



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**CIVIL APPEAL NO. 121 OF 2016**

**IN THE MATTER OF CHILDREN(CASE NO. 198A OF 2016)**

**DKK.....APPELLANT**

**-VERSUS-**

**CWN.....RESPONDENT**

**JUDGMENT**

***(Appeal from Ruling of Hon. M.A.Otindo SRM Children Court delivered on 6<sup>th</sup> December 2016)***

**BACKGROUND**

The Appellant filed appeal on 29<sup>th</sup> September 2017 and raised grounds of appeal in the memorandum of appeal condensed as follows;

The Trial Court allegedly erred in law in failing to grant the Appellant request for **DNA Paternity test** in relation to the minor AN to ascertain his paternity.

The Trial Court allegedly erred in ordering the Appellant to pay Ksh 25,000/- as maintenance of the children without considering financial circumstances and obligations of each parent. Also taking into account that the Appellant was paying school fees and expenses at a boarding school.

The Appellant sought stay of execution of Trial Court's orders pending appeal. Muchelule J delivered the Ruling delivered on 22<sup>nd</sup> June 2017 and dismissed the application for stay pending appeal.

When the appeal was set down for hearing, parties opted to canvass the appeal by written submissions.

**APPELLANT'S SUBMISSIONS**

The Appellant submitted that the appeal herein dated 19<sup>th</sup> December 2016 and filed the same day by the Appellant on the following grounds;

That **Children's Case 198A/2016** was filed by the Respondent in February 2016, eight years after she separated with the Appellant and only after she learnt that the Appellant was to solemnize his wedding in church in 7<sup>th</sup> May 2016 with his current wife. A dissolution order of the customary marriage between the Appellant and the Respondent has been issued by court in **Divorce Case No. 2B/2016 in Naivasha Law Courts**.

The minor herein was born before the dissolution of the customary marriage and the Respondent sought maintenance orders for the minor herein.

That the Trial court rendered its ruling on 6<sup>th</sup> December 2016 and the Appellant was to pay Ksh 25,000/- for maintenance of the child while he paid school fees and school expenses for the child. On the Applicant's application for review of the Court's orders so that he pays a sum of Ksh 25,000/- to the minor's mother every school holiday i.e April, August and December until the suit is heard and determined; that was granted but the order was to take effect immediately. However, the emphasized that '**any previous arrears should be settled in full**'.

The Appellant's argument was and still is that the Ksh 25,000/- maintenance was exorbitant, parental responsibility should be shared by the

parents equally. During school time, the Applicant was paying maintenance of the minor through boarding fees already ordered by the court in a high cost school, a school he was not consulted before the minor's admission, thus he was doing double payments for maintenance and being over burdened by the mother through such orders.

Further that the parties were also directed 'to fix' the suit for hearing within 60 days failure to which the interim orders shall lapse. The orders actually lapsed because the hearing date was not fixed.

New and important information came to light while the Trial court was handling the case, that actually the mother had confided to her confidants that the minor's biological father was not the Appellant herein, which prompted the Appellant to seek DNA testing. When the Appellant revealed this information and sought DNA testing, the lower court dismissed the application as an afterthought by the Appellant/Defendant. The dismissal of the DNA application necessitated the Appellant to exercise his right of appeal to this Honourable court on 19<sup>th</sup> December 2016.

The Appellant's new position was that the Respondent had all along knowingly deceived the minor herein and the Appellant on the paternity of the minor and had committed marital fraud. The Appellant further argues that the Respondent had fraudulently interfered with court documents with the sole aim of defeating justice and extorting cash through the unsuspecting court system, thus the invited the **CID** to investigate. He argues that the court's interim orders should stop until the paternity issue and fraud claims are conclusively addressed.

### **RESPONDENT'S SUBMISSIONS**

The Respondent submitted that this is one of those protracted matters where this Honorable court is once again called upon to adjudicate over the best interest of the subject minor over and above the interests, reservations, wishes and demands of any of the respective parties. Under **Section 4 (2)** of the **Children's Act**; the Court is mandated to strictly have primary consideration to the best interests of the minor herein whilst rendering its judgment.

