REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CHILDREN APPEAL NO. 1 OF 2017

DKK.....APPELLANT

- VERSUS-

WK.....1ST RESPONDENT

GK.....2ND RESPONDENT

[Being an appeal from the Judgment of the Principal Magistrate's Court at Eldama Ravine PMC Children Case No. 18 of 2015 delivered on the 31st day of January 2017 by Hon. R. Yator, SRM]

JUDGMENT

Introduction

1. This is an appeal from the decision of the trial court (Hon. R Yator, SRM) where she dismissed the plaintiff's suit pursuant to the provisions of **Order 2 Rule 15** of the Civil Procedure Rules upon holding that there was no issue pending for determination upon resolving a question of paternity of the child subject of the proceedings by a DNA test report from the Government Chemist.

2. By a Plaint dated 30th October 2015, filed in person the Plaintiff being aggrieved by the conduct of the respondents, respectively father and daughter for claiming that he (plaintiff) was the father of a child with the 2nd defendant/respondent herein, sought relief from the court by way of judgment against the Defendants for orders as follows:

a. That the Defendant be compelled to pay D.NA expenses for their son K to establish his paternity if true that he is my biological son;

b. General damages for mental torture be provided to the Plaintiff;

c. Cost of this suit Interest on (a) and (b) above and

d. Any other relief that this honourable court may deem fit and just to grant.

3. 3.The defendants filed a Defence dated 4th December 2015 through their counsel on record herein wherein the defendants averred that the issue known as C K is the biological son of the plaintiff with whom the 2nd defendant averred she had a love relationship in 1994. The defendants contended that the orders sought in the plaintiff could not be granted because

> *"11. The 1st and 2nd defendants avers and maintain that the orders sought cannot issue for the reason that they are not the ones denying the paternity. As such, since the plaintiff is alleging that he is not the father then it follows that he must proof by shouldering the costs of DNA test which the 2nd defendant is more than willing to be subjected to and so is the son."*

4. The record of proceedings of trial court and judgment are set out in full as follows:

> ***"REPUBLIC OF KENYA***
>
> ***IN THE PRINCIPAL MAGISTRATES COURT AT ELDAMA RAVINE***
>
> ***P & C NO.18 OF 2015***

D KC.……..PLAINTIFF

VERSUS

WK.…… 1ST DEFENDANT

GK.……..2ND DEFENDANT

23.11.2015

Memorandum of Appearance dated 23rd November, 2015 drawn and filed herein by

Tengek on and Koske Co. Advocates for the Defendants.

M. KASERA

PRINCIPALMAGISTRATE

23.11.2015

04.12.2015

1st and 2nd Defendants' statement of Defence, 1st and 2nd Defendants' list of witnesses and 1st and 2nd Defendants' Bundle of documents drawn and filed by Tengekyon and Koske Company Advocates for the Defendants.

R. YATOR

SENIOR RESIDENTMAGISTRATE

16.02.2016

Repyling to the 1st and 2nd Defendants' statement of Defence drawn and filed herein by

D K C the Plaintiff herein.

R. YATOR

SENIOR RESIDENTMAGISTRATE

08.03.2016

In the Registry D KCr the Plaintiff - present.

Mr. Chesire for the Defendant – present

Case fixed for hearing on 29th March, 2016.

R. YATOR

SENIORRESIDENTMAGISTRATE

29.03.2016

Coram: Before Hon. R. Yator - SRM Court clerk - Lilian

Petitioner - present

Respondent - present Chesire for Defendants - present

Plaintiff: I am ready to proceed.

R. YATOR

SENIOR RESIDENTMAGISTRATE

PW1: D KI C - ADULT CHRISTIAN AND STATES IN KALENJIN:

I come from Saos and I am a peasant farmer. I am in court as there is a child who was allegedly said to be mine and the child is not mine. We started the case herein and in fact went to chief's office twice at Saos and the third time meeting was held at my home. The case was done so I agree the child was mine and at last we disagreed and I had insisted we go for DNA so to establish if child is mine. GK the Defendant alleges I am father to her son who is a boy and who has even used my names in his birth certificate and I do not know how she got my ID copy yet I am blind. I request that my blood sample is taken to verify if I am the father.

