In re PGM (Minor Suing through her Next Friend) (Civil Appeal E080 of 2024) [2025] KEHC 36 (KLR) (10 January 2025) (Judgment)

Neutral citation: [2025] KEHC 36 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E080 OF 2024

DKN MAGARE, J

JANUARY 10, 2025

IN THE MATTER OF PGM (MINOR SUING THROUGH HER NEXT FRIEND)

BETWEEN

LKM ..... APPELLANT

AND

RMB ..... RESPONDENT

(Being an appeal against the judgment of B.O. Omwansa – Snr. Principal Magistrate in Kisii CM Children's Case No. 71 of 2017 dated and delivered on 16th April, 2024)

JUDGMENT

1. This an appeal against the judgment of B.O. Omwansa –SPM given in Kisii CM Children's Case No.71 of 2017 dated and delivered on 16th April, 2024.

2. The Appellant was the Plaintiff in the lower court and the mother of the minor herein. The Respondent was alleged to be the father of the minor.

3. The Appellant pleaded in her plaint dated 22.9.2017 that she cohabited with the Respondent from 2012 until sometime in 2015 when he became cruel, irresponsible and violent. They informally separated in 2016. The marriage was blessed with one issue PGM born on 19.7.2015.

4. The Respondent filed defence on 24.10.2017 where he denied that he ever married the Appellant. He stated that the birth certificate was forged and the Appellant was an imposter. He stated that PGM was not known to him and he is under no obligation to maintain.

5. The matter proceeded earlier and was dismissed for lack of a reasonable cause of action. The Appellant appealed and the matter was ordered to proceed to full trial. Upon proceeding to full hearing, the children's court dismissed the suit for lack of merit hence this appeal. The court heard the matter and

dismissed it on 16.4.2024 for lack of merit. The Appellant was aggrieved and filed this appeal and set forth the following grounds of appeal.

a. That the learned trial magistrate erred in law and fact by failing to appreciate the law and evaluate the evidence placed before him before arriving at the decision.

b. That the learned trial magistrate erred in law and fact by failing to take into account the evidence tendered in court and the submissions brought before him before arriving at the impugned decision.

c. That the learned trial magistrate erred in law and fact by failing to appreciate the law on the principle of loco parentis.

d. That the learned trial magistrate erred in law and fact by falling to appreciate the provisions of Section 94, 114 of the Children's Act as read together with Section 22 of Registration of Births and Deaths Act.

e. That the judgment of the learned trial magistrate was therefore not well founded in law and hence null and void.

f. That the judgment of the learned trial magistrate was therefore wrong in law and unfounded.

Evidence

6. The court ordered for DNA test. The first report dated 14.2.2018 ruled out the Respondent as the father. The Appellant sought time to appoint an advocate. The Appellant sought that parties undergo another DNA test. The court ordered another DNA test on 2.8.2018. The parties took their time before DNA test was carried out and the court continued to order for DNA test for over 2 years. The DNA report ordered on 16.1.2020 was carried out and a report filed dated 21.2.2020. The suit was dismissed summarily on 21.12.2021. It was later reinstated by the High Court in Kisii HCCA 50 of 2020. The decision is reported as PGM (Minor suing through her next friend LKM) v RMB [2021] eKLR. In the said case, the court stated as follows:

> 22. The appellant has sought to rely on the doctrine of loco parentis. She relied on the case of ZAK and another vs MA and another [2013] eKLR where the court held that step parents could assume parental responsibility in certain circumstances based on Article 53 (2) of *the Constitution* and sections 23 and 94 of the *Children Act*. Section 23 defines what constitutes parental responsibility while section 94 provides the factors to be considered by the court in directing step parents inter alia to make financial provision for a child accepted as a child of the family. The appellant had no opportunity to pursue this line of argument before the trial court, as the court dismissed her suit before it could be heard.
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> 23. The court in the case of Patel v E.A. Cargo Handling Services Ltd. [1974] E.A. 75 At P. 76 defined a triable issue as an issue which raised a prima facie case which could go to trial for adjudication. The appellant was only required to establish a prima facie case and needed not have raised an issue which had to succeed upon trial. On perusal of the pleadings and without saying much, I find that the case raises triable issues and is not a frivolous one. I therefore find that the trial court dismissed the suit prematurely.

