AWM v LNG (Civil Appeal E085 of 2023)
[2024] KEHC 12128 (KLR) (Family) (7 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12128 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

CIVIL APPEAL E085 OF 2023

MA OTIENO, J

OCTOBER 7, 2024

IN THE MATTER OF THE CHILDREN'S ACT CAP 586 LAWS OF KENYA

AND

IN THE MATTER OF I. W AND L.W (MINORS)

BETWEEN

AWM ..... APPELLANT

AND

LNG ..... RESPONDENT

JUDGMENT

Introduction

1. The Respondent was the plaintiff in Nairobi CMCC No. E474 of 2023; In the matter of IW and LW (minors suing thro' their mother and next friend LNG v AWM. In her plaint dated 9th March 2023, the Respondent averred that she married the Appellant on 24th July 2015 in a civil marriage ceremony conducted in Nairobi and that they lived together as husband and wife until on or about 6th January 2023 when the Respondent separated from the Appellant and moved out of their matrimonial home due to persistent domestic issues.

2. The Respondent further averred in the plaint that for the period the couple lived together, they were blessed with two issues, IW who was 15 years as at the time of filing the suit and LW who was then 8 years old. It was the Respondent's case at the lower court that following the separation, the Appellant stopped supporting the minors, thereby abdicating his parental responsibility.

3. For the above reasons, the Respondent prayed in the plaint for an order for legal and actual custody of the minors and an order to compel the Appellant to; pay a monthly sum of Kshs. 79,000/-

towards the maintenance of the minors; to pay the minors' school fees and school related expenses; to provide for the minor's medical needs as and when necessary; surrender possession of Motor Vehicle Registration Number KBU xxxZ to the Respondent for use to take the Minors to school and church. The Respondent also prayed that the costs of the suit be awarded in her favour.

4. With the plaint, the Respondent filed a chamber summons application dated 17th March 2023 seeking interim orders requiring the Appellant to reimburse her the sum of Kshs. 131,770/= being the amount she borrowed to pay school fees for the minors in respect of the 1st term of the year 2023; an order requiring the Appellant to pay school fees and school related expenses for the minor's 2nd term commencing May 2023 and to continue doing so for the subsequent terms until the main suit is heard and determined; an order for the Appellant to surrender to the Respondent possession of Motor Vehicle Registration Number KBU xxxZ for the use of the minors.

5. On 20th March 2023, the lower court after considering the Respondent's application issued interim ex-parte order, partially allowing the same. the court directed that directed, among others, that; the Appellant repay to the Respondent the amount Kshs. 131,770/ being the amount of money borrowed by the Respondents to pay the minors' 1st term, 2023 school fees; that the Appellant do pay school fees and pay all other school related expenses for the minors for the second term commencing in May, 2023 and subsequent terms until the main suit is heard and determined. The court also ordered that the application was to be heard inter-partes on 25th April, 2023. In the meantime, parties were directed to file their respective affidavit of means in that regard.

6. On 17th April, 2023, the Appellant filed an application seeking stay and setting aside of the lower court's interim ex parte orders of 23rd March 2023 on the basis that the orders were issued when he was unwell and hospitalized and that the same were obtained through misrepresentation and material non-disclosure of facts on the part of the Respondent. In the application, the Appellant also an order that the parties herein with the minors submit to a Deoxyribonucleic Acid Test (DNA) with a view of establishing the minors' paternity.

7. The Respondent vide her Replying Affidavit of 22nd May 2023 opposed the Appellant's application for DNA testing on the basis that it is not in the best interests of the minors to have them subjected to DNA testing. It was also her position that she was not equally willing to be subject to the process. According to the Respondent, making her to participate in the process would be an intrusion onto her privacy and therefore infringe on her constitutional rights as protected under Article 31 of *the Constitution*.

8. According to the Respondent, subjecting the minors to a DNA testing is likely to be traumatizing to them and consequently adversely affect them irrespective of the outcome of the exercise. The Respondent consequently stated that he would be willing to relinquish her claim for maintenance against the Appellant if DNA testing would be a precondition for the same, provided the Appellant also agreed to drop his claim for access/custody of the minors.

9. By its Ruling of 18th August, 2023, the lower court partially allowed the Appellant's application and set aside the exp-parte interim orders of 20th March 2023. The Appellant's to have him and the Respondent together with the minors submit to a DNA test was however declined by the court on the basis that in the court's view, the Appellant had not laid any basis for the same, either on the face of the application, or in the affidavit in support thereof. According to the magistrate, to the extent that the Appellant had assumed parental responsibility over the minors, an order for a DNA test was in the circumstances, irrelevant and unnecessary.