R. YATOR

SENIOR RESIDENT MAGISTRATE

COURT: I suggest that since this is a paternity dispute the Plaintiff and subject be subjected to

DNA test before determination of suit herein.

R. YATOR

SENIOR RESIDENT MAGISTRATE

Chesire: We concur with the court for DNA test but issue is for who to pay for the DNA test as the Plaintiff prays that Defendants shoulders the cost considering it's the Plaintiff who

filed suit.

R. YATOR

SENIOR RESIDENT MAGISTRATE

Plaintiff: I am ready to remove blood sample but not expenses.

R. YATOR

SENIOR RESIDENT MAGISTRATE

Chesire: My client is ready to take minor for collection of sample.

R. YATOR

SENIOR RESIDENT MAGISTRATE

COURT:

I do note that the Plaintiff seems undecided hence matter adjourned for him to reply on meeting of expenses.

R.YATOR

SENIOR RESIDENT MAGISTRATE

COURT: Further mention 28th April, 2016.

R.YATOR

SENIOR RESIDENT MAGISTRATE

29.03.2016

28.04.2016

Coram: Before M. Kasera - PM Court clerk - Lilian

Plaintiff - present

Defendant - present.

Mr. Chesire - present for Defendan

Plaintiff:

I am ready to pay for DNA test. I do not have money for transport. I will be ready on 20th May, 2016. i\t1. KASERA

PRINCIPAL MAGISTRATE

COURT: Mention on 24thMay, 2016 for Plaintiff to bring money for transport, DNA to Nairobi.

M. KASERA PRINCIPAL MAGISTRATE

28.04.2016

Coram: Before Hon. R. Yator - SRM

Court clerk - Lilian

Plaintiff - present

Defendant - absent

24.05.2016

Plaintiff:

I shall be able to cater for DNA test but not transport for the mother and the child and I

am not ready to pay for transport.

R. YATOR SENIOR RESIDENT MAGISTRATE

Defendant:

The last time he was to bring Ksh.13,OOO/=and today we were to go Nairobi today and

I cannot raise transport.

R. YATOR

SENIOR RESIDENT MAGISTRATE

COURT:

The Plaintiff is informed that he is the one seeking orders on DNA hence has to meet expenses and I shall be ready to pay Ksh.3000/= towards transport. R. YATOR SENIOR RESIDENT MAGISTRATE

COURT: The amount of Kshs.3000/= is paid to Defendant who acknowledges receipt and the subject be escorted to Nairobi for collection of DNA sample at the Government Chemist on the 14thJune, 2016. Results be forwarded to Eldama Ravine Law Courts.

R. YATOR

SENIOR RESIDENTMAGISTRATE

24.05.2016

06.09.2016

Coram: Before Hon. R. Yator - SRM Court clerk - LilianjDiana

Plaintiff - present

Defendant - absent

Plaintiff: I came to mention to confirm position of the DNA results which we had gone to conduct in Nairobi on in July 2016 and to date I was told results would be forwarded and the same has not arrived and I have been coming to check the same and has not been forwarded and we tried to call Nairobi and said they had forwarded. R. YATOR

SENIOR RESIDENT MAGISTRATE

COURT: The Executive Officer to write to Government Chemist, Nairobi to confirm the said results.

R. YATOR

SENIOR RESIDENT MAGISTRATE

Further mention 27th September, 2016.

R.YATOR

SENIOR RESIDENT MAGISTRATE

06.09.2016

27.09.2016

Coram: Before Hon. R.Yator _.SRM

Court clerk - Lilian Plaintiff- present Defendant -- present

The DNA results are read to the parties who are present in court this 27th September, 2016. R, YATOR SENIORRESIDENTMAGISTRATE 27.09.2016 In the Registry Giadys Kandie the 2nd Defendant -- present NIA for the 1st Defendant and the Plaintiff.

Case fixed for Mention on 13thOctober, 2016. Mention Notice to issue.

