DM v LMNK (Family Appeal E088 of 2021)
[2023] KEHC 1143 (KLR) (Family) (27 January 2023) (Judgment)

Neutral citation: [2023] KEHC 1143 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

FAMILY APPEAL E088 OF 2021

DKN MAGARE, J

JANUARY 27, 2023

BETWEEN

DM ..... APPELLANT

AND

LMNK ..... RESPONDENT

JUDGMENT

1. This matter came up today morning for hearing of an Appeal from the decision of Hon. M.A Otindo given onAugust 3, 2021. In that decision the learned Magistrate, delivered a ruling dismissing an application dated March 3, 2021. The appellant had sought prayers 8-13 of the impugned application. The same is a convoluted one and repetitive. In short that application was of another decision given on December 9, 2020pending the carrying out of DNA on a child MGN. From the record there is no evidence of the said DNA events having been carried out.

2. In a 7 paragraph Memorandum of Appeal, which is basically repetitive the Appellant sought that the Court sets aside the Children Court's order dismissing application dated March 3, 2021 be and thus court allows the same in terms of prayers 8 to 13.

3. The learned Advocate for therespondent did not attend court despite being served. I ordered the matter to proceed nonetheless

Background to the case

4. Accordingly, to the record the appellant was served and did not respond to the application for interim orders within the requisite time the application for interim orders which had.

5. I have perused page 30 of the record, which indicates that the Appellant was served with a demand letter through WhatsApp messaging service on September 18, 2020. He replied through the Advocates, 2 days later on September 21, 2021. In a terse statement the defendant's Advocates, stated: -

> " We act for (details omitted to protect the minor) (herein our client,) who has placed your letter dated September 17, 2020 instant, the contents whereof we have noted. Our client refutes the claim and put your client to strict proof"
>
> signed Kahia Mwangi
>
> Advocate

Analysis

6. I set the letter in extentio to illustrate the speed and alacrity with which theappellant refuted the demand letter. The appellant did not use the same speed to respond the summons and the application. It is instructive that it is till November 16, 2020at 11.49 am when the respondent served the appellant with pleadings.

7. No action was taken in response thereto to date. I have also perused the defence filed to the main claim. The lesser I talk about it the better given that the main claim is pending.

8. Suffice to say that there is no explanation whatsoever given to the Learned Magistrate for not defending the application that led to the orders of December 9, 2020. Theappellant is evasive in the replies in the application and even in his Defence and witness statement. It is not easy to know whether he is denying paternity for not having a relationship or because someone else is the father.

9. Back to the Appeal, the Magistrate exercised discretionary powers to grant interim orders to have the child maintained pending hearing of the main suit. In exercise of the discretion, the Magistrate has to be judicious and not capricious.

10. The respondent did not file and serve pleadings immediately he issued a demand notice. This was may have been in vain hope that consensus will be reached. This however remains in the realm of conjecture. It may never be known without the respondent attending and shading some light.

11. Thiscourt has now been called upon to set aside exercise of judicial discretion in an interlocutory matter. The Court of Appeal in the *locus Classicus* case of *Mbogo & another v Shah* (1968) EA 93 Sir Charles Newbold, at Page 96 President of the East African Court of Appeal stated as doth:-

> " The Appellate Court should not interfere with exercise of discretion of a Judge unless it is satisfied that he misdirected himself in some matter and as a result, arrived at a wrong decision or unless it is manifestly clear from the case as a whole that the Judge was clearly wrong in the exercise of discretion and that and as a result, has been a miscarriage of Justice."

12. Where the court exercised its discretion correctly, then the Appellate Court cannot interfere with such exercise. Sir Clement De Lestang, VP was succinct that the matters of discretion, where matters favour both parties, it is not enough that the Court itself would have come to a different conclusion for setting aside.

13. The Principles we distil for setting aside exercise of exercise of discretion are: -

    a. The Appellate Court cannot substitute the discretion by the Lower Court simply because it could have reached a different result.

b. Only when the court is plainly wrong in the case as a whole, with the Appellate Court interfere with discretion.

c. Exercise of discretion, even where it may be wrong but not plainly wrong cannot be set aside unless it causes injustice or undue difficulties.

d. The misdirection of the court should not be in some mundane matter but in some decisive matter which must result in a wrong decision.

14. Applying the Principles, it is noted that the parties had agreed on DNA test. On the date of examination, the appellant allegedly fell sick. To date he has not demonstrated why DNA test was not been carried out. The prayers mainly were predicated on DNA results and his alleged denial of paternity. I do not see a valid denial of aaverments in the pleadings filed in court.