7. The matter was fully heard. PW1, the Appellant testified that she had a relationship where she cohabited with the Respondent and it resulted in the issue herein. The Respondent failed to take care of the minor and was irresponsible. According to her, the minor was a child of the union. She testified that there were transactions showing rent and Mpesa sent to her. On cross examination, she stated that

they met in a cybercafé. Her evidence was that she had a landlady, Sabina from 2012 May to 2016 April. She stated that she was an attendant at the cyber café. She admitted that both DNA results showed that the Respondent was not the father. PW2 Ronah Kerubo is a clan elder. She testified that on 23.3.2017 the Respondent sent her 5,300/= when the matter was at the chief's office. This she said was for rent.

8. On cross examination she stated that the chief had indicated that the Respondent had denied paternity. She also stated that the money sent to her was not sitting allowance for the case.

9. PW3 Alloys Ochogo testified that he was a property manager, and knew the Appellant for 8 months since December 2016, when she took over the house the Appellant was staying. They issue receipts for rent paid by the Respondent. The Appellant was also a tenant. The landlady was said to be Scholastica (not the one referred by the Appellant - Sabina).

10. PW3 produced a birth certificate for the minor with names of both parties. On cross examination, he stated that he did not know who the Applicant was, but the informant was a parent, not a midwife for a child born in hospital! He stated that registration was carried out without supporting documents, except one's from Kisii Teaching and Referral Hospital. The Appellant closed her case without producing Mpesa statements which had been marked for identification.

11. The Respondent was PW1. He stated that he had no relationship with the Appellant. They never lived together, as from 2012 to 2020 he was staying at Maili Mbili. Her landlady was Elizabeth Bosire. He stated that he recalled that his documents were stolen on 21.4.2016 and reported to Kisii police station. He also relied on the 2 DNA reports. He stated that he never dealt with PW3. He referred to those documents as forgeries. According to him, he only met the Appellant while studying for PhD. He could photocopy and send Mpesa for payment or cash. He never paid maintenance for anyone. He stated that he paid for services at West Net between 2012-2015. According to him, he never got services beyond 2015. He never paid any money in 2017. The only money he sent was to the village elder on 7.2.2017 to give directions on the dispute as he had been sued at the chief's place. He was not aware that the stolen identity card was used to prepare the birth certificate. He stated that he did not interact with Fourcliff Consultants.

12. DW2, Dr. Charles Maina testified that he was a Pathologist. He produced the report carried out on 21.3.2020 which excluded the Respondent as a biological father of the child. He gave out his detailed registration details. He supported the veracity and authenticity of the DNA results from a scientific view point.

13. DW3 was the Respondent's landlady Elizabeth. She stated that the Appellant was her tenant from 2012 -2020 (typed copy indicated 2017) when he moved out to his own residence. She also knew the wife AB.

14. DW4 Kipngetich Bernard produced the government analyst's report. The report excluded the Respondent as the biological father. He was cross examined on the differences with the Lancet report and stated that he was not aware of the second report.

15. DW5 Jared Mekenye testified that DW1 used to frequent West Net Technologies. He stated that he never handled their account.

16. The court found that the Respondent is not the one who sired the minor in view of the DNA results. He dismissed the suit with no order as to costs.

Analysis

17. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In the case of Mbogo and Another vs. Shah [1968] EA 93 the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

18. The duty of the first appellate Court was in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the court in their usual gusto, held as follows;-

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

19. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017)eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> "Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

20. No parole evidence is admissible to contradict, vary or alter the terms of any written instrument. In Prudential Assurance Company of Kenya Limited V Sukhwender Singh Jutney and Another, Civil Appeal No. 23 of 2005 the Court citing a passage in Odgers Construction of Deeds and Statutes (5th ed) at p.106 emphasized that in construing the terms of a written contract;

> "It is a familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence."

21. The position in law is that it is strong thing for an appellate court to differ from the findings on a question of fact, as stated in the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

22. It should be remembered that this court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. The Court of Appeal in Kiruga vs Kiruga & Another [1988] KLR 348, observed that:

> " An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand."

23. Being a matter relating to a minor, the duty on the court is higher than ordinary civil matter. As I understand Article 53(1) *the Constitution* of Kenya provides that a child's welfare and best interest are of paramount importance in every matter concerning the child. The Constitutional imperative is given effect by Section 8 of the *Children Act* 2022 *Act No 29 of 2022* which provides as follows:

(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—

(a) the best interests of the child shall be the primary consideration;

(b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule. 19 No. 29 of 2022 Children.

2. All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child; and

(c) secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.

(3) In any matters affecting a child, the child shall be accorded an opportunity to express their opinion, and that opinion shall be taken into account in appropriate cases, having regard to the child's age and degree of maturity.