R. YATOR

SENIOR RESIDENT/MAGISTRATE

27.09.2017

13.10.2016

Before Hon. R.Yator - SRM Court clerks – Lilian/Diana Plaintiff - absent Defendants: 2nd defendant - present 1st Defendant - absent COURT: Judgment on 21st November, 2016. Notice to issue.

R. YATOR

SENIOR RESIDENT MAGISTRATE

13.10.2016"

The trial court then proceeded to give judgment as follows:

"***JUDGMENT***

D K C filed suit against WK and GK that they be compelled to pay for DNA expenses to establish paternity of one K. That the said K is an adult and son to the 2nd Defendant and that on several occasions the Defendants had alleged that the Plaintiff was the biological father of K and to which fact the Plaintiff disputed in terms of the Plaint further stating he had never been in any love relationship with the 2nd Defendant hence wondered how he could be father to the said KThat the same had subjected him to psychological torture as they insisted he be awarded a portion of the land as he was the son.

Before matter proceeded to full trial, the parties were referred to the Government Chemist for DNA analysis and paternity test and samples were obtained (in terms of the DNA report dated 5th July 2016) from: 1. D K C (alleged father) 2. GK (mother) 3. C K (child) In terms of the said report dated 5th July, 2016 and certified true copy dated 8th September, 2016, the conclusion and opinion was to the extend; "Based on the above findings, there are 99.99+% more chances that D KCr is the biological father to C K, GK's child."

As such and following the DNA report results herein, I find that there are no more issues for determination as the issue of paternity has been confirmed by the report and thus continuing with the matter herein to full trial would be a waste of the court's time.

In terms of Order 2 Rule 15 of the Civil Procedure Rule "15 (1) At any stage of the proceedings, the court may order to be struck out or amended any pleading on the ground that:

a) It discloses no reasonable cause of action or defence in law; or

b) It is scandalous, frivolous or vexatious; or

c) It may prejudice, embarrass or delay the fair trial of the action; or d) It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

As such and there being no issues pending determination, the suit herein is hereby dismissed without costs.

R. YATOR

SENIOR RESIDENTMAGISTRATE

31.01.2017."

5. The plaintiff was aggrieved by the order of the court and he filed the appeal subject of this judgment.

Submissions by the Parties

6. The Counsel for the appellant M/S Nyagaka S.M & Co advocates filed written submissions dated 19th December 2019 as follows:

"***APPELLANT'S WRITTEN SUBMISSION***

A. INTRODUCTION 1.

My Lord, the facts giving rise to this appeal are simple. By plaint dated 30th October 2015, the appellant claimed that the 2nd respondent forcefully and without his consent caused his name to be entered in the 2nd appellant child's birth certificate. The child is known as C K. The appellant denied to have ever sired a child with the 2nd respondent. However, the 2nd respondent forcefully claimed that the child belongs to the appellant hence forcing the appellant to accept the child and give him part of his estate. The appellant applied to court to have their DNA samples tested to settle the issue of paternity. DNA samples were indeed taken and the

results turned out to confirm that the appellant was most likely to be the father of the child in dispute. The appellant was dissatisfied with manner with which the trial court admitted the DNA report hence this appeal.

B. GROUNDS OF APPEAL

2. The appellant raised the following grounds of appeal.

> *I.. That the trial magistrate erred in law and fact by failing to give a concise statement of the case, the points of determination, the decision thereon and reasons for her judgement pronounced on the 31st January 2017.*
>
> *II. That the learned trial Magistrate erred in law and in fact in failing to fully appreciate the totality of evidence presented before her especially the fact that the Exhibit which was produced in court i.e. DNA report which is the only basis of the judgement is not sufficient proof that the appellant is biological father of CK*
>
> *III. That the trial Magistrate erred in law and in fact in entering judgement in favour of the respondents while ignoring the facts that the documents produced by the Respondents could not be authenticated and should be disregarded.*
>
> *IV. That the trial Magistrate erred in law and in fact in not considering and/or ignoring the submissions on behalf of the plaintiff/ appellant and refusing to benefit from material facts supplied by counsel for the plaintiff thus rendering an untenable judgment.*

3. The appellant prayed that his appeal be allowed, judgement against hi be set aside with costs.

C. RESOLUTIONS OF ISSUES RAISED IN MEMORANDUM OF APPEAL

4. My Lord, the center point of the appeal herein is how the DNA report was admitted in evidence by the subordinate court. It is this issue that propelled the Appellant towards bringing up the appeal.

