REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CHILDREN APPEAL NO. 3 OF 2019

MNW.....APPELLANT

VERSUS

LNN.....RESPONDENT

JUDGEMENT

1. This is an Appeal arising from an order of costs dated 13th August 2019 by Hon. JHS Wanyanga, SRM. The Appellant raised 4 grounds in the memorandum of appeal namely:

> **i. That the trial magistrate erred in law and fact in holding that the Respondent had succeeded in his claims against the Appellant.**
>
> **ii. That the learned magistrate erred in law and fact in holding that the Respondent was entitled to the costs of the suit.**
>
> **iii. The learned trial magistrate erred in law and fact in failing to hold that the Appellant had succeeded as against the Respondent and as such was entitled to the costs of the suit.**
>
> **iv. The learned trial magistrate erred in law and fact in awarding the Respondent the costs of the suit.**

2. Briefly, the factual background to this case is that the Respondent on 17th October 2018 filed a suit seeking orders that:

> **i. The plaintiff be granted unrestricted access to the minor GWN.**
>
> **ii. Paternity test for the minor referred to as FWN.**
>
> **iii. Reimbursement of costs for the DNA on the minor referred to as FWN**
>
> **iv. Subject to prayer no ii) above, sharing of Maintenance costs for the minors.**
>
> **v. Subject to prayer no ii) above, grant of joint legal custody of the minors.**
>
> **vi. Costs of the suit.**

3. Simultaneously, the Respondent filed an application of even date seeking for access and custody of GWN, for DNA test on FWN, reimbursement of DNA costs and maintenance provision for the minors pending the hearing and determination of the main suit.

4. The parties herein got married under the Christian Marriage and Divorce Act in the year 2001 and were later blessed with a child, GWN in 2008 who at the time of filing the suit was aged 11 years. The parties started having marital disagreement and the Respondent left home in 2010. All along, he knew that GWN was his biological child having being born within wedlock and therefore provided for the said minor on that basis.

5. In the year 2011, the Respondent averred that the Appellant gave birth to another child FWN when the parties had no opportunity to get intimate and he therefore he concluded that the 2nd child was not his and did not take up parental responsibility

6. The Appellant then filed a complaint at the Department of Children Services, Nyahururu claiming that the Respondent had refused to provide for his two biological children and the Department issued summons to the Respondent dated 13th September 2018 in which he was warned with prosecution upon failure to comply with the said summons.

7. The Respondent averred that he told the Officers at the Children Services that he could not maintain the second born and he demanded for a DNA test for the second born. That the Appellant refused to submit to DNA and insisted that the Respondent had to provide by the second born child and denied him access to the first not. It was against this backdrop that the Respondent moved to court.

8. In her defence statement, the Appellant admitted that FWN was not the Respondent's child and therefore what was sought to be proved by way of DNA was proved by way of her admission. Further, 14th may 2019 it was also confirmed by way of DNA that the Respondent was not GWN's biological father.

9. On 18th June 2018, the parties' advocates addressed the court on the issue of costs and a ruling was delivered on 13th August 2019 whereby the trial court awarded the costs of the suit to the Respondent on the basis that he was the successful party occasioning the present appeal.

APPELLANT'S SUBMISSIONS:

10. The Appellant submitted that the Respondent did not get any of the prayers sought both from the application dated 17th October 2011 and the entire suit thus he lost in both.

11. It was her assertion that the issue that gained traction in the paternity of GWN and as a result a compromise was reached to subject GWN for a DNA test and parties agreed on equal sharing of the DNA test costs, subject to reimbursement of the costs to the party whose contention would carry the day in the DNA results. That following the DNA results the Respondent refunded the sum of Kshs. 12,750/- to the Appellant on account of the costs incurred by her in the DNA exercise thus it is evident that the Respondent lost in his quest to justify that he was the biological father of GWN.

12. The Appellant reiterated that based on the foregoing, she was the successful party in the said suit and therefore the trial court erred when it found otherwise. Reliance was placed on ***Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & Another (2016) eKLR*** and **Elite Intelligent Traffic System Ltd vs HFC Limited; Hassan Zubeid & 2 Others (Interested Parties) (2019) eKLR**.

13. The Appellant asserted that the parties did not formally agree on anything when they appeared before the Sub County Children Officer, Nyandarua on 13th September 2019 and that the allegations that the Respondent to the effect that the Appellant has refused to subject FWN for a DNA test was misleading and it was therefore unfortunate that the trial court fell into this trap and went further to find that had the Appellant agreed on DNA testing, the suit could not have been filed.

14. In conclusion, the Appellant asserted that she had demonstrated that she was the successful party and as such was entitled to the costs before the trial court and prayed that the award be set aside.

RESPONDENT'S SUBMISSIONS:

15. The Respondent asserted that even though the Appellant knew that the second born was not a child of the Respondent she reported the Respondent to the Children's Department, refused to voluntarily submit to DNA and even made the Respondent to file suit seeking an order for DNA to prove that he was not the father and therefore stop the extortion and threats of criminal prosecution.

16. The Respondent asserted that he was successful in proving that he was not the biological father of FWN (the second born) thus why the trial court considered in exercising its discretion in his favour and warded him the costs of the suit.

17. The Respondent emphasized that it is trite la that an appellate court shall not interfere with the discretion of a trial court unless that discretion was exercised injudiciously or the trial court applied wrong principles in arriving at the decision. Reliance was placed on ***Section 27 of the Civil Procedure Act***, an excerpt from ***Richard Kuloba, Hints on Civil Procedure, 2nd Edition, Page 101*** and ***Party of Independent Candidates of Kenya vs. Mutua Kilonzo & 2 Others, HC Ep No. 6 of 2013.***

18. It was the Respondent's assertion that a reasonable man in the place of the trial court and faced with the facts of this case would have awarded costs to the Respondent just like the trial court did for the following reasons: -

19. The Respondent was reported to the Children's Department for failure to maintain the two minors whom the Appellant alleged were his biological children.

