



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 87 OF 2019

DMN.....APPELLANT

-VERSUS-

DMM.....RESPONDENT

(Being an appeal from the Orders made by Hon. A. Nyoike (PM) on 2nd July, 2019 and 29th May, 2019 in Machakos Children's Case No. 9 of 2018)

BETWEEN

DMM..... APPELLANT

AND

DMN.....RESPONDENT

JUDGEMENT

1. This appeal arises from Machakos CM's Court Children's Case No. 9 of 2018 which was instituted by the Respondent herein against the Appellant. In the said case, the Respondent who was suing as the mother of a minor, pleaded that the parties met in the year 2014 and were blessed with a child, **NM**, on 9th October, 2015. However, the Appellant completely abdicated his duties towards the said minor leaving the Respondent as the sole provider of the said minor notwithstanding the fact that the Appellant was a teacher and therefore capable of providing for the minor.

2. The Respondent therefore sought orders for maintenance of the said minor.

3. In his defence, the Appellant denied being the biological father of the said minor and averred that the Respondent was attempting to enrich herself by using the said minor in disguise. He therefore maintained that he had no parental responsibility to maintain the said minor.

4. According to the record of the proceedings for 4th September, 2018, the Respondent herein informed the Court that she had withdrawn the suit and learned counsel for the Appellant confirmed that their office had been served with a notice of withdrawal dated 3rd September, 2018. Accordingly, it is minuted "withdrawn as per notice of withdrawal".

5. However, further proceedings seem to have taken place thereafter and on 29th May, 2019, the Court was informed that there was an application seeking to reinstate the suit. The Respondent informed the Court that she was coerced to sign the withdrawal notice and sought for a DNA test as per the orders issued previously. The Court then proceeded to reinstate the orders for DNA testing stating that it was in the interest of justice and directed that the test be conducted by the Government Analyst.

6. On 2nd July, 2019, the Respondent informed the Court that though she presented herself for the DNA test together with the said minor, the Appellant failed to show up. Despite having been duly served with the said order. On those grounds, the Court issued a warrant of arrest against the Appellant.

7. This appeal is based on the ground that the orders issued on 29th May, 2019 and 2nd July, 2019 were issued before the suit, which had been

withdrawn, was reinstated.

8. The instant appeal was filed on 3rd July, 2019. That was some 35 days after the order of 29th May, 2019 was issued. That was clearly outside the 30 days period prescribed for filing an appeal. There is no evidence that an order extending time to appeal against that decision was sought and obtained. Therefore, in so far as the appeal seeks to challenge the order issued on 29th May, 2019, the same is incompetent.

9. As regards the order of 2nd July, 2019, the same was based on the order issued on 29th May, 2019 reinstating the earlier orders. Accordingly, without successfully challenging the order issued on 29th May, 2019, the appeal against the order issued on 2nd July, 2019 is rendered stillborn.

10. It is therefore my view that the appeal fails in its entirety.

11. However, the Court cannot lose sight of the fact that the proceedings before the Learned Trial Magistrate were unprocedurally conducted. Without reinstating the suit, the Court could not purport to reinstate the orders which had been issued therein. This Court however being a court of equity must treat that which ought to have been done as done. It is my considered view that by reinstating the orders in the suit, the Learned Trial Magistrate, proceeded as if the suit was in existence. The matter before me involves the interests of a minor and such matters ought to be disposed of expeditiously.

12. Section 78 of the *Civil Procedure Act* provides that:

(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require the evidence to be taken;

(e) to order a new trial.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

13. This Court therefore has the same powers as those conferred on the trial court when hearing an appeal. In exercise of the said powers, I hereby direct that the suit be and is hereby reinstated. I however set aside the warrants of arrest issued on 2nd July, 2019.

14. There will be no order as to costs considering the nature of this case being a children's matter.

15. Orders accordingly.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 11TH DAY OF MARCH, 2021

G V ODUNGA

JUDGE

Delivered the presence of:

Mr Mutinda for Mr Kilonzo for the Appellant

Respondent in person

CA Geoffrey