5. As noted above, the appellant denied to have ever been III any relationship with the 2nd respondent. The appellant applied to have a DNA test to determine whether or not C K is his child. The DNA report was the only evidence that would rest the contest between the litigants herein.

6. At page 42 of the Appellant's record of appeal, the DNA result was read to the parties. Whether or not the DNA report was properly executed is unknown as the report was never produced and Marked in evidence. At page 46 of the appellant's record of appeal, the appellant protested against the DNA report which according to him was not signed as can be seen at page 57 of the record of appeal. It is therefore safe to say that the DNA report was not properly admitted in court as required by section 65 and 67 of the Evidence Act Cap 80 laws of Kenya. 67. Proof of documents by primary evidence Documents must be proved by primary evidence except m the cases hereinafter mentioned.

7. The DNA could not be admitted under Section 77 of the Evidence Act because if such a document is to be admitted under that section, it has to be in criminal proceeding alone. In Naomi Bonari Angasa – vs Republic [2018] eKLR {quoted in Kenneth Mwenda Mutugi v Republic [2019] eKLR} the court held as follows:

> *"Whether the P3 medical form was admissible depends on whether it is produced by the make thereof or under Section 77 of the Evidence Act. The doctor who examined PW1 and prepared the P3 form was not called Section 77 of the Evidence Act allows a person other than the one who prepared a report such as the P3 form in issue to produce it provided the presumption of authenticity is met .Once the presumption of authenticity under Section 77(2) aforesaid is met the documents is admissible but the trial court may "Suo moto" or upon request by the accused person call the matter of such a document to appear in court for cross examination on the form and the contents of the report". (Emphasis ours)*

8. As held in the above case, and reasoning by analogy, the DNA report could only be produced by the maker as required by section 65 and 67 of the Evidence Act Cap 80 laws of Kenya which provides as follows: 65. Primary evidence (1) Primary evidence means the document itself produced for the inspection of the court.

9. The DNA report having not been produced and marked could not therefore be used as evidence as rightly put by section 71 of the Evidence Act which provides:

> *Proof of execution of document required by law to be attested*
>
> *If a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there is an attesting witness alive and subject to the process of the court and capable of giving evidence:*

10. As a result of the above, the authenticity of the DNA result could not be verified by the appellant. The appellant was therefore denied a right to fair hearing as he could not be in a position to cross examine the contents of the result of the DNA report. The manner with which the DNA report was admitted in court and the fact that the Appellant did not have a chance to cross examine the

authenticity of the DNA report prejudiced his case as a result of which the scale of Justice tilted in favour of the respondents without giving a chance to the appellant to be heard.

D. CONCLUSION

11. In view of the above, it is therefore safe to hold that the DNA report was admitted in error and was not safe to admit such a document without its maker hence denying the appellant a chance to examine and question it. For reasons stated above, the appellant's appeal is meritorious and same should be allowed as prayed.

Dated at Nakuru this 19TH day of December 20 19

M/S NYAGAKA S.M & CO. ADVOCATES."

7. Counsel for the Respondents M/S Tengekyon & Co. Advocates filed written submissions dated 30th December 2019 in reply as follows:

"***1ST AND 2ND RESPONDENTS SUBMISSION***

These are the humble submissions of the 1st and 2nd respondents herein:

A. PRELUDE.

My lord, These submissions are with respect to the children's Appeal case filed by the Appellant herein.

The Appellant filed a children's case in the lower court being Eldama Ravine Children's case No. 18 of 2015. The same was defended by the Respondents herein and subsequently judgment was made by the then sitting Magistrate Hon. R. Yator SRM on 31st January, 2017.

