REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 296 OF 2014

P M M M..... PLAINTIFF

-V E R S U S –

G M M ..... DEFENDANT

RULING

1. P M M M, the plaintiff herein, filed an action against G M M by way of plaint dated 18/08/2014.The brief background leading to the suit is as follows:

> The plaintiff states that he was born on 6/02/1967 and alleges that, the defendant herein is his biological father, and his mother's pregnancy was as a result of defilement by the defendant herein. At that time, his mother was 12 years old. The plaintiff states that he ws born and grew up in difficult circumstances with his mother struggling, because the defendant herein denied to take up parental responsibility in respect of the plaintiff.

The plaintiff seeks via his plaint for the following declarations that:

> i. *The Gikuyu customary law that allows men to impregnate minors, girls and women and get away with it by paying a Ksh.700/- penalty when found guilty to elders of the girls side, to be declared unconstitutional, null and void.*
>
> ii. *The defendant be ordered to undergo a Deoxyribonucleic Acid Test- DNA test, to prove paternity to enable the plaintiff herein bear his father's name and apply for a birth certificate, which he needs as a civil servant to be registered for biometrics, an exercise that is on going in the civil service.*

With the above declarations, the plaintiff also prays for exemplary and general damages.

2. The defendant filed his statement of defence dated 3/11/2014 denying the plaintiff's claim.

3. The defendant/applicant has now taken out the notice of motion dated 30th June 2017, in which she sought for the following orders;

> **1. That the Honourable court be pleased to strike out the plaint.**
>
> **2. That allowing prayer number 1 herein, this Honourable Court be pleased to dismiss the suit herein with costs to the defendant.**

3. That the costs of this application and the suit herein be granted to the defendant.

4. The motion is supported by the affidavit of G M M. The respondent/plaintiff filed a replying affidavit of P MM M to oppose the motion. When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the motion disposed of by written submissions.

5. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application. I have also considered the rival written submissions.

6. The defendant/applicant avers that the plaint as drawn is frivolous, vexatious and a total abuse of court process. That the plaint as drawn is vague and discloses no cause of action and does not raise any triable issues. That the suit filed is only meant to cause embarrassment to the applicant who is clueless about the issues in the plaint. The court documents as drawn are more of a novel than legal pleadings and should be struck out.

7. The respondent on the other hand avers that the applicant's motion is an abuse of court process and his plaint was filed in good faith for matters relating to paternity and parental responsibility. The issues raised touch on his constitutional and fundamental human rights and ought to be addressed by this court. The respondent avers that he has a right to know his biological father. The purpose of verbosity in his plaint and documents filed is to enable him reveal all the facts that relate to this suit. The respondent avers that he is 50 years old and his family want to meet is father. If the defendant claims damages for the embarrassment caused to him by this suit, while the respondent avers that if the DNA tests comes out not in his favour, then he will be willing to compensate the defendant for the embarrassment he may have cause him , and this should apply vice versa. The respondent prays that this suit proceeds to its logical conclusion for justice to be seen to be done.

8. The Applicant's motion seeks to strike out the suit herein on grounds that it is scandalous, frivolous and vexatious. The test to be applied in such an application are:

i.The plaint shows on the face of it that the action is not maintainable or that an absolute bar to it exists,

ii. The plaint is so bad that even an amendment would not cure it,

iii. The suit is baseless and wantonly brought without the shadow of an excuse and that to allow it to proceed to trial will only allow the Defendant to be vexed.

iv. the action is an abuse of legal procedure.

9. The defendant/applicant submits that the plaint has 65 paragraphs with quotations from the constitution of Kenya and other international laws and instruments, thus fails to qualify as a plaint per the requirements set out in Order 4 of the Civil Procedure Rules. The applicant submits that the plaint does not raise any triable issues and cited the case of **Dupoto Group Limited –vs- Kenya Airports Authority& Another (2013)e KLR**, where it was held inter alia that:

"... the overriding principle to be considered in an application for striking out pleadings is whether it raises triable issues . This is because a pleading that raises triable issues confirms existence of a reasonable cause of action, and it cannot consequently be said that the pleading is scandalous, frivolous or vexatious."

10. It is the applicant's submission that if a plaint does not raise any triable issues, then there does not exist any reasonable cause of action.

11. The applicant submits that a court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and is incurable by amendment. As long as a suit can be injected with life, it should not be struck out.

12. The applicant submits that this suit is so hopeless and no amount of cure or redemption would suffice, not even an amendment of the same would bring it back to life, as it was already dead on arrival.

13. The plaintiff/respondent on the other hand submits that his plaint raises triable issues , in that his constitutional and fundamental rights were violated and continue to be violated by the applicant herein, who is his father. For this reasons therefore the responds states that this court should order the applicant to take a Deoxyribonucleic Acid Test-DNA test, to establish if the applicant is his biological father. The respondent submits that, when paternity is established he will know his father and bear his surname. The respondent cited the case of **In The Estate of Fredrick Clarence Kittany, High Court at Eldoret, Succession cause No.11 of 2001** where it was held stated *inter alia*:

> **" it is good to have a surname of the deceased parent in a child's birth certificate because when time of inheritance comes, one is considered an heir."**

14. The plaintiff further submits that by virtue of Order 2, Rule 14 of the Civil Procedure Rules, no technical objection may be raised to any pleadings on the ground of only want of form, if at all his plaint lacks form, it can be cured by amendment per Order 2, Rule 15.

15. In this matter I have considered the material placed before this court and I find that the plaint herein raises triable issues and therefore a reasonable cause of action has been disclosed. I do find that there are issues of both law and fact arising from the pleadings in this case which cannot summarily be determined by an application. Evidence should be tendered and interrogated via a trial.

16. The Applicant has failed to demonstrate that the plaintiff's suit is scandalous, frivolous, vexatious or an abuse of the court process.

17. The application is dismissed with costs abiding the outcome of the suit.

Dated, Signed and Delivered in open court this 20th day of December, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant