unprocedural. Section 19 does not provide for legitimation of a child. It cannot have been the intention of the legislature that where a father refuses to register a child under his name, a relative acknowledge paternity on his behalf after his death and re-register the child under the deceased's name with the effect of legitimizing the child. The procedure of having close relatives of a deceased person coming up to vouch for the paternity of a child born out of wedlock, when the father himself never acknowledged paternity, does pose difficulties. It creates opportunities for fraud. This is so especially in a case where the deceased himself never openly acknowledged the paternity of the child when alive. The most reliable and conclusive way to verify paternity of a child is to conduct DNA tests.

Whilst there is no direct evidence to support the allegation that the first respondent connived with officers of the second respondent to record the process of acquisition of the second birth certificate as a legitimation, no doubt the re-registration itself was improperly conducted. The second respondent purported to be acting in terms of s12. Section 12 does not provide for legitimation. The Registrar sought to argue that because the word "legitimation" is not endorsed on the birth certificate, its use in the birth notice does not affect the registration. The process of registration of a child includes the process of giving notice of the birth and the birth notice is the document where the history of the child is collated. If legitimation is given as the reason for a registration and it is relied on, it has a bearing on the subsequent registration of the birth, despite that the word may not appear on the actual birth certificate. Reliance on legitimation as the reason for the re-registration was inappropriate.

Section 12 does not provide for re-registration of a child born out of wedlock. The circumstances of the birth of the child have not changed and there was no justification for re-registration of the birth in terms of s19. The fact that the deceased used to maintain the child is of no consequence. The child is and will forever remain a child born out of wedlock. The notice of birth states that the reason why the birth was not notified within 42 days was 'legitimation'. The birth of the child had been notified and registered four years earlier. It is not correct that the birth had not been registered nor that there was a delay in registering the birth. The birth had been registered 4 years earlier. This representation amounts to a false representation. Legitimation is not a valid reason for re-registration of a birth. Even if it is accepted that legitimation is meant to refer to legitimization, it was not competent to

legitimize the child born out of wedlock as his parents did not subsequently marry. The Registrar-General was unable to adequately explain the use of and meaning of the word 'legitimation'. The word, in the context of our law is meaningless and cannot remain on the birth certificate. It is misleading and ultimately the status of the child is unclear. Even if it is accepted that word is used indoors, its use led to a wrong decision and deserves to be impugned. There is no competent provision allowing the re- registration that took place. The Registrar has at his whims made up a procedure.

The position given out in the birth certificate is incorrect and misleading. The purpose of a birth certificate is to prove one's age, place of birth and identity. A legitimate birth certificate is one that contains correct and valid information about a person whose name appears on the certificate and as such the certificate ought to be reliable and trustworthy. It should not embrace incorrect and false information. A birth certificate is required to contain information that satisfies legal requirements of the law. A birth certificate that reflects that a child is a legitimate, when such is not the case ought to be disregarded. The best interests of the child which are to ensure that a valid and accurate record of his birth is kept cannot be served should the birth certificate be allowed to stand. Registration of births and deaths is required to be done in accordance with the procedures laid out in the Births and Deaths Registration Act. Any registration done outside the act is irregular and invalid. A birth notice and birth certificate that contains false, misleading and inaccurate information is *null and void*.

The procedure adopted by the Registrar in re-registering or changing the minor child's name is invalid. The birth certificate does not contain honest and truthful information about the circumstances surrounding the birth of the child. The Registrar bungled this registration by re-registered the child resulting in him legitimizing the child in the absence of proof of a marriage between the parents. The re-registration carried out is a non-event and is declared null and void.

Accordingly it is ordered as follows,

- (a) The birth certificate issued by the 2nd respondent in favour of Munashe Jonathan Kanengoni under Birth Certificate number 1924644 on the 21st of March 2014 was irregularly obtained and is declared null and void.
- (b) The 1st respondent to pay costs of suit.

GN Mlotshwa & Company, applicant's legal practitioners
Thondhlanga & Associates, 2nd respondent's legal practitioners
Curator for the minor child, Ms P Nyamapfene