My lord, it is the said decision by the said Magistrate that forms the basis of this Appeal. Needless to say the said Appeal was filed in court on 15th October, 2019 and an answer thereto filed on 2nd December 2019.

ANALYSIS OF EVIDENCE AND THE LAW.

1. THE APPELANTS CASE

The Appellant being dissatisfied with the decision of the Honourable Magistrate in the lower court hinges his appeal on the grounds inter alia that the trial Magistrate failed to give a concise statement of the case, the decision thereon and reasons for the judgment. The appellant also contends that the trial Magistrate failed to appreciate that the DNA report which formed the basis of her decision was not sufficient proof that he was the biological father to one C K.

He further contends that the documents produced by the Respondents could not be authentic and should be disregarded. Lastly the Appellant contends that the trial Magistrate erred in law and in fact in not considering the submissions of plaintiff.

My Lord, It is our humble submission that the Appeal as filed is totally incompetent and ought not be entertained by the court as it amounts to an abuse of the court process. This is because of the following reasons: a) The suit in the lower court was summarily determined. The said case did not go to full trial and what the trial Magistrate did was to exercise powers conferred on her under order 2 Rule 15 of the civil procedure Rules. We therefore submit that requiring the trial Magistrate to give a concise statement of the case and points of determination is not tenable. b) The main prayer of the Appellant in the lower was that the defendants be compelled to pay DNA expenses for their son K to establish paternity.

My Lord, before trial could commence the trial Magistrate ordered that DNA samples be taken which was indeed done pursuant to the Court Order dated 24thMay, 2016. The samples were taken at Government Chemist on 14thJune, 2016.

My Lord it is in the light of the DNA results that informed the judgment and any allegations that the DNA report from the Government Chemist was not sufficient proof of paternity and in the absence of controverting evidence is extremely absurd. c) The documents tendered by the respondents in respect of the lower court case were all authentic.

My Lord, apart from the DNA report, the Respondents supplied the following documents and the same were not in essence challenge by the Appellant.

I. Copy of 1st and 2nd defendants ID Cards. –

11. Copy of son's child heath card or clinic card.

lll. Copy of son's birth certificate.

lV. Copy of minutes of elders meeting held on 31/09/2007.

v. Copy of minutes of elders meeting held 30/04/2009.

VI. Assorted photographs.

It is worth noting that the Appellant admits in his pleadings that he had a relationship with the 2nd Respondent in the year or before 1994 (See paragraph 4 of the reply to the 1st and 2nd defendants' statement of defence dated 16th February 2016.)

My Lord, while appreciating that the matter did not go to full trial in the lower court the only remedy if any available to the appellant would have been a re-trial so as to interrogate the veracity of Respondents documents. Unfortunately, the Appeal as drafted does not in any way embody any prayer for a re-trial.

d) Parties are bound by their pleadings. The appellant prayed for an order of D A testing which was allowed and done. The return of paternity results confirming that the probability that the appellant was the biological father of one COLLINS KIPKOECH KIBET was 99.99%.

My Lord, we submit that the trial Magistrate was correct in holding that the DNA results having confirmed beyond peradventure that the Appellant was the biological father to C K, there were no other issues for determinations hence her holding and judgment.

2. THE RESPONDENTS CASE

The Respondents case is crystal clear and is predicated on the fact that through and through they - held the position that the appellant is the biological father to C K K. The 2nd respondent, the mother to the above named had a relationship with the appellant sometimes leading to his birth in the year 1994.

We submit that the Childs clinic card and birth certificate indicate that the appellant is the father.

The Respondents obeyed the court order and had samples taken at the Government Chemist as requested by the appellant. We further submit that allegations that the DNA report was tampered with are totally unfounded.

The appellant has no evidence of any interference whatsoever and such wild allegations amount to mere denial of the obvious that he is the biological father.

CONCLUSION

My Lord, in conclusion we submit that the instant appeal is so frivolous and amounts to an abuse of the court process.

