



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 22 OF 2020

DNR..... APPELLANT

VERSUS

MMK..... RESPONDENT

(Being an appeal from the Ruling of the Hon. E. Tsimonjero (R.M) dated 19/2/2020 given in the Meru Children's Cause No. 58 of 2019)

J U D G M E N T

1. On 29/8/2019, the respondent lodged a plaint in the Meru Children's Court alleging that the appellant who was his father had reneged on his parental responsibility to him. He therefore prayed that the appellant be compelled to resume his parental responsibility and pay to him a total of Kshs.30,000/- towards his upkeep and shelter.
2. The appellant filed his defence on 1/11/2019 and denied respondent's claim. On 3/12/2019, he applied to strike out the plaint on the basis that it did not disclose any reasonable cause of action and that the suit was frivolous, vexatious and an abuse of the process of the court.
3. By a ruling made on 19/2/2020, the trial Court dismissed the application. The trial Court opined that the issues raised in the affidavits of the respective parties ought to be subjected to cross-examination at a full trial.
4. Aggrieved by the said decision, the appellant preferred this appeal setting out four grounds of appeal: -
 - a) *The trial Court erred in accepting the respondent's suit and application which were filled without prior leave of the court as required under section 91 (h) of the Children's Act cap 8 of 2001.*
 - b) *The trial Court erred in failing to strike out the suit whilst it was clear from the face of the pleadings that the plaintiff did not have a reasonable cause of action against the appellant.*
 - c) *That the trial Court erred in failing to strike out the respondent's suit despite DNA evidence that the respondent was not sired by the appellant.*
 - d) *The trial Court erred in allowing the case to proceed which was obviously vexatious embarrassing an abuse of the court process.*
5. As a first appellate Court, I have reviewed the entire trial Court record with a view to coming to my own independent findings. The parties filed their respective submissions which the Court has carefully considered.
6. The first ground of appeal was that the trial Court erred in accepting the respondent's suit which had been filled without prior leave of court as required under *section 91 (h) of the Children's Act cap 8 of 2001*.
7. It was submitted for the appellant that the only avenue available to a person who has attained the age of majority to institute proceedings under the *Children's Act* is by dint of *sections 28 and 91 of Children's Act* where the court is empowered to extend parental responsibility beyond the age of 18 years.
8. That the respondent needed to have obtained leave prior to filing the proceedings. No such leave was obtained. The cases of **Joseph Kaara Mwethaga v Thabiti Fincance Co. Ltd (In Liquidation) & 4 others [1998] Eklr, Bisal & Another v Kenya Commercial Bank Limited 2002 EA** and **Sandhurst & 3 Others vs Kenya Commercial Bank and 2 others 2010 eklr** were cited in support of those submissions.

9. On his part, the respondent submitted that the decision appealed against was in accordance with **Article 159 of the Constitution**. That the appeal was malicious and contemptuous of the said article of the Constitution.

10. According to the record, contemporaneous with the plaint, the respondent filed an application under **sections 28 and 91 of the Children's Act**. One of the prayers sought in that application was 'extension of parental responsibility in favour of the respondent beyond his eighteenth birthday'.

11. The trial Court granted the orders sought in that application but upon application by the appellant, the same was set aside on 13/11/2019. In setting aside the said orders, the trial Court observed that the issues raised in the entire suit be considered at the main trial and set down the suit for pre-trial. Instead of taking pre-trial directions, the appellant lodged the application to strike out the suit.

12. It is clear that the trial Court had granted leave to the respondent to proceed with his suit. However, the trial Court set aside that leave when setting aside the orders of maintenance which it had granted contemporaneous with the leave.

13. In my view, the cases relied on by the appellant are not applicable. They relate to bringing suits against companies under liquidation. The legal regime applicable in those circumstances are different as opposed to the legal regime under the Children's Act. There is nothing in the Children's Act that bars the lodging of the application for leave contemporaneous with suit as the respondent did here.

14. Since the trial Court was satisfied that the issues raised be dealt with at the trial of the main suit, and having already granted the extension sought, I am unable to find that the suit had been filed against the law as contended by the appellant. I am satisfied that the respondent had complied with the provisions of **section 91 (b) of the Children's Act**. The suit was filed with the leave of the court.

15. The second ground was that the trial Court erred in failing to strike out the suit whilst it was clear from the face of the pleadings that the plaintiff did not have a reasonable cause of action against the appellant

16. It was the appellant's submission that the provisions of **section 28 and 91 of the Children's Act** presume a situation where a party has assumed parental responsibility when the child is still a minor. If no such responsibility had been assumed or imposed on a party when the child is a minor, there is no responsibility to extend. The cases of **CM v SWA [2019] eKlr** and **Allan Njau Waiyaki v Eddie Waiyaki Hinga [2019] eKlr** were cited in support of that submission.

17. On the other hand, the respondent submitted that during the lifetime of the appellant's father by the name **M'R**, the appellant had accepted him as a son in the presence of one witness **M'Ikiao M'Nkanata** in the appellant's offices.

18. The respondent is admittedly aged 33 yrs. The affidavits show that the appellant has throughout been denying that he sired the respondent. The respondent was educated by his late mother and grandmother. In the suit, he sought that the appellant be compelled to resume parental responsibility and pay college fees and pay for the respondent's upkeep.

