RSW v LOM (Civil Appeal E040 of 2022)
[2024] KEHC 14942 (KLR) (27 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14942 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CIVIL APPEAL E040 OF 2022

WM MUSYOKA, J

NOVEMBER 27, 2024

BETWEEN

RSW ..... APPELLANT

AND

LOM ..... RESPONDENT

(Appeal from the decision of Hon. L. Ambasi, Chief Magistrate, CM, in Busia CMC Misc. Application No. E021 of 2021, of 28th September 2021)

JUDGMENT

1. The appellant had been sued by the respondent, and another, at the primary court, vide an originating Motion, dated 17th June 2021, where the respondent was seeking that a sibling deoxyribonucleic acid (DNA) test be conducted to determine the paternity of her child and another, named in that application, with respect to determining possible fatherhood by DDM, deceased; and an order that the appellant avail her children for the purpose of that test. The test was apparently being sought for succession purposes, although there was no mention of any pending succession proceedings, to the estate of the late DDM.

2. The appellant filed a reply to that application, vide an affidavit that she swore on 21st July 2021. She averred that she was the widow of the deceased, who she named as DMA, who had died on 26th April 2020. She argued that during the illness of the deceased, and even after his death, the issue of the 2 children did not arise. She stated that the respondent did not show up for funeral arrangements, after the deceased died, not even for the funeral service. She said that the issue arose for the first time, when the Samia Sub-County Deputy Commissioner stopped the processing of the death gratuity payable on account of the said death. She asserted that subjecting her children to a DNA test would be intrusive into their right to privacy and integrity.

3. She has attached documents to support her case, being a certificate of the marriage between her and the deceased; a certificate of death, in respect of the deceased; a letter from the Chief of Ageng'a Location, disclosing the survivors of the deceased; and a letter from the Deputy County Commissioner stopping the processing of the death gratuity benefits, arising from the death of the deceased.

4. The respondent filed a further affidavit, sworn on 17th August 2021, in reaction to the replying affidavit. She averred that the letter from the Chief left out the subject children, while that by the Deputy County Commissioner raised a genuine concern. She stated that she had obtained the certificate of the birth of her child before the deceased passed on; and that the certificate of death in respect of the 2 children had mentioned the deceased as their father. She also mentioned that 1 of the subject children had written to the Harambee Sacco Cooperative Society, seeking to stop release of the investment by the deceased in that Sacco. She disclosed that there was a pending succession cause, in the estate of the deceased, Busia CMCSC No. 205 of 2020, where the issue of paternity arose.

5. The application was canvassed by way of written submissions. In the ruling of 28th September 2021, the court ruled that a DNA test be carried out with samples from the 2 children and the children of the appellant.

6. The appellant was aggrieved, hence the instant appeal. The appeal has several grounds, that the children of the appellant were not party to the proceedings at the trial court; that 1 of the subject children had been treated as a minor, while he was in fact an adult; the appellant had no power to compel her adult children to subject themselves to a DNA test; the 2 children had opportunity, during the lifetime of the deceased, to have that test conducted; and the DNA test order was intrusive and invasive of the rights of her children.

7. Directions were given on 5th February 2024, for canvassing of the appeal by way of written submissions. In the end, only the appellant filed written submissions. She has argued that a DNA test was intrusive and invasive of the rights of her children, who were not even parties to the matter before the trial court. She relies on SWM vs. GMK [2021] eKLR (Majanja, J).

8. From the framing of the Motion, that was before the trial court, the need for determining the paternity of the 2 children, arose with respect to succession to the estate of the deceased. Both parties did not initially disclose that there was a pending succession cause, and that disclosure was not made until the respondent filed a further affidavit, where she disclosed that there was indeed a succession cause, being Busia CMCSC No. 205 of 2020, where the 2 children had sought, in objection proceedings, to be treated as children of the deceased, but their approach was rebuffed by the court, for lack of forensic evidence. She attached a ruling, delivered in Busia CMCSC No. 205 of 2020, on 1st March 2021, and it would appear that the Motion, the subject of the appeal, was prompted by the verdict in that ruling.

