REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 116 OF 2015.

EKC.....APPELLANT

VERSUS

IK (Minor) suing through TS.....RESPONDENT

(Being an appeal from the ruling and Order of Honourable T. Olando Resident Magistrate in Children Case No. 327 of 2012 delivered on 8th October, 2015).

JUDGMENT

1. The Appellant, Exekiel Kipkemboi Cheboi, the defendant in Eldoret Children's case No. 327 of 2012 appeals against the whole ruling delivered by Honourable T. M Olando on 8th October, 2015 on the following grounds:-

i. That the ruling is erroneous as it makes findings on issues not pleaded or canvassed.

ii. That, the trial Magistrate erred in law in not dealing with the application before it.

iii. That the trial magistrate erred in law in going on a frolic of his own.

iv. That, the trial magistrate erred in law in not considering all the submissions.

v. That the trial magistrate erred in law in granting final orders to an interlocutory application.

vi. The trial magistrate erred in law in granting final orders when there are triable issues.

vii. The trial magistrate erred in law in granting orders based on grounds that the respondent had abandoned.

viii. That the ruling in extenso shows that the trial magistrate has no basic understanding of the law.

ix. That the ruling is not founded or premised on any factual or legal basis.

x. That the ruling is irrational exuberance of the resident magistrate, seeking publicity.

xi. That the ruling as it is, is an abuse and violation of the law as is established.

2. The appellant prays that the ruling delivered on 8/10/2015 be set aside ex debito justitiae, the respondents application dated 14/10/2015 in Eldoret Children's case no 327 of 2012 be dismissed with costs.

3. The application was canvases by way of written submissions. The appellant submitted that he is praying for inter alia the setting aside the ruling and order of the Children's court together with subsequent orders thereto delivered on 8/10/2015 following the application dated 14/5/2015 that sought final orders that were already sought in the plaint including seeking for and canvassing issues which were not pleaded.

4. The evidence before the trial court did not justify the exercise of the court's discretion in ordering maintenance orders in Guardian ad litem's favor nor did the court have sufficient information upon which it could make an informed decision as parentage was denied.

5. The trial court issued an irregular ruling and order against the appellant while the pleadings raised triable issues of paternity, parental responsibility and maintenance.

6. That parentage is in dispute, consequently suspension of the maintenance orders until the full hearing of the main suit and until the court determines the same with finality is necessary.

7. The issue of paternity remains outstanding as is yet to be determined during the trial of the main suit. It was therefore incumbent for the trial court when confronted with contradictory evidence as to whether the appellant is the biological father of the minor, to in the best interest of the child deal with the issue of a DNA test to establish paternity.

8. Lastly, that the trail court erroneously held inter-alia that the guardian ad litem may have been raped or defiled by the defendant without being intimate. The orders were given in vacuum as they are not sought nor supported by the prayers sought in the main suit.

9. The respondent submitted that in the disputed application the respondent specifically prayed for orders in paragraph 3, 4 and 5 which was canvased by way of written submission. In his ruling, the trial magistrate clearly addressed the issues raised by the parties.

10. The ruling clearly stated that the appellant is to pay Kshs. 33,500 per month being interim maintenance for the minor on the 5th of every month pending the hearing and determination of the main suit. It is thus clear that the orders of the court were interim orders pending the hearing and determination of the main suit.

11. *Section 97* of the *Children's Act, 2001* provides that a court shall have power to make interim maintenance order and in so doing may dispense with any notice that may be prescribed to be given to any person, if it is satisfied that it is in the best interest of the child to do so.

12. The appellant decline to undergo a DNA test to corroborate his denial of being the biological father to the minor only proves that he is the biological father to the said minor and thus the issue of paternity was no longer an issue and the court was only left to deal with interim maintenance and custody of the child.

13. Lastly, that the ruling is not an abuse of court process and violation of the law, the appellant has neither cited the law which the ruling has violated nor demonstrated how the ruling is an abuse of the court process.

14. The main issues for determination are:

a) Whether the Order of 8/10/2015 should be reviewed or set aside

b) Whether the trial magistrate misdirected herself in issuing the said orders.

15. The jurisdiction of the Court for review of orders is provided for in *Order 45 Rule 1 (1)* of the *Civil Procedure Rules* which provides that:

> ***"1. Application for review of decree or order***
>
> ***(1) Any person considering himself aggrieved-***
>
> ***(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
>
> ***(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.***

16. The basis for an application for review or setting aside of an order may be the discovery of new and important matters of evidence which after due diligence, was not within the knowledge or could not be produced by the appellant at the time when the decree was passed or the order made.

17. An application may also be made on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.

18. The Respondent/Applicant has not placed any new and important matter of evidence before this Court for consideration. He has not demonstrated that there is an error apparent on the face of the record and no other sufficient reason has been placed before the Court to warrant the review, variation or setting aside the order of 8.10.2015.

19. The guiding principle in all matters relating to children is that the best interests of the child comes first and is of paramount consideration. This principle is set out in *Article 53(2)* of the *Constitution of Kenya 2010* as follows: *Article 53(2)* of the *Constitution* provides:

> *"(2) A child's best interests are of paramount importance in every matter concerning the child."*

20. The principle underpins and reinforces the provisions of section 4(2) of the Children Act which provides:

> ***"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."***

21. The appellant though claiming that the child is not his has not undergone a DNA test, which would have absolved him of all parental responsibility if his claim is right. The applicant would have avoided orders for maintenance if he had undergone the DNA test and established he was not the minor's father.

22. The appellant despite use of harsh and in my view unfair language against the trial magistrate by expressing that, "the ruling in extenso shows that the trial magistrate has no basic understanding of the law and that the ruling is irrational exuberance of the Resident Magistrate, seeking publicity," has failed to establish factual or legal cause warranting reversing the ruling of 8th May 2015. As such the appeal lacks merit and is dismissed with costs to the Respondent.

S. M GITHINJI

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this **17th** day of **December, 2019**

In the presence of:

Ms Cheptoo holding brief for Mr. Kipkorir for the appellant

And absence of Ms Cherono for the respondent

Ms Abigael – Court assistant