The Appeal

10. Aggrieved by the lower court's said Ruling of 18th August 2023, the Appellant, vide his memorandum of appeal dated 30th August 2023 lodged this appeal, raising the following five (5) grounds of appeal; -

    i. That the learned magistrate erred in fact and in law in failing to appreciate that the suit was for the maintenance orders and to determine whether the Appellant can be ordered to maintain the minors, it was imperative to determine first whether he is the father of the minors through DNA test.

    ii. That the learned trial magistrate erred in law in not considering the provisions of Section 7, Section 8, and Section 11 of the Children's Act, 2022 as well as Article 53(2) of *the Constitution* that stipulates that every child has a right to know his biological parents.

    iii. That the learned trial magistrate erred in fact and in law in failing to appreciate that there is sufficient cause for seeking the order and there is a likelihood that the respondent is not the father of the children.

    iv. That the learned trial magistrate erred in law in failing to appreciate that respondent's objection to submit the children to the DNA test violates the children's right to know their father and the objection unreasonably deprives the child of the possible enjoyment of the rights and benefits enshrined in sections 5 to 16 of Part II of the *Children Act*, 2022.

    v. That the learned magistrate erred in law and in fact in failing to allow the Appellant's application for DNA testing for the minors yet no prejudice would be occasioned to the minors.

11. The appeal was canvassed by way of written submissions. The Appellant's submissions is dated 22nd May 2024 whilst that of the Respondent is dated 9th July 2024.

Appellant's submissions

12. In his submissions, the Appellant identified that the only issue for determination in this appeal whether in the circumstances of the case, the lower court erred in holding that the Appellant in his application of 17th April 2023, failed to established a good basis for having the Appellant, Respondent and the minors submit to a Deoxyribonucleic Acid (DNA) test.

13. The Appellant submitted that the lower court erred, both in fact and in law in failing to allow his application for DNA testing since in doing so, the magistrate failed to appreciate that in a suit for maintenance orders involving children, it is imperative that the issue of paternity be determined first to help in the determination of the question of custody and maintenance of the minors, particularly in instances where paternity of a child is disputed, as the case herein.

14. According to the Appellant, it would be grossly unfair for the him to assume parental responsibility before a DNA test is undertaken to determine paternity of the minors, particularly in view of the fact that he disputed paternity. Citing the decision in the case of P.P.M. VS Senior Principal Magistrate Children's Court At Nairobi And Another (2014) eKLR and that of ZW v MGW [2014] eKLR, the Appellant asserted that it is important that the DNA be conducted to determine whether the appellant should be ordered to maintain the minors.

15. The Appellant further submitted that it would be in the best interest of the minors that they know their biological father for identity purposes and clear any confusion that might have been created in

their minds by the Respondent who has on a number of occasions told the Appellant in the presence of the minors that he is not their biological father.

16. Relying on the decision in the case of FKW (suing as the mother and next friend of GDW (Minor) v DMM [2015] eKLR, the Appellant argued the DNA test is necessary in the circumstances of the case and that it is in the best interests of the minors. That it is the minors' constitutional right growing up with the knowledge of who their biological parents are.

17. For those reasons, the Appellant prayed that the appeal be allowed and the lower court's decision dismissing the prayer for Deoxynbonucleic Acid Test (DNA) be set aside in its entirety. That an order be made by this court directing that the Appellant and Respondent to submit to a DNA test with the minors. That and costs of the DNA test be shared equally by both parties and that in the event the test confirms that the Appellant is not the biological father, the Respondent be compelled to refund the Appellant's cost of the DNA.

Respondent's submissions

18. On her part, the Respondent supported the ruling by the lower court. The Respondent submitted that having the minors subjected to a DNA test will be traumatizing to them and will not in the best interest of the minors. Relying on Article 53 (2) of *the Constitution* and Section 18(2) of the Children's Act, 2022, the Respondent asserted that minors' best interests are of paramount importance and must always be observed and protected in every matter concerning them.

19. The Respondent further submitted that by the Appellant in insisting on having the minors subjected to DNA testing, the Appellant is simply engaged in a fishing expedition and a roving inquiry, all calculated to serve his personal interest of having him escape from his parental responsibilities towards the minors, as opposed to the minor's best interest.

