KPM v JWK (Civil Appeal 83 of 2019) [2022] KEHC 14610 (KLR) (Family) (28 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14610 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

CIVIL APPEAL 83 OF 2019

AO MUCHELULE, J

OCTOBER 28, 2022

BETWEEN

KPM ..... APPELLANT

AND

JWK ..... RESPONDENT

(An appeal from the ruling and or order of the Honourable G.M. Gitonga (PM) delivered on 12th July 2019 in Nairobi Children's Court Case No. 105 of 2017)

JUDGMENT

1. The appellant KPM and the respondent JWK had an affair, following which between August 2012 and February 2014 they cohabited. On April 17, 2012 the respondent delivered a son AFB. At the time there was no issue about the child's paternity. All the relevant documents indicated the appellant as the father.

2. In 2014 the relationship between the appellant and the respondent went sour. The respondent took away the child. She eventually relocated to Australia, leaving the child with her mother. This led the appellant to file Cause No 105 of 2017 at the children court at Milimani seeking to have the physical custody of the child, among other prayers. He obtained an interim order of custody pending the hearing and determination of the application he filed along with the cause. In the course of the application, the respondent claimed that the appellant was not the father of the child and made an oral application for a DNA test to determine the paternity of the child. The trial court asked the parties to discuss the issue. They recorded a consent to have the DNA test to be conducted. This was on November 21, 2018.

3. In the course of time, the appellant changed his mind and claimed that a DNA test was an intrusion on his right to privacy. This led to the respondent to file a formal application dated January 11, 2019

seeking a DNA test. The court heard the application, and on July 12, 2019 directed that the DNA be conducted. The court's position was that the parties, having entered into the consent of November 21, 2018, were bound to have the DNA conducted. It stated as follows:-

> ' The parties having consented to conduct a DNA test cannot turn around to argue an application seeking to address the same thing. The integrity of this court lies in the consistency of its orders. The court regrets that we had to hear an application which was unnecessary in light of the consent order on record regarding DNA testing.'

4. This ruling led to the present appeal dated July 22, 2019 whose grounds were as follows:-

'

' 1) The learned magistrate erred in fact and law by holding that there is a court order on record in respect of DNA test.

2) The learned magistrate erred in fact and law by resurrecting an order when thee was none.

3) The learned magistrate erred in fact and law by failing to determine the defendant's application dated January 11, 2019 in the merits and on the basis of submissions made by parties on the application.

4) The learned magistrate erred in fact and law by failing to give a decision on the application dated January 11, 2019.

5) The learned magistrate erred in fact and law by failing to consider that the consent order of the parties on November 21, 2018 had been frustrated, vitiated, spent, nullified and/or by vacated the conduct of the defendant and subsequent orders of the court.

6) The learned magistrate erred in fact and law by failing to consider that the court itself had made orders subsequent to the order of November 21, 2018 based on changed circumstances and the conduct of the defendant which frustrated, vitiated and subsequently vacated and/or nullified the orders of November 21, 2018 and changed the position and rights of the parties.

7) The learned magistrate erred by failing to consider that the defendant's application dated January 11, 2019, which was before the court for hearing and determination, had been necessitated and predicated upon the changed circumstances and the defendant's disobedience of the court's earlier orders and frustration, vacation and/or nullification of those orders.

8) The learned magistrate erred by failing to consider and determine that the application by the defendant to subject the plaintiff to a DNA test had been founded on bad faith and illegality and therefore could not be enforced.

9) The learned magistrate erred in fact and law by directing that a DNA test should be conducted without due regard for the law and procedure before making such an order.

10) The learned magistrate erred fundamentally by failing to consider that the court had constructively coerced the parties/plaintiff into entering a consent

order/agreement on November 21, 2018 for the conduct of a DNA test without sufficient regard for the seriousness of the issue, the rights of the parties and the peculiar circumstances of the case, which require a fair and considered hearing.

11) The learned magistrate erred in fact and law by casually and offhandedly directing the plaintiff to subject himself to a DNA test without taking into consideration the gravity, implications and rights of the plaintiff and the welfare and best interests of the child.

12) The learned magistrate erred in fact and law by holding that the rights of the parties and parental responsibility to the child can be determined on the basis of the DNA test.

13) The learned magistrate fundamentally erred in fact and law by not considering the welfare and best interests of the child before directing the plaintiff/parties to submit himself to a DNA test.

14) The leaned magistrate erred in fact and law by contradicting himself and holding that there was already a consent order on the one hand and the other had giving orders that were not agreed upon by the parties.

15) The learned magistrate erred in ruling that the plaintiff shall bear the costs of the DNA test in the event of a negative test, ie a test that established that the plaintiff is not the biological father of the subject minor without taking into consideration the fact that the plaintiff does not deny paternity and has never refused responsibility for the child.

16) The learned magistrate erred in fact and law by failing to consider and hold that the defendant by her own conduct was estopped from demand a DNA test to determine the paternity of the child.

17) The learned magistrate erred in fact and law by failing to consider and determine that the defendant was not acting the best interests of the child.

18) The learned magistrate erred in fact and law by failing to consider and determine that in view of the defendant's conduct a DNA test could not resolve and determine parental responsibility and was therefore not in the best interests of the child.

19) The learned magistrate erred in fact and law by directing that a DNA test be conducted when the defendant had had not laid any or any property basis for the conduct of the test in accordance with the law.