19. **Section 28 of the Children's Act** gives the court a wide discretion is extension of parental responsibility in respect of a child beyond the age of eighteen if the court is satisfied that special circumstances exist with regard to the welfare of the child. The section provides: -

"28(1) Parental responsibility in respect of a child may be extended by the court beyond the date of the child's eighteenth birthday if the court is satisfied upon application or of its own motion that special circumstances exist with regard to the welfare of the child that would necessitate such extension being made."

20. **Section 91(b)** on its part provides the circumstances when a person who is not a child can apply to court for a maintenance order.

21. In **JNT v JWO & Another [2019] Eklr**, a respondent aged 23 had been granted an extension of parental responsibility by a trial court. Muchelule J reversed the decision on the ground that there was no evidence that the appellant had catered for the respondent's education prior to becoming an adult. There was also no evidence that the respondent had commenced his university education.

22. In **Allan Njau Waiyaki v Eddie Waiyaki Hinga [2019] Eklr**, the court held: -

"My reading of sections 28 and 91(b)(i) of the Act is this. A child is in school or training at the expense of his parents. He attains the age of 18, and the programme he had enrolled for has not ended. At that point, the parents stop paying or threaten to stop paying. He will go to the Children's Court to seek an order for extension of parental responsibility to force the parents to see him through the completion of that programme. At the conclusion of that programme, parental responsibility will cease. His parents will now be dealing with an adult who is supposed to fend for himself."

In this case, the appellant was provided for by the respondent up-to the completion of his undergraduate studies. The respondent did this without compulsion of an order of extension of parental responsibility. The appellant went for extended parental responsibility long after he was 18, and when there was no continuing programme that the respondent was providing, or was responsible for. The respondent may be a rich father. However, in the circumstances of this case, he had no obligation to pay for the appellant's Master's programme ..."

23. In **M N B v J N M & another [2019] Eklr**, the court held: -

"For the parental responsibility to be extended it must have existed in the first place and that is not the case here."

The appellant had an opportunity to move to Court prior to his attainment of the age of majority. This application is being made 7 years after the Appellant attained the age of majority and I find that the same is belated.

The reasons the Appellant advanced for not making the application earlier is that he did not know his father and further that he was ignorant as what he should do.

I find that there is evidence that in the year 2003, the Appellant was already made aware by the 1st Respondent that the 2nd Respondent was his father. I further find that the said issue was disputed by the 2nd respondent and it needs to be proved by the person alleging the same.

Even if the said paternity is not in dispute, to ask the 2nd Respondent to assume parental responsibility for an adult aged 26 years old would amount to setting a dangerous precedent.”

24. In the present case, the respondent acknowledges that he had known that the appellant was his father. He was at the time a minor when he was taken to the offices of the appellant and that the appellant allegedly admitted his paternity. He never moved the court as a minor. He has since attained the age of majority. The suit is being filed 15 years after attaining the age of majority.

25. Further, the respondent conceded that he is married and has children of his own. He also admitted that the appellant never took care of him all of his lifetime. That at no time the appellant assumed parental responsibility over the respondent. In this regard, it would be unfair to impose upon a party, an obligation of another adult mind who should fend for himself.

26. Even in circumstances where there is admitted paternity, it would be a dangerous precedent to impose responsibility of a man aged 33 years upon his father. The Children’s Act caters for children and not men and women who are of age and whom society expects to fend for themselves. That is why the order for continuous maintenance will be made where a programme a child is undertaking has not yet been completed. Ground 2 therefore succeeds.

27. The third and fourth grounds were argued together. These were to the effect that due to confirmed DNA results that exonerated the appellant as the father of the respondent, the suit was frivolous, vexatious and an abuse of the process of the court.

28. It was submitted that the DNA test undertaken by the appellant and the respondent showed that there was no relationship between the appellant and the respondent. The respondent on his behalf alleged that the DNA result was fraudulent at the time it was undertaken, he was a minor and was not accompanied by any guardian.

29. In **Trust Bank Limited v Amin Company Ltd & Another (2000) KLR 164**, it was held: -

“A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expense. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action”

30. In **Kivanga Estates Limited v National Bank of Kenya Limited [2017] Eklr**, the Court of Appeal held: -

“It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction, capable of bringing a suit to an end before it has even been heard on merit, yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations”.

31. In the present case, I have found that the respondent is not a child. He is a man aged 33 years who never sought to enforce what he thought to be his rights for over 15 years. He has not challenged the DNA results notwithstanding that he has had knowledge of them all this time. The tests may have been wrongly undertaken if it be true that he was a minor and he was unaccompanied when they were undertaken. That however does not give him the right to bring the suit which he brought before the trial Court.

32. The DNA results have not been properly challenged and or set aside. They stand as the best evidence of the relationship or lack of it between the appellant and the respondent. In this Court’s view, the suit is frivolous and cannot stand. The respondent could have approached the matter in a different way but not through the Children’s Court as he sought in this case.

33. In this regard, I find that the appeal is meritorious and is hereby allowed. The plaintiff’s suit is hereby struck out. In the circumstances of this case I will order the parties to bear own cost both in the trial court and this appeal.

DATED and DELIVERED at Meru this 2nd day of July, 2020.

A. MABEYA

JUDGE