



MALTA

**QORTI CIVILI
(SEZZJONI TAL-FAMILJA)**

**ONOR. IMHALLEF
ABIGAIL LOFARO**

Seduta tat-22 ta' Jannar, 2015

Citazzjoni Numru. 56/2013

A R C

vs

- 1. D M C; and**
- 2. in virtue of decree dated 1st October, 2013 Dr Noel Bartolo and PL Nicolette Aquilina were nominated as curators to represent the minor N J C; and**
- 3. in virtue of decree dated 3rd May 2013 Dr Cedric Mifsud and PL Noel Scerri were nominated as deputy curators to represent KS; and**
- 4. Director Public Registry**

The Court,

Having seen the writ of summons by virtue of which plaintiff premised:

Kopja Informali ta' Sentenza

1. That the applicant got married to respondent D M C in Germany on the 9th September 1999, however she has been living with her husband permanently in Malta from the year 2000, from which marriage they had no children. The applicant and the respondent D M C are presently de facto separated;
2. That on the 25th March 2012, the applicant gave birth to a child in Malta by the name N J, and as results from Act of Birth number 2000/2012 [original copy hereunder annexed as Dok. A] since the minor was born within the term established by Article 68 of the Civil Code, the same minor was put down as N J C, that is as the child of her husband since the presumption at law is that a child that is born in the marriage is considered to be the child of the husband;
3. That the applicant submits that her husband D M C is not the natural father of the minor child and this owing to the fact that in the time that the same minor child was conceived she was involved in an intimate relationship with a third party and had no physical and intimate contact with her husband the respondent already from two years prior. Furthermore, she left the matrimonial home and started living separately from her husband as of January/February of the year 2011. Hence the respondent D M C was in the physical impossibility of living with the applicant;
4. That the applicant effectively got pregnant between the 20th June and the 4th July of the year 2011 during a holiday in Sri Lanka from a relationship with the respondent KS who she had been involved in a relationship with since the year 2010 and which relationship is still ongoing today;
5. That therefore the respondent D M C cannot be the father of the minor N J known with the surname C since he and the applicant had no intimate relationships between the three hundredth [300th] day and the one hundred eightieth [180th] day before the birth of the minor child and there was no reconciliation between the applicant and her husband D M C in this period;
6. That although the applicant requested her husband the respondent to submit himself to a DNA test in order to ascertain definitively that he is not the natural father, he refused to do so and this without any valid reason. On the other hand however, her husband the respondent has told the applicant several times that he has no difficulty, rather he wants, that he no longer appears as the father of the child

Kopja Informali ta' Sentenza

on N J's birth certificate because for him it is pretty obvious that the child is not his son;

7. That the applicant submits that her husband the respondent was never present in the life of the minor, never treated the minor as his son and/or provided for the same minor nor does he want to be present in the life of the minor; in fact the parties, due to various reasons and even because of this child that was conceived further to an adultery, are going to initiate the necessary divorce proceedings in Germany;
8. That the child is in fact the natural son of the N who lives in Sri Lanka. The mentioned N does not have any problem to recognise N J as his son and to submit himself to the appropriate DNA tests in order that it can be established that he is 99.999% the biological father of the minor;
9. That furthermore the natural father of the minor N J is in constant contact with his son via Skype when the applicant is in Malta. Moreover the applicant has already visited Sri Lanka when her minor son was only three and a half months old in order to take him to visit his father KN;
10. That it is the right of the applicant and in the interest of all the parties concerned, including the minor's interest, that the minor is declared to be the natural child of KN and does not continue to appear to be the child of D M C, however the applicant wishes that in the best interests of the minor her son starts carrying her maiden surname, that is "Mertel" instead of the surname "De Silva" and this also owing to the fact that eventually the applicant will be reverting to her maiden surname Mertel;
11. That the applicant has been duly authorised to proceed with this cause after the term of six months from the birth of the child established in Article 77C of the Civil Code in order to institute this action for disavowal had elapsed, and this by virtue of a decree issued by the Civil Court [Family Section] on the 18th February 2013, a true copy of which decree is hereunder being annexed and marked as Doc. B;

REASONS FOR THE CLAIM

Kopja Informali ta' Sentenza

12. That therefore these present proceedings are being instituted:

- (1) Primarily in order to establish and declare that the minor N J known with the surname C is effectively the son of the respondent Kaludeepa-Nimal de Silva and not the son of D M C as indicated in the Act of Birth number 2000/2012;
- (2) Consequently that a correction is affected in the Act of Birth numbered 2000/2012 is made in order to reflect this tR about the paternity of the minor child;

CLAIMS

Plaintiff is requesting defendant to state why this Court should not in view of this premised above, and saving any declaration that may be necessary and appropriate:

1. Declare and decide that the respondent D M C is not the natural father of the minor N J known with the surname C;
2. Consequently declare and decide that the respondent KN is in fact the natural father of the minor N J known with the surname C;
3. Declare and decide that the minor N J is to carry the maiden surname of the applicant, his mother, this being the surname "Mertel" and this in the best interests of the same child;
4. Consequently order the respondent Director of the Public Registry to make the following amendments to Act of Birth number 2000/2012 of the minor N J presently known by the surname C, these being:
 - (a) To substitute the surname "C" in the column "**Name or names by which the child is to be called**" with the surname "Mertel";
 - (b) To substitute the words "D M C" in the column "**Name and Surname**" with reference to the heading "**The Father of the child**" with the words "KN";
 - (c) To substitute the numbers and the words "002011A Maltese ID card Number" in the column "**Identification Document**" with reference to the heading "**The Father of the Child**" with the words and numbers "Sri Lankan Passport Number N2695357";
 - (d) To substitute the numbers "44" in the column "**Age**" with reference to the heading "**The Father of the Child**" with the number "35";

Kopja Informali ta' Sentenza

(e) To substitute the words "Leeds England" in the column "**Place of Birth**" with reference to the heading "**The Father of the Child**" with the words "Balapitiya, Sri Lanka";

(f) To substitute the words "Pieta, Malta" in the column "**Place of Residence**" with reference to the heading "**The Father of the Child**" with the words "Egodamulla Ahungalla, Sri Lanka";

(g) To substitute the words "M C (Alive)" in the column "**Name and surname of the father and whether living or dead**" with reference to the heading "**The Father of the Child**" with the words "KV (Alive)";

(h) To delete the words "the said" from the annotation made in the same Act about the civil status of the mother, the applicant A R C;

With expenses against the respondents or whosoever of them, all of who are being summoned as of now for the reference to their oath.

Having seen applicant's list of witnesses;

Having seen the reply filed by the Director of Public Registry by virtue of which it was stated:

1. That on a preliminary basis, at least from the acts which were notified to the same Director, it transpires that no *ad litem* deputy curators were nominated by this Honourable Court to represent the minor N J C' interests. Thus, deputy curators to represent N J C are to be nominated by this Honourable Court in terms of Articles 782 and 783 of Chapter 12 of the Laws of Malta;
2. That on a preliminary basis, the Director admits that he is not aware of the facts of the case as declared in the sworn application and thus, he will rely on the evidence that will be produced as to the merits of the case although in the context of the same, this Honourable Court is requested to invite all concerned parties to submit themselves for the relative genetic testing as established in Article 77D of Chapter 16 of the Laws of Malta;
3. That without prejudice to the above, for a successful outcome of the plaintiff's requests, she must prove that between the three hundred (300) days and the one hundred and eighty (180) days before N J C' birth, plaintiff A R C had committed adultery with KN De Silva and moreover, prove by some other means which could

Kopja Informali ta' Sentenza

include genetic testing that indicate the KN de Silva as the natural father of the same minor N J C, and this in terms of Article 77B of Chapter 16 of the Laws of Malta;

4. That the request for the plaintiff's surname alone to be added cannot be acceded to since the applicable Article is Article 92(1) of Chapter 16 of the Laws of Malta which states that when a child is recognised by the natural father, the same child should assume his father's surname, however the mother's surname may be added. The second proviso of Article 77C of Chapter 16 of the Laws of Malta is not applicable to the case since N J C's surname was never 'Mertel'. The proviso mentioned by defendant is applicable when a minor will be keeping the surname with which he was habitually known prior to the filiation. In the present case, the minor's surname was always C, never Mertel and for this reason Article 77C is not applicable;
5. That finally, always without prejudice to the above, the Director submits that in any case, the suit is not attributable to any wrong-doing on his part and consequently should not be attributed the costs of the same;
6. Save the production of further pleas.

With expenses to be borne by the plaintiff, with reference to the oath of the other party.

Having seen the Director of Public Registry's list of witnesses;

Having seen Dr. Cedric Mifsud and Legal Procurator Noel Scerri's reply as the duly appointed deputy curators, by virtue of which they stated:

That they were nominated as deputy curators by this Honourable Court on the 3rd May 2013. That to this day, they received no information as to how they could attempt to communicate with Kaludeepa- Nimal De Silva and consequently they are not in a position to file a more detailed sworn reply since they are not aware of the facts of the case. In the event that they manage to establish contact with the defendant, they will immediately inform this Court and if necessary they will request authorisation to file another reply;

Having seen Dr. Noel Bartolo and legal procurator Nicolette Aquilina's reply as deputy curators by virtue of which they stated:

Kopja Informali ta' Sentenza

1. That at this stage they are not aware of the facts of the case and thus, reserve the right to file another reply when and if they manage to communicate with the defendants they represent and in this respect, they request plaintiff to provide any information that she might have to establish contact with the defendant;
2. Save the right to file other pleas if necessary.

