REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CIVIL APPEAL NO 18 of 2014

(Appeal from Decree passed on 11/04/2013 in Kandara PM Children's Case No 1 of 2009 – T M Gesora, PM)

NWW…………………………….……….………….APPELLANT

VERSUS

KKM…………………….…….……...…..…………RESPONDENT

J U D G M E N T

1. Although the Appellant filed suit in the lower court in the name of her child, with her as the child's next friend, she was actually the plaintiff. She alleged that the Respondent (defendant) was the father of the child and sought monthly contributions as the court may determine for the maintenance of the child, as well as special damages for the costs of delivery and maintenance of the child incurred as at the time of judgment. She also sought costs and interest. She is a single mother. The Respondent filed defence and denied liability. He specifically denied that he had ever had sexual relations with the Appellant, and could thus not be the child's father.

2.On 11/04/2013 the plaintiff's suit was dismissed with no order as to costs upon failure of the plaintiff or her advocate to attend court for further hearing of the case. This appeal is against that order of dismissal. The grounds of appeal amount to two specific complaints – one, that the trial court misdirected itself in dismissing the case before the parties had fully presented their respective cases and cross-examined each other; and, that the trial court also misdirected itself in relying upon **DNA** reports that had not been properly introduced in evidence, and whose makers were not called for cross-examination.

3. I have considered the submissions of the learned counsel for the Appellant, and also those of the Respondent, who was not represented. I have also carefully perused the record of the trial court.

4. Trial of the case commenced on 29/09/2009 when the Appellant testified. In the course of cross-examination by the Respondent she agreed for DNA testing to be performed in order to determine whether the Respondent was the father of the child. The court did then not rule on the issue. On 17/12/2009 when the case came up for further hearing the Respondent renewed his request for DNA testing, and the Appellant again agreed for the same to be done. The court then directed the parties to go and have the test done.

5. On 06/07/2010 the Appellant presented to the court a DNA report dated 14/06/2010 by a ***Government Analyst*** (page 10 of the record of appeal). The report is signed by one **Joseph K Kimani**, the Government Analyst. The report excluded the Respondent as a biological father of the Appellant's child. The Appellant then stated to court, in effect, that she did not agree with the report since she knew that the Respondent was the father of the child and even looked like him. She requested that another test be done

by a different doctor. The Respondent who was in court stated that he had not seen the report but that if it said he was not the father, it only confirmed what he already knew. He also stated that he had no problem with a fresh DNA test. The court then accorded the parties a chance for a second DNA test.

6. The record reveals that after a long time without the Appellant arranging for the second DNA test, the Respondent complained to court of the delay on 29/09/2011. The court then directed, in effect, that rather than wait for a second test to be done, the Government Analyst who made the first DNA report be summoned for cross-examination on the report. As it happened, the Government Analyst never attended court for cross-examination; at one time it was reported to court that he had travelled to China for further studies, and that no one knew when he would come back.

7. It would appear that on 22/02/2012 the court again allowed the parties to go for the second DNA test. On 16/05/2012 the court was informed that the parties had provided the necessary samples for the test. The court then directed that both parties collect together the results. On 05/07/2012 both parties informed the court that they had collected the second DNA report. But none of them had the report. The Appellant said that her copy was with her advocate who was not in court. The Respondent said he had not come with his copy because he expected the Appellant would bring hers. The court then fixed the matter for mention for 22/08/2012.

8. It appears that on that date the report was filed in court. A copy of a report dated 11/06/2012 is at page 21 of the record of appeal. It is by the Government Analyst and is signed by one **H K Sang**, a Government Analyst. The report, again, excludes the Respondent as the biological father of the Appellant's child. The Appellant then informed the court that she would proceed with her case (apparently in spite of the two DNA reports). The court then fixed the case for further hearing on 11/09/2012.

9. Hearing never resumed; there were a number of adjournments at the behest of the Appellant, with up to three "last adjournments" being granted to her, despite the protests of the Respondent at the delay. This was the situation that the trial court had to deal with on 11/04/2013. The court stated -

> ***"It is not fair that the defendant should be constantly dragged to court by a plaintiff who does not seem interested in the matter….***
>
> ***I have gone through the record and seen that the court had ordered a DNA to determine the parentage of the child.***
>
> ***There are two reports dated 14/06/2010 and another dated 11/06/2012 certified on 27/06/2012. In both reports the defendant is excluded as the biological father of the child….***
>
> ***It is unfair to saddle the defendant with a responsibility that is not his.***
>
> ***For these two reasons, that is, that the plaintiff doesn't have interest in the matter, and that the defendant is excluded as the biological father of the child of the plaintiff herein, this case is untenable and is dismissed. I make no order as to costs."***

10. The court obviously proceeded under the provisions of **Order 12, Rule 3** of the ***Civil Procedure Rules, 2010*** (the **Rules**) which states -

> ***"If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court."***

There was overwhelming need to bring this-long standing dispute over the paternity of the Appellant's child to a close. It was not in the interests of justice for the matter to be adjourned time and again at the instance of one party. It was apparent that in view of the DNA reports the Appellant had no case against

the Respondent; yet she would not give up the suit. The court acted properly in dismissing the suit.

11. As for the DNA reports, this were the parties' own documents. The first report was requested for by the Respondent. The Appellant agreed to the same being sought. It came out negative in favour of the Respondent. The Appellant sought the second DNA test when the maker of the first report proved unavailable for cross-examination. The Respondent readily agreed for this second test to be done. The report was again negative in favour of the Respondent. Both DNA reports were by Government Analysts. The second report was collected by both parties together. The record does not show that the Appellant asked to cross-examine the maker of it. It is also to be noted that the trial court used the DNA reports merely as an additional reason not to adjourn the matter any longer. They were not the main reason for dismissing the suit.

12. I find no error or misdirection at all in the way the trial court dealt with the umpteenth application for adjournment by the Appellant. Her case was properly dismissed.   There is no merit in this appeal. It is hereby dismissed with costs to the Respondent. It is so ordered.

DATED, SIGNED AT MURANG'A THIS 29TH DAY OF JULY 2015

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 31ST DAY OF JULY 2015