24. The aforesaid principles are well anchored in the Convention on the Rights of the Child to which Kenya is a party. Under the UN Convention on the Rights of the Child (CRC) that Kenya ratified on 30 July 1990, Article 3 provides that:

a. 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.

b. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

25. The case basically raises two issues. That is:

a. The paternity of the minor.

b. Loco parentis.

Paternity

26. The pleaded case related to paternity. The Appellant attacked the judgment for failing to evaluate the evidence or to appreciate the law and evaluate the evidence. The court analyzed the evidence on the record as far as possible. The Appellant herself could not give an explanation why the DNA results were negative. There was no evidence of involvement of the Respondent either in the conception, birth or care of the child. The duty that was on the Appellant was brief and succinct. This was to prove that the Respondent was the father of the minor. This she failed to do. The burden of proof was on the Appellant as postulated in sections 107-109 of the *Evidence Act*. The same provides as follows:

> " 107.
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
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> 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
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> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

27. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J, as he was then, in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

28. This was further enunciated in the case of Palace Investments Limited v Geoffrey Kariuki Mwenda & Dollar Auctions [2015] KECA 616 (KLR), where the Court of Appeal [J Karanja, GG Okwengu, CM Kariuki, JJA] stated as follows:

> The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in Miller –vs- Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say:-
>
> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

29. In this case, DNA tests were carried out. The scientific methods of examinations were explained by DW2. The two medical reports were not impeached by any contrary evidence. The expertise of the examining doctors were not put to question. DNA testing thus provided irrefutable evidence that the Respondent does not have biological paternity for the minor. The tests were carried out in the best ethical standards to safeguard the interests of all parties while having the best interest of the child at hand. It serves no purpose to pin a child on a man science has said is not the biological father.

30. The Court of Appeal in Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR the Court stated as follows:

> " It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."

31. The evidence placed before the court was an allegation that there was cohabitation from 2012 to 2015 between the parties. No scintilla of evidence was placed. The second one was that a child was born in hospital and a birth certificate with the name of the Respondent issued on 16.7.2017, before the suit was filed barely two months later in 2017. There was nothing else. The further evidence was that the Respondent had denied liability from the beginning.

32. The Appellant confirmed that there is a negative report excluding paternity of the Respondent. Without a conflicting report, the court was bound as it did to dismiss the case. The issue of submissions not having been taken into consideration is not a ground of appeal. Appeals case turn on evidence and not submissions. Submissions are essentially a marketing tool and not pleadings. Mwera J, as he then was, in discussing the role of submissions, stated that they are a course by which counsel or litigants direct the court's attention to the points of the case that should be given the closest scrutiny in order

to firmly establish a claim, as seen in the case of Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993:

> " Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

33. Submissions are not, strictly speaking, part of the case, and the absence of submissions may not necessarily prejudice a party. Their presence or absence does not, in any way, prejudice the case, as held in Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749, the Court held that:

> " As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

34. The Court of Appeal was more succinct in that submissions cannot take the place of evidence when they addressed the question in the case of Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

Loco parentis

35. Section 2 of the *Children Act* 2022 defines a parent to mean the mother or father or any person who is conferred parental rights by law. Ipso facto, a parent cannot arise outside the law. In the case of ZAK and another vs MA and another (2013) eKLR the court had this to say:

> " Looked at from the above perspective, should there be sufficient evidence to show that the 1st petitioner was in loco parentis to the two other children of the 1st Respondent, he would have an obligation to support them in the same way as he is under obligation to support his biological children."

36. For the concept of loco parentis to arise there must clearly be three elements.

    a. The party being placed in loco parentis must, from evidence know that the children are not his.

b. The party, in this case, a step father or a grandparent, must assume responsibility in a scenario, where, he has taken unto himself, a duty that he could otherwise not be having.

c. The dispute must be pleaded to deal with such and cannot arise out of implication or failure of the pleaded limb of paternity.

37. The foregoing essentially places the burden on the person claiming that another is in loco parentis to plead so and give elements upon which the claim is based. In other words, a party must clearly plead and support their case. If a different case is pleaded, then only that case ought to be proved. In this case, the Appellant pleaded that the minor arose out of escapades between the Appellant and Respondent in their sojourn through cohabitation between 2012 and 2015. The minor is said to have been an issue from the relationship. The Respondent is also pleaded to have eschewed liability from the beginning. The relevant paragraph of the plaint reads as doth: -

> " 5. That all was well in the marriage until sometime 2015 (sic) when the defendant suddenly changed and became very cruel, violent, irresponsible and abusive leading to their informal separation in April 2016. The particulars of cruelty and negligence were set out in the plaint as follows: -
>
> 6. That since then the Defendant has continued with his acts of cruelty and negligence and the following are some incidents thereof.
>
> **Particulars of cruelty and negligence**
>
> a. Failing to provide maintenance and upkeep for the minor child
>
> b. Denying the issue of the relationship fatherly love and attention.
>
> c. Displaying an uncaring attitude towards his child and keeping away from her.
>
> d. Acting in total disregard to the best interest and welfare of the said child.
>
> e. Putting the child in a state that she needs protection and care by the law.