20. The Respondent in the summons was even threatened with prosecution.

21. He still insisted that he knew FWN was not his child and he requested a DNA test. In the circumstance of this case, it is the Appellant who had taken the case to the Children's Office and therefore the one who would have definitely declined a DNA test and not the Respondent because clearly she knew who the father of the two children was. She therefore declined a DNA test.

22. The Appellant made the Respondent to believe for 11 years that the first born GWN was his biological child. He was therefore justified and entitled to seek access like he always had.

23. The Appellant insisted that the Respondent had to maintain both children even after the Respondent stated that he was not the father of the second born.

24. The Respondent apart from seeking access of the first born sort for an order for DNA to prove that he was not the father of FWN and the harassment of the Appellant was therefore unlawful.

25. The fact that the Respondent was not the father of FWN was admitted by the Appellant in her defence, therefore proved that the Respondent succeeded to that extent

26. The suit would not have been necessary had the Appellant not take the action of reporting the Respondent to the children department for upkeep of the children while she clearly knew that they did not belong to the Respondent

27. In conclusion, the Respondent prayed for the appeal to be dismissed with costs.

ANALYSIS AND DETERMINATION

28. From the foregoing, the only issue that arises is that of the award of costs by the trial court.

29. Section 27 of the Civil Procedure Act Cap 21 (Laws of Kenya) provides as follows:

> **"Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:**
>
> **Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order"**

30. The Civil Procedure Act gives this court discretionary powers to order payment of costs where it deems fit to do so. I fully associate myself with the statements of the learned judge in ***UAP Insurance Company v Toiyoi Investment Limited [2020] eKLR*** that:

> **"The law in designing the legal phrase that "Cost follow the event'' was driven by the fact that there could be no "one-size-fit-all'' situation on the matter.**
>
> **The Court should, therefore, look at the event within the circumstances of the case. And that exercise will inform the exercise of discretion by the Court. It should also be understood well; that a successful party does not refer to a person who has been taken through rigorous and convoluted motions of litigation by the other party.**
>
> **Similarly, a party does not cease to be a successful party merely because he met little or no contest in his claim against the Defendant. He is a successful party because he is declared so by the Court after looking at the result of the entire litigation, which includes; negotiations or steps which culminates to, and the recording of a consent thereto, conduct of the Plaintiff etc."**

31. As relied upon by the Respondent in the ***Party of Independent Candidate of Kenya vs Mutula Kilonzo & 2 Others [2013],*** the court held that:

> **"…it's clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs in a matter in which the trial judge is given discretion…but this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.''**

32. In ***Orix Oil (Kenya) Limited v Paul Kabeu & 2 Others [2014] eKLR*** the court stated:

> **"…the court should have been guided by the law that costs follow the event, and the Plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied the costs or the successful issue was not attracting costs. None of those deviant factors are present in this case and the court would still have awarded costs to the Plaintiff, which I do."**

33. I associate myself with the court's holding on the exercise of discretion in the case of ***Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231***, where the court held that:

> **"A Court will not interfere with the exercise of discretion unless it is satisfied that it is clearly wrong, because it has misdirected himself, or acted on matters which it should have not acted or failed to take into consideration matters which it should have considered and in so doing arrived at a wrong conclusion…Discretion must be exercised judicially and not arbitrarily or capriciously; nor should it be exercised on the basis of sentiment or sympathy."**

34. Having gone through all the material in the instant suit and in light of the position of the law, I do find that the learned trial magistrate did not depart from the general rule that costs follow the event. The event herein being that the Respondent was the successful party and was therefore entitled to the costs awarded. The Respondent has demonstrated that he deserves the costs awarded by the trial magistrate as he instituted that suit following the Appellant's decision to report him to the Children's Department only for the Appellant to later admit in her defence that FWN was indeed not his biological child. The appellant averred that the Respondent lost in his quest to justify that he was the biological father of GWN but it must be noted that this was an issue that arose in trial aside from the main issue which was the paternity of FWN following the appellant's' demands that he provide for both children. The respondent undertook the trouble to institute the trial court proceedings and the appellant's admissions in defence do not negate that fact.

35. Justice (Retired) Richard Kuloba in the earlier cited book states as follows:-

> **"The words "the event" mean the result of all the proceedings to the litigation. <u>The event is the result of the entire litigation.</u> It is clear however, that the word "event" is to be regarded as a collective noun and is to be read distinctively so that in fact <u>it may mean the "events" of separate issues in an action.</u> Thus the expression "the costs shall follow the event" means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. <u>An issue in this sense need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgement in the whole or in part"</u>**

36. In ***<u>Jasbir Singh Rai & Others vs Tarlochan Rai & Others [2002] eKLR</u>*** the court observed that:-

> **"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, prior to during and subsequent to the actual process of litigation."**

37. Accordingly, the Respondent acted reasonably by instituting the suit and consequently he had had to undergo expenses whether monetary or in terms of time and energy as a result of the suit, and the accompanying application. I agree with the learned trial magistrate that the issue of costs came as a result of all the proceedings to the entire litigation and there is also no attrition of any conduct which would prevent the plaintiff from being awarded costs. Remarkably, it is my considered view that the Appellant seems to want to have her cake and eat it, a position that cannot be sustained by this court. The upshot of this court's decision was that the Appellants' Appeal is unmerited and the court makes the orders;

i. Appeal is hereby dismissed.

ii. Costs to the respondent.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 18TH DAY OF NOVEMBER, 2021

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CHARLES KARIUKI

JUDGE