20) The learned magistrate erred in fact and law by failing to consider and determine that in view of the defendant's conduct the demand for a DNA test was made in bad faith to be a roving inquiry and a violation of the plaintiff's rights and fundamental freedoms.'

5. The prayers in the memorandum of appeal were:-

' a) This appeal be allowed.

b. The decision and ruling of the children's court made on the July 12, 2019 be and is hereby set aside to the extent that its directs or compels the plaintiff to submit himself and his child to a DNA test.

c. A declaration be and is hereby issued that it is not in the best interest and welfare of the child (AFB) for the plaintiff and the child to be coerced into conducting a DNA test.

d. A declaration be and is hereby issued that the defendant is estopped from demanding or coercing the plaintiff to submit himself to a DNA test to determine the paternity of AFB.

e. An order be and is hereby made directing the parties to hear and determine the suit before the Nairobi children's court on merit.

f. Any other relief the honourable court may deem just and fit to grant.

6. It should be noted that the main suit before the children court has not been heard and determined. This is quite unfortunate given that such a matter relating to a child ought to have received immediate attention and conclusion.

7. This court directed the counsel to the parties to address the appeal through written submissions. I am grateful that either side filed the submissions.

8. This being a first appeal, this court is called upon to subject the whole evidence before the trial court to a fresh and exhaustive review and reach its own conclusions thereon, while remembering that it did not have the opportunity to see and hear the parties, an advantage the trial court had (*Selle & Another –v- Associated Motor Boat Co Ltd & Others [1968]EA 123*). In the appeal, I consider that the parties have not been heard by the trial court on the main cause. Matters will certainly become clearer when that happens. The appeal only relates to the ruling delivered by the trial court on July 12, 2019.

9. For purposes of emphasis, the portion of the ruling that was contentious, and therefore appealed against by the appellant, was the trial court's reiteration of the fact that the issue of DNA testing on the part of the appellant had been determined by the consent entered into by the parties on November 21, 2018, and therefore that the application dated January 11, 2019 by the respondent seeking that DNA test be conducted was, as it were, superfluous and not deserving of consideration. I say this because of the complaint by the appellant that the trial court did not consider the rival affidavits and written submissions when dealing with the application.

10. The record shows that the consent that was recorded on November 21, 2018, by M/s Soweto for the appellant and Mr Muriuki for the respondent followed negotiations. It was therefore a consent consciously entered into by the parties. This consent created a contractual arrangement between the appellant and the respondent as regards the issue of DNA test to determine whether or not the former was the father of the child in question. Indeed, it is trite that an order made with the consent of the parties becomes a contract to be honoured by the parties as it is binding upon them (*Hiram –v- Kassam (1952) 19 EACA 131*). The parties were however at liberty to apply to the trial court to vary and/or set aside or discharge the consent order if they were able to demonstrate that the order was obtained by fraud or collusion or misrepresentation, or for any other reason which would enable the court to set aside an agreement (*Brooke Bond Liebig v Mallya]1975] EA 266*).

11. Once the consent order was recorded, the appellant was not allowed to whimsically seek to bolt out of the arrangement. If he had come by any reasons that would make him come out of the arrangement

regarding DNA, he needed to make a formal application to the court to vary or discharge the order. He was not otherwise allowed to resile from the agreement.

12. The same consent order bound the respondent. She was not at liberty to seek the same order for DNA testing. When she filed the application subject of the appeal, the trial court was correct in reminding her that there was already a consent order directing the appellant to go for DNA testing.

13. The appellant has argued in this appeal that the order to undergo DNA testing was an affront to morality and the values of the *Constitution*; was an intrusion on his privacy; and not in the best interests of the child. Quite unfortunately, this court is not dealing with an appeal against the consent order recorded on November 21, 2018. It has no jurisdiction to re-open the matter, when the order has not been varied, set aside or discharged.

14. This is not the forum to argue that the trial court erred in fact or law by directing that a DNA test be conducted when the respondent had not laid any or proper basis for the conduct of the test in accordance with the law. Nor can it be argued that the court failed to consider and determine that the respondent's demand for a DNA test was made in bad faith. This is because the parties voluntarily agreed to have the appellant to undergo a DNA test.

15. Lastly, if the appellant felt that the consent order had been frustrated and or vitiated by the subsequent conduct of the respondent, he was required to formally apply to the trial court for review and establish by evidence how this had come to be.

16. In passing, let me point out that, whether one is considering article 53(1)(a) of the *Constitution* or article 6 of the African Charter on the Rights and Welfare of the Child or article 24 of the International Convention on Civil and Political Rights or article 7 of the United Nations Convention on the Rights of Child, a child has the right to be registered at birth, to have a name and its nationality indicated. He has the right to have the name of his parents indicated in his birth documents. Having an identify is a fundamental right which allows the child the ability to enjoy all his other rights. Identity encompasses the family name, the surname, date of birth, gender and nationality.

17. In this case, the appellant and the respondent declared the name of the child and that of its father when it was born. When the respondent subsequently claimed that the appellant was not the father of the child, that immediately put the identity of the child at peril. This threatened the child's fundamental right to identity. Fortunately, the parties immediately agreed to settle matter through the consent. These are the reasons why the conduct of DNA test will be in the best interests of the child who has to be helped to know, once and for all, whether the applicant is his biological father.

18. I hope I have said enough to show that, this appeal has no merits and is hereby dismissed with costs.

DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 28TH DAY OF OCTOBER 2022.

AO MUCHELULE

JUDGE