38. The minor is said to have been born on 19/7/2015 and the Respondent eschewed responsibility since 2015, all through the informal separation in April 2016 up to and until now. However, in her evidence she changed the story that the Respondent supported the child and paid rent. She then stated that the Respondent no longer provided. The rent is said to have been paid until April 2016. In short, her own evidence does not show that the Respondent accepted responsibility for the child, in any case, it was incumbent upon her to plead as such.

39. The question of loco parentis arose at the appeal level. The first time was in HCCA E050 of 2020. Then in this matter. Pleadings were not amended and evidence led to loco parentis. The Appellant's evidence was that the Respondent was a biological father. That is what she sought to prove. She never pleaded or tendered evidence that the Appellant accepted responsibility notwithstanding not being a biological father.

40. The primary pleadings and evidence by the Appellant were that the minor was Respondent's biological child. There was first test which was negative. The Appellant called for a second one which was again

negative. At no time did she admit that the child belongs to another man but the Respondent accepted liability. Under Section 23 of the *Children Act* it is provided thus;

1. "in this Act, parental responsibility "means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child.
2. The duties referred to in Sub -section (1) include in particular-
   (a) the duty to maintain the child and in particular to provide him with-
      i. Adequate diet
      ii. Shelter
      iii. Clothing
      iv. Medical care including immunization
      v. Education and guidance.

41. There was no evidence that the Respondent carried out any of the duties on the minor after knowing that they are not biologically related. The Respondent maintained that the Appellant was a fraudster who prepared the birth certificate from the documents robbed from his house.

42. The DNA report both the initial one and the 2nd DNA report requested for by the Appellant were negative. They excluded the Respondent as the father of the minor. There was no evidence of romantic liaison with the Respondent. The evidence given is of doubtful origin. Why pray, will a husband have to send rent to the wife to pay? Why not pay directly. Why incur expenses sending money for someone else to send instead of sending directly. The so-called agent was of doubtful character. He did not even know which house he was collecting rent. He contradicted the Appellant that it is the Respondent who was paying rent. The evidence of PW1 was that the Respondent sent money for the Appellant to pay rent.

43. The payment of Ksh. 5,000/= from time to time was inconsistent to cruelty and eschewing of responsibility from sometime in 2015. To compound the misery, there is no evidence from the Appellant that the money was sent to the landlord. The Mpesa statements were not produced and it is telling. In the case of Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR, Justice G V Odunga as he was then stated as doth:

> 41. Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:
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> > "Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:
> >
> > > 'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'
> >
> > Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make the adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho

–vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

44. The Appellant pleaded one case and tried to prove another at appellate level. This was not a case in the court below. Such an appeal is frivolous. Once they argued the first appeal, if the Appellant thought that the concept of loco parentis will be useful, she should have leaded the same. Such pleadings are what was referred to in the case of Trust Bank Limited v Amin Company Ltd & Another (2000) KLR 164, where it was held: -

> " A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expense. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action."

45. Therefore, parties are bound to plead their cases fully. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth: -

> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
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> > ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
> >
> > ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

46. In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

> As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case

without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

47. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

> "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....."

48. Parties must plead their cases fully. The question of loco parentis was not pleaded, nor was it left to the court to determine. In Pacific Frontier Seas Ltd v Kyengo & another [2022] KECA 396 (KLR), the Court of Appeal at Malindi in Civil Appeal No. 32 of 2018 held as follows:

> As regards unpleaded issues, the principle is well settled that a court, even when it has jurisdiction, will not base its decision on unpleaded issues because the issues determined by the court must flow from pleadings. It is the pleadings which guide the litigation and succinctly inform the parties and the court what is in dispute. However, where the parties lead evidence and address the unpleaded issues and from the cause adopted at trial it appears that the unpleaded issues have been left for the decision of the court, the court will validly determine the unpleaded issues. (See Captain Harry Gandy v. Caspar Air Charters Ltd [1956] 23 EACA 139; Odd Jobs v. Mubea [1970] EA 476, D.E.N. v. P.N.N. (supra), Baber Alibhai Mawji v. Sultan Hashim Lalji & Another, *CA No 296 of 2001*; and Mapis Investment (K) Ltd v. Kenya Railways Corporation (2005) 2 KLR 410). Nevertheless, we should add that parties cannot validly leave unpleaded issues over which the court has no jurisdiction for it to decide, simply because parties cannot by consent, confer jurisdiction to a court which in law it does not have.