20. Citing the various court decision including that of P. K. M vs. Senior Principal Magistrate Children's Court at Nairobi &another [2014] eKLR and that of R.K vs. J.K & Another [2016] eKLR, the Respondent submitted that a DNA test cannot be ordered as a matter of course and that it should only be ordered in circumstances where the same is 'eminently needed to establish the truth and reach a just conclusion in the matter absent any other form of evidence and a prima facie case warranting the order ought to have been established first.

21. It was further the Respondent's position that by having the minors subjected to DNA testing in the manner proposed by the Appellant will infringe on the minors' right to privacy contrary to Article 31 of *the Constitution* and will also in breach of section 23 and 33 of the *Data Protection Act, 2019*. The Respondent cited the case of S.W.M v G.M.K [2012] eKLR in that regard.

22. The Respondent also submitted that on her part, she is also not ready to submit to DNA test because it will infringe on her right to bodily security and integrity and also the right to privacy.

23. It was further the Respondent's position that in view of the fact that she has since withdrawn her claim for maintenance of the minors against the Appellant, there no longer exists any valid reason for the Appellant to insist on a DNA test.

24. In the premises, the Respondent therefore urged this court to dismiss the appeal with costs in her favour.

Analysis And Determination

25. This being a first appeal, the duty of this court is to re-evaluate and re-assess the evidence tendered at the trial court with a view of reaching its own conclusion bearing in mind the fact that unlike the trial court, it did not have the advantage of observing the demeanor of the witness and hearing their evidence first hand. Due allowance must therefore be given for the same. See the Court of Appeal decision in Peters vs Sunday Post Limited [1958] EA where the court stated that; -

> " 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.....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..."

26. At the same time, I will also bear in mind the fact that an appeal to this court is by way of retrial and this court is not bound by the findings of the trial court merely because it did not have the advantage of hearing the witnesses testify and seeing their demeanor as was held in the case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA where the court stated that: -

> " ...I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial court .....is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

27. I have perused the memorandum of appeal and submissions by the parties in this appeal and note that the only two issues for determination in this appeal is whether the trial court's ruling of 18th August 2023 disallowing the Appellant's application to have the parties herein and the minors submit to a DNA test was in the circumstances of the case supported by law and the evidence submitted by the parties at trial.

28. In all matters involving children as the case herein, it a constitutional imperative that the rights and best interest of the child must at all times be upheld. Article 53 (1) (e) and 2 of Constitution provides that:

> " (1) Every child has the right:
>
> (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.
>
> (2) A child's best interests are of paramount importance in every matter concerning the child."

29. Further, Section 8(1) of the Children's Act, 2022 directs that in deciding upon any matter involving a child, courts are obliged to give priority to the best interests of the said child. The Section provides: -

> " (8).
>
> (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 interest of the child shall include but shall not be limited to the considerations set out in the First Schedule

(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.

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

30. In ANM & RMM [2019] eKLR, Odunga J (as he then was) stated as follows on the best interest of the child principle; -

> " 36. These provisions have been the subject of legal proceedings both in this country and in other jurisdictions. Lord McDermott, for example, in J v C (1970) AC 668, while dealing with the issue of paramountcy of the child's interest being an overriding factor as: "A process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices, and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare. That is...the paramount consideration because it rules upon or determines the course to be followed."

31. From the pleadings, it is clear that the Respondent instituted proceedings against the Appellant for orders of custody and maintenance of the minors in question. It was the Respondent's case that the minors are biological children of the Appellant and that the best interest of the minors lay in the Appellant not absconding his parental obligation and responsibilities towards the minors.

32. On his part, the Appellant in return sought for an order to have the parties herein and the minors submit to a Deoxyribonucleic Acid (DNA) test with a view of establishing paternity. According to the Appellant, it is critical that the issue of paternity be determined first to help in the determination of the question of custody and maintenance of the minors, particularly in instances where paternity of a child is disputed, as the case herein.

33. The Appellant also argued that a DNA test would be in the best interest of the minors since they will be able to know their biological father for identity purposes and clear any confusion that might have been created in their minds by the Respondent, who has on a number of occasions told the Appellant in the presence of the minors that he is not their biological father.