We therefore urge the court to uphold the decision of the trial court and dismiss the appeal with costs.

In sum we rely on Order 2 rule 15 of the Civil Procedure Rules. In terms of Order 2 Rule 15 of the Civil Procedure Rules:

"15 (1) At any stage of the proceedings, the court may order to be struck out or amended any pleading on the ground that

(a) It discloses no reasonable cause of action or defence in law; or

(b) It is scandalous, frivolous or vexatious; or c) it may prejudice, embarrass or delay the fair trial of the action; or d) It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be".

My Lord, We lastly humbly submit that the appeal is scandalous, frivolous and vexatious and ought to be dismissed with costs to the respondents.

Dated at Eldama Ravine this 30th day of December 2019.

M/S Tengekyon & Koske Advocates for the respondents."

8. Judgment was reserved.

Issue for determination

9. The broad issue for determination is whether the exercise of discretion by the trial court in dismissing

the appellant's suit was proper and in that determination, the questions of procedure adopted by the trial court for production of Government Chemist's DNA testing report was lawful and violation of the appellant's right to fair hearing arise.

10. The technical objection as to the conformity in form of "Judgment" of the Court to the requirements of "*a concise statement of the case, points for determination, the determination and reasons for the judgment*", as prescribed in like terms by Order 20 rule 4 of the Civil Procedure Rules may be cured by section 79A of the Civil Procedure Act, as follows:

> "*79A. No decree to be altered for error not affecting merits or jurisdiction*
>
> *No decree shall be reversed or substantially varied, nor shall any case be remanded,* ***in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case*** *or the jurisdiction of the court.*
>
> *[Act No. 10 of 1969, Sch.]"*

11. Although not set out in the Ruling of the court under the same rubrics, the aforesaid contents of a judgment are contained in the decision of the Court, and the default does not affect the merit of the decision.

Determination

Test for appellate interference with trial court's discretion

(1) The test of appellate interference with discretion as set out in ***Mbogo v. Shah*** (1968) EA 93 as follows:

> "*A Court of appeal should not interfer with the exercise of the 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 manifest from the case as a whole that the judgment was clearly wrong in the exercise of his discretion and that as a result there has been misjustice."*

12. This appellate court is satisfied that the trial court was ***plainly wrong*** in that it purported to exercise discretion to ***dismiss***, really strike out, the Plaintiff's pleading under **Order 2 rule 15 of the Civil Procedure Rules**, which it could only do on an application by motion under Order 51 rule 1 of the Civil Procedure Rules and ***not on its own motion.*** Order 2 rule 15 of the Civil Procedure Rules is set out in full as follows:

> "***15. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—***
>
> ***(a) it discloses no reasonable cause of action or defence in law; or***
>
> ***(b) it is scandalous, frivolous or vexatious; or***
>
> ***(c) it may prejudice, embarrass or delay the fair trial of the action; or***
>
> ***(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.***
>
> ***(2) No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.***
>
> ***(3) So far as applicable this rule shall apply to an originating summons and a petition."***

13. The trial court's decision subject of the appeal was professed by the trial court as an exercise to discretion to strike out pleadings under Order 2 Rule 15 of the Civil Procedure Rules. However, it is clear that for a valid exercise of the discretion under the rule, there must be ***an application*** before the court under the rule in which according to sub rule 2 of rule 15 there shall be attached no evidence but only a consideration of the particular pleading as a matter of law. That the trial court had to take evidence of the Government Chemist on the DNA test report put the matter beyond the purview of the Order 2 Rule 15 which the trial Magistrate cited as authority for her decision to dismiss the appellant's suit. It was an improper exercise of discretion which must be set aside.

Right to fair hearing

14. As regards the admission into evidence of the DNA report, it is noteworthy that the document was not produced before the court in evidence. No witness was called to produce the report. With, tremendous respect, the trial court acted as a party to the suit by calling for the DNA testing and asking the Executive Officer of the Court to write to the Government Chemist to confirm the authenticity of the report. The record does not show whether or not the Executive Officer wrote to the Government Chemist and whether the DNA report was authenticated. However, the court must assume that this was done as the trial court proceeded to act on the Report as giving authentic position regarding the DNA testing report. As the report was not properly produced before the court, the court could not properly rely on the same for any decision.