49. The above position had been affirmed in Justice Kalpana H. Rawal v Judicial Service Commission & 3 others [2016] eKLR by the very Court of Appeal in Civil Appeal No. 1 of 2016 at Nairobi. The Court expressed itself thus:

> " The principles of law on unpleaded issues, as stated by the appellant, are correct and not in dispute. A court will not determine or base its decision on unpleaded issues. Where however, evidence is led and it appears from the cause followed at trial that an unpleaded issue has been left to the court to decide, the trial court can validly determine the unpleaded issue. Accordingly, we need not belabour or restate the principles here in detail, save to mention but some decisions, which have crystallized those principles. These include Captain Harry Gandy v. Caspar Air Charters Ltd [1956] 23 EACA 139; Odd Jobs v. Mubea [1970] 476, D.E.N. v. P.N.N. (supra), Baber Alibhai Mawji v. Sultan Hashim Lalji & Another, *CA No 296 of 2001*; and Mapis Investment (K) Ltd v. Kenya Railways Corporation (2005) 2 KLR 410."

50. Before I depart from the ruling, I note that the Appellant raised issues of certain sections of the law, which are all irrelevant and have no bearing to the case. For example, Section 94 of the Children's Act relates to privacy of proceedings. Further, Section 114 of the Children's Act, provides for financial provisions by step-parents and presumptive guardian. The Respondent was not pleaded as a step father or presumptive father. The DNA results have ruled out any presumption. In any case, it was not shown to exist.

51. The Respondent is not a step father or presumptive father, since he is neither married to, nor a presumptive father. It has been irrefutably proved that the Respondent was excluded as a father of the minor herein.

52. On the other hand, Section 22 of Registration of Births and Deaths Act provides as follows:

> Any person who fails to give notice of a birth or death the registration of which is compulsory, or who refuses to furnish any of the prescribed particulars, or who contravenes section 21 of this Act, and any person who willfully gives any false information or particulars for the purpose of registration, shall be guilty of an offence and be liable to a fine not exceeding five hundred shillings or to imprisonment for a term not exceeding six months, or to both such fine and such imprisonment. It is irrelevant.

53. The above section is more applicable to the Appellant in a criminal case than the Respondent.

54. I note that the court did not analyze some of the aspects. In this regard the court took guidance from the Court of Appeal in the case of Sugut v Jemutai & 3 others (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR Kiage JA stated as doth: -

> " I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; Selle Vs Associated Motor Boat Co [1968] EA 123). I do accord due respect to the factual findings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge

failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge."

55. In the end, I find that the court below was correct. The appellant misled the Registrar of Deaths and Birth to register the Respondent as the father, when the same was not correct. I am satisfied that the registration was done fraudulently and not supported by evidence. The Appellant has viciously fought the Respondent, in spite of DNA results from two institution's confirming that the Respondent is excluded as a father. There was no justification in relentlessly seeking to entrap the Respondent. In order to correct an injustice that is patent, it is fair that the Respondent's name be deleted from the birth certificate No. 70510168 in respect of the minor and from the register, entry No. 0161517066.

56. Award of costs in this court are governed by section 27 of the *Civil Procedure Act*. They are discretionally. The Supreme Court has set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or Respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– those costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

57. The Appellant shall bear the Respondent's costs of the appeal of Ksh. 75,000/=. The same shall be paid within 45 days, failing which execution shall issue.

Determination

58. In the upshot, I make the following orders:

    a. The Appeal lacks merit and is accordingly dismissed.

    b. In order to correct an injustice that is patent, it is fair that the Respondent's name be deleted from the birth certificate No. 70510168 in respect of the minor and from the register, entry No. 0161517066. The registrar of births and deaths, Kisii County is hereby directed to delete the name of the Respondent from the said register, entry No. 0161517066 and birth certificate No. 70510168.

    c. The Appellant shall bear the Respondent's costs of the appeal of Kshs. 75,000/=, which shall be paid within 45 days, in default execution do issue.

d. The file is closed.

DELIVERED, DATED AND SIGNED AT KISII ON THIS 10TH DAY OF JANUARY, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

G. M. Nyambati & Co. Advocates for the Appellant

S. O. Omwega & Co. Advocates for the Respondent

Court Assistant – Kiptum