9. As the issue of paternity arose in succession proceedings, where the 2 children have already intervened, the application for a paternity test ought to have been filed in that cause. It is an issue relevant in succession proceedings, and it can quite properly be determined in those proceedings, without the parties having to initiate separate proceedings. There is wealth of case law, where the probate courts have entertained such applications, and made appropriate determinations. It was underscored, in those proceedings, that the court has unfettered discretion in that regard. See EWG vs. JMN & another [2017] eKLR (Odero, J), In re Estate of Jacob Mwalekwa Mwambewa (Deceased) [2018] eKLR (Thande, J), In re Estate of SMM'I (Deceased) [2019] eKLR (Mabeya, J) and In re Estate of JMK (Deceased) [2021] eKLR (Achode, J).

10. I suspect an element of forum-shopping in the whole affair. Hon. PY Kulecho, Senior Resident Magistrate, was seized of the succession cause, in Busia CMCSC No. 205 of 2020, where the probate

court declined to accept that the 2 children were children of the deceased, in the absence of forensic evidence. As the court seized of the matter had pronounced itself on the matter, it would appear that the respondent chose not to move the same court, on the application for the DNA testing, and hedged her bets elsewhere, in separate proceedings, in the hope that the matter would not land in the hands of Hon. Kulecho, SRM.

11. Secondly, an application for a DNA test, ought to be made in a substantive suit, either in a succession cause, or a children's matter, or in a constitutional petition. The order for it ought not be sought in miscellaneous proceedings. The reason for this is that an order for a DNA test is very invasive or intrusive, in terms of the rights to integrity and privacy of those affected. The test ought to be conducted within a certain context. A succession cause, or a children's case, or a constitutional petition would provide such a context. There must be a foundation, to provide basis for allowing such an invasion of privacy. There was no such context in the cause that was before the subordinate court. The trial court relied on a decision made by a probate court, and another by a children's court, but it missed the context within which those decisions were made, for they were all made in substantive causes, rather than in miscellaneous causes.

12. A substantive suit or cause turns on substantive issues. Where substantive proceedings are filed, a full trial is usually conducted, to determine those substantive issues or matters. A miscellaneous cause does not turn on substantive matters, but mainly on peripheral or procedural issues. A decision, that would affect the fundamental or constitutional rights and freedoms of an individual, ought not be made in a miscellaneous cause, but in a substantive cause, where a substantive trial or hearing ought to be conducted, before orders, with the potential of compromising on fundamental rights and freedoms, are made.

13. Thirdly, because of its very invasive nature, an order for DNA testing, using samples to be provided by individuals who are alive, ought to be made against persons who are themselves parties to the proceedings. That came out in In re Estate of RNC & 2 others vs. SMG [2017] eKLR (Ougo, J) and In re Estate of MAP (Deceased) [2019] eKLR (Ougo, J), where the court was reluctant to order DNA profiling, using samples taken from persons who were not party to the matter, although those individuals were related to the deceased, so long as their consents had not been obtained. See also In re Estate of ZWN (Deceased) [2022] eKLR (J. Ngugi, J).

14. The order, that the trial court made, was against the appellant, yet the appellant was not the one to avail the DNA samples. The samples were to come from her own children. Her children were not made parties to the miscellaneous cause that was before the trial court. The letter from the Chief indicates that most of the said children were adult, except for 1. The adult children could only be compelled, if they had been made parties to the suit in their own right, where they would have had opportunity to be heard in the case against them. Regarding the minor child of the appellant, the miscellaneous cause before the trial court had not been brought against the appellant on behalf of that minor. That minor was not, therefore, a party in those proceedings, and no orders could validly issue against her. Although the miscellaneous cause was framed as a case against the appellant, the orders sought were not in fact against her, but her children, as it was them to provide the samples, yet they were not named as parties in that cause. Those children should not have been condemned unheard, and the trial court should not have ordered invasion into their privacy, in the manner sought, without them being party to the matter in court, and, therefore, without affording them a chance to say something, either in support or opposition to the order sought against them.

15. In a succession cause, such children, as those of the appellant, would be parties, for a succession cause would be in the estate of their dead father, where they would have a stake. A DNA test order sought there would entitle them, in those proceedings, to have a say on the matter.

16. In view of the above, I believe I have said enough to demonstrate that the appeal herein has merit, and I hereby allow it. The consequence shall be that the order, made on 28th September 2021, in Busia CMC Misc. Application No. E021 of 2021, is hereby vacated, and substituted with an order dismissing the Motion, dated 17th June 2021. Each party shall bear their own costs. Orders accordingly.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 27TH DAY OF NOVEMBER 2024.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Otanga, instructed by Bogonko Otanga & Company, Advocates for the appellant.

Mr. Ashioya, instructed by Ashioya & Company, Advocates for the respondents.