



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**(CORAM: CHERERE-J)**

**CIVIL APPEAL NO. 85 OF 2019**

**BETWEEN**

**PC.....APPELLANT**

**AND**

**MAO.....RESPONDENT**

**(Being an Appeal from the Ruling and Orders in Kisumu CMCC**

**Children Case No. 21 of 2019 by Hon. S.Telewa (SRM) on 11<sup>th</sup> July, 2019)**

**JUDGMENT**

1. By a plaint dated 13.03.19 filed on 14.03.19, **MAO (Respondent)** filed suit against **PC (Appellant)** in the lower court claiming seeking custody of the minor, maintenance and costs.
2. By a defence dated 23.05.19 filed on 27.05.19, the Appellant denied the Respondent's claim and prayed for its dismissal with costs.
3. On 11.07.19 when matter came up for mention before the trial court, the learned trial magistrate made an order that a DNA between the child and the Appellant be conducted by the Government Chemists at the cost of the Appellant and that any DNA conducted previously be disregarded.

**The Appeal**

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 17.07.19 filed the Memorandum of Appeal which sets out six (6) grounds which I have summarized into three (3) grounds that:

- 1) **The substantive order was made on a mention date**
- 2) **The trial court expunged the Appellant's documents leading to a miscarriage of justice**
- 3) **The Appellant was denied a fair hearing**

**5. Analysis and Determination**

This being the first appellate court, its duty is to re-evaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. (See **Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123**).

6. This appeal was argued by way of written submissions. In further exposition of the appeal, both parties cited various authorities and I will address the main issue as hereunder.

**Whether a substantive order can be made on a mention date**

7. The Appellant holds the view that the trial court erred in not giving him a hearing before making the impugned order.

8. The court record demonstrates that on 11.07.19 when the impugned order was made, the Respondent complained that a paternity test had been conducted without her knowledge. Mr. Otieno advocate for the Appellant submitted that paternity was disputed and that the Appellant had filed documents in support of its assertion.

9. Whereas paternity is an issue for determination and the court may at some point in time require the DNA results, there is evidence that neither of the parties made an application for DNA tests. Similarly, there is evidence that the court did not give any reasons for expunging the Appellant's DNA documents or for condemning him to pay for DNA tests without giving him a hearing.

10. In the case of **Mrs. Rahab Wanjiru Evans vs. Esso (K) Ltd Civil Appeal No. 13 of 1995 [1995-1998] 1 EA 332**, the Court of Appeal held that when the matter is fixed for mention, it cannot be heard unless by consent of the parties and that orders cannot be made before hearing submissions of the parties. This position was reiterated in **Republic Vs. Anti-Counterfeit Agency & 2 Others Exparte Surgipharm Limited, Nairobi JR Miscellaneous Application No. 11 Of 2012 [2014] eKLR** and **Paul Odhiambo Ogunde V Maersk Kenya Limited [2016] eKLR**.

11. The Respondent holds the view that the court made the impugned orders under its inherent jurisdiction under Section 3A of the Civil Procedure Rules.

12. My answer to the Respondent's assertion is to be found in Article 50 (1) which underscores the right to be heard and provides that:

**Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.**

13. Further to the foregoing, **Halsbury Laws of England, 5<sup>th</sup> Edition 2010 Vol. 61 para 639** states that:

**"the rule that no person is to be condemned unless that person has been given prior notice of the allegations against him, and a fair opportunity to be heard, (the Audi alteram partem rule) is a fundamental principle of justice."**

14. Having made a finding that the Appellant was denied an opportunity to be heard, I need not delve into the other issues as to whether DNA tests would be required and at whose cost since these issues might arise when a substantial application is made before the trial court which will be expected to afford both parties an opportunity to be heard.

### **Orders**

15. In the end, I find that this appeal has merit and is allowed in the following terms:

- 1) The ruling and orders made on 11<sup>th</sup> July, 2019 are set aside in their entirety**
- 2) The Respondent is condemned to pay the costs of this appeal.**

**DELIVERED AND SIGNED IN KISUMU THIS 05<sup>th</sup> DAY OF March, 2020**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

**Court Assistant - Amondi/Okodoi**

**For the Appellant - Mr. Mbeka**

**For the Respondent - N/A**