15. The procedure of the trial court in calling for the DNA testing and in receiving and seeking authentication thereof placed the trial court in

the middle of the arena of conflict between the parties. The procedure denied the appellant an opportunity to cross-examine the maker of the DNA report and otherwise challenge the findings which is a constitutional guarantee by the right to fair hearing under Article 50 (1) of the Constitution, which provides as follows:

> "***50. Fair Hearing***
>
> *(1)* ***Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing*** *before a court or, if appropriate, another independent and impartial tribunal or body."*

16. In adverting to the contents of the right to fair hearing the Court of Appeal for Eastern Africa in the oft-cited judicial review case of ***De Souza v. Tanga Town Council***, (1961) EA 377 identified the right to cross-examine an accused and challenge evidence put forward against a party as follows:

> "*A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view: Board of Education v. Rice and Others: and to make relevant statement they may desire to bring forward* ***De Verteuil v. Knoggs; General Medical Council v. Speckman*** *(1943) AC 627,641."*

17. Unfortunately, in the suit subject of the appeal the plaintiff was not given an opportunity to challenge the DNA testing report acquired and admitted by the court into evidence without having the analyst produce it before the court. It matters not that the DNA results in the report were accurate; it is that the plaintiff did not get an opportunity to challenge the report, and probably show why the report was inaccurate or wrong. He was not ***heard*** on the report. A judgment obtained without hearing a party is a nullity and one which the party affected is entitled to have set aside ***ex debito justitiae.*** See***Craig v. Kanssen*** [1943] I All ER 108. See also Lord Diplock in *Isaacs v. Robertson*, [1984] 3 All E.R. 140 at 143 that there is a category of orders liable to be set aside *ex debito justitiae* even without need to apply for its setting aside:

> *"[T]here is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make. The judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring* ***an order into the category that attracts ex debito justitiae the right to have it set aside,*** *save that specifically* ***it includes orders that have been obtained in breach of rules of natural justice."***

Order for retrial

18. Counsel for the Respondent pointed out to a retrial as a possible remedy which the appellant could have sought in the prayers of the appeal. Although not sought in the prayers of the Memorandum of Appeal which merely seeks that the appeal be allowed and judgment set aside with costs, the consequence of the grant of prayer for setting aside of judgment is to reopen the suit for hearing at the trial court, akin to a retrial.

19. Moreover, the court is entitled to make consequential orders following its decision on appeal, and under section 78 of the Civil Procedure Act, some of the powers of the appellate court are to remand a case or order a new trial, as follows:

> "***78. Powers of appellate court***
>
> *(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—*
>
> *(a) to determine a case finally;*
>
> ***(b) to remand a case;***
>
> *(c) to frame issues and refer them for trial;*
>
> *(d) to take additional evidence or to require the evidence to be taken;*
>
> ***(e) to order a new trial.***
>
> (2) *Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.*

20. Pursuant to section 78 (1) (e) of the Civil Procedure Act, the appellate court shall, therefore, order a new trial by the trial court as a consequential relief, and in order not to prejudice the retrial, this court shall not discuss the merits of the parties' respective cases.

Orders

21. Accordingly, for the reasons set out above, the appellate court makes the following orders:

1. The Judgment of the trial court delivered on 31st January 2017 is set aside.

2. The hearing of the suit shall proceed to a new trial in the trial court differently constituted.
3. Being in the nature of a Children Case, the shall be an order for expeditious hearing of the dispute and for that purpose the court file in trial court shall forthwith be returned to the trial court for **Directions** as to hearing within 30 days from today.
4. As the appeal was occasioned by an error of the court there shall be no order as to costs on the appeal.

Order accordingly.

DATED AND DELIVERED THIS 29TH DAY OF MAY 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Nyagaka & Co. Advocates for the Appellant.

M/S Tengekyon & Co. Advocates for the Respondents.