15. The results were to be obtained through collection of samples within 15 days as ordered by the court 30/6/2021 as per page 49 of the record. Those days lapsed on 15/7/2021. There is therefore no subject matter to await trial.

16 The DNA test was not carried out. Several moths later the Appellant has not had DNA test carried out. It is this illusory request meant to obsibicate issues and waste precious judicial time. The DNA test was the linchpin upon which the application dated March 3, 2021 and this Appeal were predicated upon. The same have evaporated like morning due in the presence of hot summer air.

17. The learned magistrate had indicated that the orders were to subsist till DNA was carried out. Nothing could have been easier than to do DNA as ordered and foreclose the issue. The growth of a minor does not wait for adults to finish playing their games. Every day in a minor's life is crucial as failure to maintain has immediate dire and sometimes cataclisic effect on the life of the minors. It is easier to undo payment of maintainance though a refund than sending an apolicgogy to an emaciated child whose "putative parents", to use the Appelnts' lingo are inovled in a wild goose chase of their ego and subtleties that have nothing germanine to the growth of the minor.

18. The record indicates that at some point the appellant was admitted, reportedly at MP Shah Hospital. That could have been a perfect place to extract DNA and transmit to the relevant lab, with the chain of custody being complied with and with necessary arrangements being made between legal counsel for the parties

19. Without having DNA samples extracted, the appellant does not appear genuinely interested in knowing the truth. It is not a normal behaviour of someone who does not already know the truth.

20. He however chose to use his sickness as an excuse not to extract samples. DNA samples are still valid even if one is sick or even, it has been extracted where the case involved an alleged deceased father. The appellant cannot thus fault the court in exercise discretion in favour of a child who is most likely his. He cannot fault the court. He has taken no step to samples collected. The exercised discretion judiciously and with utmost interest in the best interest of the child.

21. The appellant did not take a chance to have the test carried out. In the circumstances, he cannot visit any injustice upon anyone other than himself.

22. Before I depart from this Judgment, there is an issue that disturbed me about the conduct of the appellant is the matter. The appellant was proceeding on the premises that he had denied paternity and as such he is not bound to pay maintenance till paternity is proved. That is not the law and that is not the position in so far as the pleadings in this matter are concerned.

23. The court below was determining a matter of the interest of Children. Children cases by their very nature are brought forth through a process covered under section 60 (m) of the *Evidence Act*, that is the court can take Judicial Notice of the following facts: -

> " (m). The ordinary course of nature."

24. The respondent in a succinct application, laid bare facts and circumstances that will lead the court, even when not invited, to take Judicial notice of ordinary cause of nature. None of the averments regarding the nature and extent of natural activities, which both parties are presumed to be capable of engaging in, were specifically denied or traversed seriatim.

25. The appellant simply pleaded:

> " I am a public figure who may have associated with the plaintiff."

26. To be an associated person, according to black law dictionary is to akin to noscitur asociis, which means "that it is known by its associates." It is my humble view that unless, the appellant pleads with exactitude the basis of denial of paternity, the court will presume the association as narrated by the Respondent in her pleadings.

27. In the case of *Raghbir Singh Chatte v National Bank of Kenya Limited* [1996] eKLR, the court of Appeal stated as doth:-

> " Paragraph 4 of the defence then indulged in what can only be described in the particular circumstances of the case, as prevarication, lack of candidness and double tongue and which in my view, made things worse than they already were,.....

The court continued:-

> (Therefore) I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in he appellant's defence.

28. In, the pleadings the appellant answers to the question of a putative father. A putative father according to black law dictionary, is an alleged biological father born out of wedlock. However, the Respondent pleaded that the minor is the biological of a child of the Appellant; paragraph 11 of the plaint narrates as follows:- "3. On or about 25/9/2008, the plaintiff met the defendant and fell in love. Out of the said relationship, they were blessed with a minor, MGN who was born on. (details omitted)."

29. The Appellant has not in any pleading denied the above vivid description. I put this question to counsel who refered me to paragraph 3 of the defence. The appellant has also not denied any sexual escapades that led to the birth of the minor.

30. In the defence dated December 16, 2020 filed by his advocates, Paragraph 2 of the defence deals with a putative father. The putative father is not in the Plaintiff's pleadings. That the learned Magistrate struck out documents application filed by the firm since the Notice of Appointment was filed later No appeal was filed against their Ruling. However, the defence was not struck out.

31. In my view the said defence is properly on record. Under Order 6 Rule 2(4) of the *Civil Procedure Rules*, where a defence contained an address for service as required under order 6 Ruler 2(3), it is to be treated as an Appearance. Therefore, Defence is properly on record. The same does not specifically

deny paternity. Parties are bound by their pleadings. The court had no basis not to allow the application of December 9, 2020.

