REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

HCCA CASE NO. 15 OF 2015

L R & M C

(suing as father and mother and next friends of

A C).....APPELLANT

-VERSUS-

C K.....RESPONDENT

JUDGMENT

In a plaint filed in court on 25th June 2014 and of even date the plaintiffs averred that on 14th February 2014 the subject was stolen from M C within and the whereabouts of the suspect were unknown until the 13th day of June 2014 when defendant was arrested with the suspect.

It is further averred that although the plaintiffs laid a claim to the child the police did not conduct a DNA test to determine the paternity but released the child to the defendant who was known to be barren and had alleged to have been given the child as a dumped one by Mr. Kones a children officer.

As per paragraph 8 of the plaint, the plaintiffs claim is for the restoration of the child to them in their capacity as the biological parents. It is also their prayer that the court does order that DNA samples of the plaintiffs and the subject be taken by the government analyst or any other recognized laboratory for the determination of paternity.

The grounds of appeal are that the learned magistrate erred in law and in fact in dismissing suit on 17th September 2014 when the matter was mentioned for the reading of DNA results.

Secondly, that the learned trial magistrate dismissed the suit on 17th September, 2014, when the direction for hearing of the suit had not been given and the defendant had not filed defence to the suit.

Further that the suit was dismissed when issues of DNA had not been conclusively undertaken by parties.

4) That the learned trial magistrate erred in finding that there was no evidence against the defendant based on finding of the DNA results.

5) That the learned magistrate erred in law and in fact in dismissing the suit on the 17th day of September 2014 without according the parties an opportunity to be heard.

This appeal is opposed on the grounds that the applicant's advocate had on the 26th of June 2014 informed the court that the only way to ascertain paternity was through a DNA test which could be done at the Government Chemist at Nairobi.

It is further contended that directions were taken on 26/6/2014 when parties agreed to take samples for DNA testing and that was the only prayer in the plaint for determination before the court. That there was no other issue pending for the courts determination.

It is submitted that parties were granted an opportunity to be heard when they appeared before the magistrate on 26th June 2014 wherein they agreed to refer the matter for DNA testing so as to determine paternity.

The appellant contention is that the Respondent did not file evidence and that the basis of the judgment by the court was through their submissions dated 7/5/2015 which were not served on the appellant, it is further submitted that the dismissal of the suit was done before a

defence had been filed and that the dismissal of the suit was before it had been set down for hearing and the appellant was denied a right to be heard.

It is the appellants contention that when the matter came up for mention in order to read the DNA results, the appellant and counsel were absent. The appellant and his counsel, it is submitted being absent did not have an opportunity to probe the truthfulness of the said results and to be able to request the maker of the document to be availed for cross examination or take other avenues available to them.

That the learned magistrate ought to have given the parties a mention date on the direction of the main suit.

Further that the appellants intended to have a second DNA test to be carried out.

DETERMINATION

A perusal of the plaint shows that there were only three prayers sought.

1. An injunction restraining the defendant from parting with the custody of the child A C.

2. An order to issue that DNA samples of the plaintiff and the subject child be taken by the Government chemist in Nairobi or any other recognized laboratory for the determination of paternity.

3. Actual custody and control of subject child be restored to the plaintiffs.

The main issue for determination before the lower court was paternity of the child. Both parties had agreed on the modus operandi of that determination which was through DNA testing.

That DNA testing was carried by the Government chemist and results were arrived at. To that extent the appellant cannot be heard to say that he was not given an opportunity to be heard.

The appellants were partly to blame for failure to insist at the earliest possible opportunity to have the DNA test to be carried out by another entity of their choice apart from the government chemist.

However, after the learned trial magistrate read the results of the DNA test he did not give the appellants the opportunity to react one way or another on the said results. The appellants may have wanted to have the maker of the document to be cross-examined so as to establish the veracity of his evidence and or his findings or any other application they may have wanted to make before the court.

It is because of this reason that I order that the dismissal of the suit be set aside and order that it be reinstated. No prejudice will be occasioned to any of the parties as issues therein will be ventilated in the main hearing.

The appeal has merit and its allowed with no order to costs.

Judgement delivered dated and signed in open court this 9th day of December 2016 in the presence of learned council for the appellant Miss Koech, learned counsel for the respondent Mr. Kenduiwa, court assistant Mercy/Rotich.

M. MUYA

JUDGE

9/12/16