REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 7 OF 2014

(An appeal from the Judgment of the Senior Principal Magistrate, Embu in Children Case No. 9 of 2012 dated 3/3/2014)

C N (Suing as mother

and next of friend)………….............APPELLANT/APPLICANT

VERSUS

J M……........….......................................RESPONDENT

R U L I N G

This is a ruling on an application dated 23/1/2015 seeking for orders that the court allows the appellant/applicant to adduce and/or produce additional evidence whether oral or documentary before the hearing and determination of this appeal.

In the supporting affidavit of C N, she states that she was the plaintiff in Embu Children case No. 1 of 2012 from which this appeal emanates. The suit was dismissed because there was no DNA test carried out to prove paternity of the child. An application for review was filed before the trial magistrate but it was dismissed. It is the applicant's contention that the evidence should be admitted so that the court can deliver judgment accordingly. It is further argued that the case involves a minor whose interests are paramount. The minor stands to suffer due to lack of parental support due to mere technicalities on the part of the applicant. The applicant opines that in the event that the application is granted, the respondent is not likely to suffer any prejudice.

The application was opposed by the respondent relying on his replying affidavit sworn on the 18/2/2015. He states that the applicant was given a chance by the trial court to adduce all the evidence she had. Her application for review came after the suit was dismissed. It would be unprocedural for the court to re-open the matter where judgment has already been delivered.

Both parties filed submissions in support of their arguments.The applicant was represented by Mugambi Njeru & Company Advocate while Fatuma Wanjiku & Company Advocates represented the respondent.

The applicant argues that under Order 42 Rule 7 additional evidence may be adduced. During the trial, the applicant did no adduce DNA evidence due to the fact that she honestly believed that the evidence she had tendered was sufficient to prove her case. The failure to produce DNA was a procedural technicality which the court should disregard. It is important that the matter be decided with due regard to Article 159 of the Constitution.

The respondent submitted that the provisions of Order 42 Rule 7 are only applicable where the trial court

has refused to admit evidence which is not the case in this application. The applicant was not denied a chance to adduce the evidence that she says is in her posssesion at the moment. She has not cited any law allowing the court to re-open a case after judgment. Order 21 Rule 3 prohibits altering of a judgment after its delivery except where it is done through review under Section 99 of the Civil Procedure Act.

This application is brought under Order 42 Rule 27 of the Civil Procedure Rules which provides:-

27(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if –

a. *The court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or*
b. *The court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.*

2. Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reason for its admission.

It was held in the case of ***UKWALA SUPERMARKET COMPANY LIMITED VS EZEKIEL MAUGO NDUBI [2013] eKLR*** that it is discretionary upon the judge to weigh the circumstance of each case in deciding whether or not to allow the calling of additional evidence. Such discretion should however be exercised judiciously so as not to overlook the objectives for which the rules made hereof were written.

In the instant case, the applicant omitted to adduce evidence of paternity of the child namely DNA during the trial. After judgment was delivered she presented before the trial magistrate an application for review of the judgment for the purpose of admitting additional evidence. The application was dismissed on the grounds that the magistrate did not have powers to re-open a case after judgment.

There is no evidence that the applicant was denied her right to a fair hearing under Article 50(2) of the Constitution. Order 42 Rule 27 refers to a case where the trial court has refused to admit evidence which ought to have been admitted. In this case, the applicant failed to present the evidence before the trial court. It cannot be said that the applicant was denied the chance to tender the evidence. The trial court rightly held that it “had no authority or jurisdiction to re-open the trial on its own”.

The applicant relies on Article 159 of the Constitution which provides that “justice should be administered without undue regard to procedural technicalities”. The provisions of this article must have regard to existing statutory provisions. The Civil Procedure Act does not provide for admission of additional evidence except as stipulated under Order 42 Rule 27. The omission of the DNA evidence by the applicant is not a mere procedural technicality.

The law allows correction or alteration of a judgment in terms of provisions of Section 99 which provides:

> *“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”*

The application before the trial court did not fall under the category covered by Section 99.

Order 21 Rule 3 provides:-

> *“A judgment once signed shall not afterwards be altered or added to save as provided by Section 99 of the Act or on review.”*

The facts of the application before me are not covered by the foregoing provisions. The applicant is indirectly asking this court to quash the judgment of the trial magistrate and order a retrial. I find no justification to make such orders.

It is my finding that Order 42 Rule 27 is not applicable to the facts of this application.

All considered, I decline to exercise my discretion in favour of the applicant for the foregoing reasons.

It is my considered opinion that this application has no merit and it is dismissed with costs to the respondent.

It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF JUNE, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Mrs. Njuguna for Fatuma for Respondent

Mr. Kiua for Mugambi for Appellant/Applicant