REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. 108 OF 2019

MCC.....APPELLANT

VERSUS

SKM.....RESPONDENT

(Being an appeal from the Orders of the Hon. R.O. Mbogo (Mr) Resident Magistrate in Nairobi Milimani Children's Court Case No. 1068 of 2019)

JUDGMENT

1. This appeal arises from the order of the Resident Magistrate (Hon. R.O. Mbogo) issued on 16th September 2019 directing both the appellant MCC and the respondent SKM to avail themselves at the Government Chemist on an agreeable date for DNA testing whose purpose was to determine the paternity of a child KMK. who was born on 18th November 2016. The reason given for the order was that the respondent had denied that he was the father of the child. The trial court indicated that it was issuing the order in the best interest of the child.

2. The appeal was filed on 25th September 2019 to challenge the order for the DNA. The appellant complained that the order was neither necessary nor warranted, and that, in any case, the respondent had admitted paternity in his replying affidavit dated 13th September 2019.

3. The background of the dispute was that the appellant had sued the respondent in the Children's Court, seeking joint legal custody of the child; exclusive physical custody of the child with visitation rights given to the respondent; and for the respondent to be compelled to pay rent, fees, medical and maintenance of the child. With the suit was an application for interim order for payment of fees, medical and maintenance. The application was under certificate of urgency. When it went before the Court, no orders were granted. The Court asked that the application be served for *interparte* hearing. It was served, and the respondent filed a replying affidavit sworn on 13th September 2019. The application came up for hearing, and that was when the order complained of was issued.

4. The appellant works for the Standard Media Group and the respondent is a practicing advocate.

5. In response to the appeal, the respondent filed a notice of preliminary objection to state that the jurisdiction of the court had been prematurely invoked in the absence of a substantive court order amenable to this court's appellate powers –

> **"for the reason that what has been brought before this court is merely a preliminary procedure from court."**

In the replying affidavit that the respondent swore before this court, he supported the order for DNA on the basis that he could not be asked to maintain a child he did not father. He further stated that the order complained of was within the exclusive jurisdiction of the Children Court. The appellant had complained in the appeal that the Children Court was wrong in not granting the interim orders that she had sought against the respondent.

6. It is the duty of this court to reconsider the evidence tendered before the trial court and make its own conclusions thereon **(Selle –v- Associated Motor Boat Company [1968] EA 123).**

7. It is true that the respondent cannot be made to take responsibility over the education, medical expenses and maintenance of the child if he is not the father. The trial Court had to establish that he was the father before granting orders against him in relation to the child. The question is whether the order for DNA was warranted or necessary, given the facts of the case between the parties.

8. It is trite that parties are bound by their own pleadings, and the court itself is bound by the pleadings of the parties (**Dakianga Distributors (K) Ltd –v- Kenya Seed Company Limited [2015]eKLR).** It is the pleadings that define and delimit clearly and precisely the real matters in controversy between the parties upon which they can prepare and present their respective cases that the court will be called to decide.

9. On what basis was DNA ordered? Why was it necessary to subject the appellant and the respondent to DNA? Was the paternity of the child in question? In the plaint the appellant stated that she and the respondent were the parents of the child who was born on 18th November 2016, the two having lived together between 2015 and 2019. I appreciate that the respondent has not filed a defence. But he filed a replying affidavit to the application filed together with the plaint. In paragraph 10 of the affidavit he stated as follows:-

> **"10. THAT I will separately apply to the honourable court for orders to issue subjecting the minor to a DNA test and that subject to the DNA test being carried out to confirm that I am the biological father of the minor, I undertake to provide of all reasonable needs of the minor other than these related to the plaintiff's household."**

When counsel for the parties went before the Children Court for the *interparte* hearing of the appellant's application for interim orders of maintenance, the respondent's counsel said he was challenging paternity. That is how the Court came to make the impugned order.

10. I agree with the appellant that the respondent had in his affidavit admitted paternity, and therefore it was not necessary for the court to require DNA testing. In Paragraph 13 of the replying affidavit, the respondent stated as follows:-

> **"13. THAT I state that I have been a doting father to the minor and that I have given the plaintiff as the mother thereof all the necessary support I would ably provide for and I am now taken aback by the alleged spurious and unparticularised acts of domestic violence levelled against me which I believe are mere attempts at character assassination and intended to meet an ulterior motive....."**

In paragraph 15 he stated as follows:-

> **"15 THAT there is no occasion for me to put the minor in harm's way and the allegation that on 1st August 2019 I took him to unknown destination after allegedly threatening the house help is mere scaremongering. The fact of the matter is that I took my son out for dinner at Fahari Restaurant on Church Road and thereafter retired to our home on a night the plaintiff did not show up, a matter that I am not duly bothered about ....."**

It is clear the respondent considered himself the "**father**" of the child, and considered the child as his "**son**." This was his sworn evidence from which he cannot be allowed to depart. This was over and above the fact that the child carried his name, the annexed birth certificate of the child had him as the father and the child was born when he was living and cohabiting with the appellant.

11. As for the objection taken that the jurisdiction of the court had been prematurely invoked, I consider that the order of DNA, although issued during interlocutory proceedings, was a substantive order that was appealable. There was, therefore, no merit in the objection.

12. There was also the issue that the appeal did not contain any prayers; that it was just a summary list of complaints. The complaint is merited, but it cannot be the basis for the dismissal of the appeal. It was clear the complaint was that the DNA order was not necessary, the respondent having admitted the paternity of the child. The court has to consider that the dispute is over the minor. The interests of the minor are of paramount consideration under **section 4(2)** of the **Children Act** and **Article 53(2)** of the Constitution. The court is enjoined to do substantive justice to achieve the best interests of the child. The best interests of the child demand that the matter be urgently committed back to the Children Court to determine the issues raised in the plaint and in the chamber application, now that the issue of paternity has been settled by this court.

13. Consequently, I allow the appeal and set aside the order for DNA testing that was issued by the Children Court on 16th September 2019.

14. In view of the defect in of the appeal, and bearing in mind that costs usually follow the event, I ask that each side should pay own costs. I have considered that the appeal was drawn and filed by counsel who should have known better.

DATED and DELIVERED electronically, following consent of the parties, at NAIROBI this 7TH day of MAY 2020

A.O. MUCHELULE

JUDGE