34. The Respondent countered this by stating that a DNA test would traumatize the minors and infringe on their privacy and therefore not in the minors' best interest. The Respondent stated that she was ready to protect her children's mental well-being and offered to drop the claim for maintenance against the Appellant if a DNA test would be a necessary pre-condition for the Appellant to accept to provide for his own children.

35. The Respondent in any event stated that on her part, she was not willing to undergo DNA test since the same will infringe on her constitutional right of privacy.

36. I have carefully analyzed and considered the parties' submissions in support of their respective positions. It is clear from the pleadings and proceedings in the lower court that the suit is one for custody and maintenance and that the same is based on the assertion by the Respondent that the Appellant is the biological father to the minors. The Appellant on the other hand denied paternity.

37. In my view, the best way of resolving the issues is to conduct a DNA test. The test will not only help in resolving the dispute before the trial court, but will also help the minors know who their biological father is. This is a constitutional right which cannot be taken away from the minors.

38. In FKW (suing as the mother and next friend of GDW (Minor) v DMM [2015] eKLR, the Ngaah J. dealing with a substantially similar situation stated as follows regarding the issue; -

> " What all these decisions point to is that where it is in the best interests of the child that a paternity test should be undertaken; where there is no other means of determining the father of a child other than by means of a paternity test and therefore where such a test is necessary in the circumstances and, where, in any event, the applicant has made out a prima facie case for such a test, then a court of law will ordinarily make an order for such a test. Looking at the applicant's case from this perspective, there is no doubt that it is in the best interests of the subject child that the DNA test should be taken. It is the child's constitutional right and he is better of growing up with the knowledge of who his parents are. As noted earlier there is no other way of determining who the father of the subject child is apart from conducting a DNA test and therefore this test is necessary in the circumstances of this case."

39. Again, in FSL v FNK, Civil Appeal no E060 of 2021 [2022] eKLR Thande, J observed that : -

> " 12. In the present matter which relates to a child of the parties, the interests of the child supersede those of the parties and must at all times be upheld. In this regard, the court is guided by the provisions of *the Constitution* of Kenya, 2010 and of the *Children Act* which require the court to give paramount importance to the best interests of the child."

40. The fact that the Respondent has withdrawn the claim for maintenance as alleged is immaterial. It was not her claim. It was a claim made on behalf of the minors. As a matter of fact, it is in my view not legally permissible for the Respondent to unilaterally take an action which has the effect of depriving the minors of their right of maintenance by their father.

41. Further both Article 53 (1) of *the Constitution* and Section 11 (1) of the Children's Act, 2022 are clear in their provisions that every child has a right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.

42. From the above it is clear that the rights of minors to receive maintenance should not be contingent on the actions of one party. The law typically seeks to protect the interests of minors, ensuring they receive the support to which they are entitled, regardless of the circumstances surrounding the claim, including the relationship between their parents.

43. The question of whether or not the Appellant had in the circumstances of this case acquired parental responsibility over the minors is not an issue for determination by this court. That, I leave to the trial court.

44. In the premises, I find the appeal merited and I hereby set aside that portion of the trial court's Ruling of 18th August 2023 dismissing the Appellant's prayer for DNA testing. I substitute ethe same with an order of this court allowing the Appellant's prayer in his application of 17th April 2023 that the Appellant and Respondent be ordered to submit to a Deoxyribonucleic Acid Test (DNA) with the minors.

45. I however direct that the cost of DNA testing to be met by the Appellant since he is the one who has asked for the same.

46. Accordingly, I order and direct that; -

    i. The parties shall avail themselves for a paternity test at the Government Chemist within thirty (30) days effective 8th October 2024.

    ii. In undertaking (i) above, the best interest of the minors must at all times be observed, protected and upheld by all the parties including the Government Chemist.

    iii. The results from the said DNA exercise shall be furnished before the trial court in the Nairobi CMCC No. E474 of 2023: In the matter of IW and LW (minors suing thro' their mother and next friend LNG v AWM).

    iv. I remit this matter back to the trial court which shall expeditiously hear and determine the main suit, taking into account the DNA results and other facts and evidence to be adduced by the parties thereat.

47. Parties to bear their own costs of this appeal.

48. It is so ordered.

SIGNED DATED and DELIVERED IN VIRTUAL COURT THIS 7TH DAY OF OCTOBER 2024

ADO MOSES

JUDGE

In the presence of:

Moses Court Assistant

Ms. Kamotho h/b for Ms. Kihika ..... for the Appellant

Mogotu..... for the Respondent