Having seen the deputy curators' list of witnesses;

Considers :

In relation to the Preliminary pleas as raised by the Director of Public Registry

By means of the first preliminary plea, the Director of Public Registry notes that at the time of notification, the deputy curators intended to represent the minor child were not yet appointed. However it transpires that the same deputy curators were in fact appointed and they even filed a sworn reply on behalf of the same minor and thus, this Court will not delve into this plea any further.

As for the rest of the pleas raised by the Director of Public Registry, it needs to be said that they are all related to the merits of the case.

Plaintiff's version of the Facts

By means of her affidavit¹ plaintiff explains that she was married to defendant D M C, which marriage broke down in 2010. The parties separated *de facto*. On the 25th March 2012 she gave birth to the minor child N J and simply because of the legal presumptions imposed by Maltese law, the authorities listed her husband as the child's natural father. She explains that the natural father of her son is actually a Sir Lankan man, the other defendant with whom she has an ongoing relationship. She further states that there's no possibility of her husband having fathered her child since there had been no intimate relations between them

¹ See a fol. Number 31 of the acts

Kopja Informali ta' Sentenza

since 2007 (with no reconciliations) and that furthermore the minor child was conceived during a visit she made to the defendant in Sri Lanka. She also states that although defendant D M C does not want the child to be officially registered as his child, he refuses to sit for a DNA test and thus, she had no other option but to resort to these proceedings. Attached with her affidavit are a number of documents which prove the time-frames she speaks about, including the lease agreement when she moved out of the matrimonial home she shared with her husband.

The Merits of the Case

The main issue at point is whether the plaintiff managed to prove to the required standard imposed by law that the minor child born on the 25th March 2012 and named N J C² is not defendant D M C' natural child but the natural child of the other defendant Kaludeepa-Nimal De Silva, and consequently if the same plaintiff managed to prove that there's enough proof to rebut the legal presumptions and any of the circumstances contemplated in Article 77 of Chapter 16 of the Laws of Malta.

Reference is made to the DNA test exhibited in the acts³ which is proof of the fact that defendant D M C is not the natural father of the minor. Dr. Marisa Cassar further confirms on oath⁴ that the other defendant KS is actually the father of the same minor child.

By means of the same test, plaintiff managed to prove in the most absolute manner that the minor child N J is not D M biological son, since the latter was excluded from being the potential father of the same child by means of a DNA test. It needs to be noted that DNA testing is the ultimate proof in relation to paternity cases and consequently, what the parties attest has little bearing. Consequently it is evident that plaintiff managed to prove beyond any shadow of a doubt that the minor child N J is not D M C' biological son but the natural son of the other defendant KS and consequently she has managed to rebut all the legal presumptions which were applied with regards to the paternity of her son.

Thus, for the reasons cited above, the Court:

² See the birth certificate exhibited a fol. Number 11 of the acts

³ See a fol. Number 70 of the acts

⁴ See a fol. Number 73 of the acts

Kopja Informali ta' Sentenza

1. Accedes to the first request and declares that respondent D M C is not the natural father of the minor child N J known with the surname C;

2. Accedes to the second request and declares that respondent KN is the natural father of the minor child N J known with the surname C;

3. Rejects the third request;

4. Accedes to the fourth request limitedly in the following manner and orders Director of Public Registry to affect the following amendments in the minor child's birth certificate:

a. surname of the child is to be substituted from 'C' to 'De Silva';

b. name and surname of the child is to be substituted from 'D M C' to 'K-N';

c. the numbers and words '002011A Maltese Identity card Number' in the column 'Identification Document' with reference to the heading 'The Father of the Child' is to be substituted with the words and number 'Sir Lankan Passport Number N2695357';

d. the number '44' in the column 'Age' with reference to the heading 'The Father of the Child' is to be substituted with '35';

e. the words 'Leeds England' in the column 'Place of Birth' with reference to the heading 'The Father of the Child' is to be substituted with the words 'Balapitiya, Sri Lanka';

f. the words 'Pieta', Malta' in the column 'Place of Residence' with reference to the heading 'The Father of the child' is to be substituted with the words 'Egodamulla Ahungalla, Sir Lanka';

Kopja Informali ta' Sentenza

g. the words 'M C (Alive) in the column 'Name and Surname of the father and whether living or dead' with reference to the heading 'The father of the child' is to be substituted with the words 'K_V (Alive)';

h. delete the words 'the said' from annotation made in the same Act about the civil status of the mother.

With expenses to be borne by the plaintiff.

< Sentenza Finali >

-----TMIEM-----