32. I also note the appellant has special knowledge whether or not he had unprotected sex with the Respondent. This is a matter within his actual knowledge. Whereas, section 107 places the burden of proof on whoever alleges, there are exceptions, in particular Section 112 of the *Evidence Act* this provides as ...

> "Proof of special knowledge in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

33. The appellant was uniquely and singularly in a position to tender evidence, and plead whether the child is his, but he failed. Having not denied the child to be his in his pleadings or in any way traversed any of allegations, the court was right in presuming the defendant to be the father.

34. The foregoing is buttressed by section 4 of the *Evidence Act* which provides for the rebuttable presumption. The court was did not err in ordering the appellant to maintain the minor and ordered by the court below, till DNA is carried out.

35. This order however cannot continue in perpetuity as the parties remain in a state of animated suspension. The truth should be known and parties be set free as only the truth can open the way for the appellant to bond with is child before age of majority as all fathers will want to do.

36. The Magistrate exercised her discretion correctly. I find no fault whatsoever in her reasoning.

37. In the circumstances, the Appeal lacks merit and is hereby dismissed with costs.

38. At the time of delivery of Judgment, the court may at its discretion award costs with or without respondent. This is premised on section 27 of the *Civil Procedure Act*.

Section 27 of the *Civil Procedure Act* provides;

> "(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
>
> (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

39. Having awarded the costs to the respondent, I exercise discretion to determine at this time of Judgment the extent to which costs are to be paid. This was a fairly contentious matter. Having regard to the subject matter, the interest of the parties, the costs are awarded at Kshs. 75,000/= payable within 30 days to the Respondent and in default execution do issue.

40. In order to avoid prolonged continued lethargy in this matter, I make the following orders , proprio motu, that original file in respect of the Children's matter it is hereby ordered that the primary file be returned forthwith to the Children Court for expedited hearing at the earliest possible opportunity.

Disposition

a. The Appellate Court cannot substitute the Lower Court's discretion, merely because the Appellate Court could have reached a different conclusion.

b. In case where there are two possible correct decisions, once the Magistrate exercises discretion correctly, the said has to stand even if the alternative could have been at equally correct decision. In other words, where these are conditions favourably the Applicant and Respondent equally the Appellate Court cannot false the trial Court for Ruling in favour of the Respondent even if the trial Court itself, had a divergent opinion.

41. Itherefore make the following orders: -

    a. The Appeal lacks merit and is hereby dismissed with costs of Kshs. 75,000/= payable within 30 days failing which execution do issue.

    b. The appellant to avail himself for extraction of DNA samples within the next 21 days at the Government Chemist, Nairobi, whether or not he will be of good health.

    c. Failing taking of DNA samples there will be an irrebutable presumption, from the 22nd day that from the Date hereof that the minor herein is a biological daughter of the Appellant.

    d. The parties to avail themselves for carrying out of DNA Test at the Government Chemists, Nairobi within 21 days from the date hereof. The Appellant to pay for the test if the Respondent had not paid already. Should the test from out to be negative, the Respondent to refund.

    e. In default of not taking DNA samples or paying for the test within 21 days, the order for DNA shall lapse. In case of lapsing, there shall be an irrebutable presumption that the minor herein is the biological daughter of the appellant.

    f. The trial Magistrate to fix the matter for hearing after 21 days from the date hereof and proceed as in total compliance with section 4 of the *Evidence Act*. For avoidance of doubt, the Magistrate is to proceed to determine only the issues of maintenance, upkeep school fees among others as pleaded except paternity the same having been foreclosed. The issue of partnity will have been determined either though the DNA or the irrebuttable presumption, if no DNA is extracted within 21 days as aforesaid.

    g. The Lower Court file to be transmitted to the Children's Court for hearing on a day to day and on priority basis. The matter children be mentioned on February 20, 2023 in the Children's Court to fix a near hearing date and to receive DNA results or further orders regarding the DNA results before the said Magistrate or a Magistrate assigned case.

    h. The Children case be mentioned on February 20, 2023 to fix a hearing date and get a report on compliance.

    i. This matter be mentioned on March 4, 2023 before the Deputy Registrar for further orders regarding costs.

    j. The file is closed same for costs.

DATED, SIGNED AND DELIVERED THAT 27TH DAY OF JANUARY, 2023.

JUSTICE DENNIS KIZITO MAGARE

JUDGE OF THE HIGH COURT, NAIROBI

In the presence of Mr. Bariki for the Appellant

No appearance for Respondent

Lucy Mwangi..... court Assistant