The Respondent stated that the backdrop of the instant appeal emanates from **Children's Case 198 'A' of 2016** between the parties herein in which the Respondent (then Plaintiff) filed Plaint seeking for orders against the Appellant (then Defendant) for the maintenance of the subject minor AN Simultaneously, with the Plaint, the Respondent filed a motion Application dated 16<sup>th</sup> February 2016.

On 6<sup>th</sup> December 2016, the Trial Court exercising its mandate to promote and enhance the best interests of the subject minor herein directed that the Appellant pays maintenance of Ksh 25,000/- per month but only during the school holidays. It should however be noted that initially, the Trial Court ordered the Appellant to pay school fees and related expenses for the minor as well as maintenance of **Ksh 25,000/-** monthly. This is the crux of the instant appeal.

The Respondent informed the court of the following developments;

**a) The main suit in the Children's Court has never been heard due to the delays by the Appellant as well as the instant Appeal;**

**b) The Application for stay was accordingly dismissed by Muchelule J. on 22<sup>nd</sup> June 2017.**

The Respondent added that in the instant appeal as canvassed in the Memorandum of Appeal dated 19<sup>th</sup> December 2016, there are only two (2) issues that can be deduced from the same for which the Respondent shall limit its humble submission to thus;

a) Whether parties should undertake a paternity test

b) Whether the Appellant is mandated in law to contribute towards the welfare of the subject minor.

### **DETERMINATION**

**Article 53 (1) (e) of the Constitution stipulates the rights of the child thus;**

***"Every child has the right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married or not;***

**Article 53 (2) of the Constitution provides;**

***"A child's best interests are of paramount importance in every matter concerning the child."***

**In D.N.M vs J.K Petition 133 of 2015 [2016] eKLR where the Petitioner sought DNA testing at the interlocutory stage; the Court held that;**

***"In PKM vs SPM Children's Court the Court relied on India's Supreme Court test in the case of Bhahani Prasad Jena vs Convenor Sec Orissa Civil Appeal Nos 6222-6223 of 2010 which provided; The Question is whether the DNA test was 'eminently needed' to establish the truth and reach just conclusion of the matter absent any other form of evidence.***

In the case of **WKG vs JWM & Anor [2016] eKLR** the Court alluded to the standard and burden of proof provided by **Sections 107-109**

Evidence Act Cap 80 and found;

***“In paternity cases the Court could opt for a scientific method [DNA] for conclusive results.”***

In the case of ***RK vs WJK & Anor [2016] e KLR*** held;

***“A DNA test will not be ordered unless there are clear circumstances that justify making the order....”***

The child the subject of these proceedings is one whom at this stage was/is deemed to an issue of the former customary marriage between the Appellant and Respondent. Upon dissolution of the customary marriage, the Respondent sought maintenance of the child from the Appellant. There is no evidence on record to confirm if and when the Appellant complied. What the record confirms are series of applications by the Appellant for review of Trial Court’s order of Ksh 25,000/- maintenance to be paid whilst the Appellant was to pay school fees and expenses for the child in boarding school. The review was granted to the extent that when the child was in school the amount would not be payable except during school holidays. The arrears were to be settled. The matter was to be fixed for hearing in default these orders lapse. The matter was not fixed for hearing and therefore orders lapsed. Therefore there is no competent appeal on payment of Ksh 25,000/- as the orders lapsed after default of not setting the matter for hearing.

The only issue is on of DNA testing, since the issue of sharing parental responsibility over the child by both parents has been by protracted litigation; the only avenue/solution is to conclusively determine paternity so as to consider maintenance of the child by the Appellant.

As long as the issue of paternity was raised and remains unresolved, the Appellant cannot be compelled legally to maintain the child and the circus will not end in the absence of conclusive determination to end litigation and promote and sustain the best interests and welfare of the child once and for all. I find compelling reasons to allow DNA testing. DNA to eminently needed; to confirm/deny of the Appellant is biological father of the child or not.

#### **DISPOSITION**

- 1. The Appellant shall present himself for DNA testing at Government Chemist within 60 days from today.**
- 2. The Respondent shall avail the Child for DNA testing at Government Chemist within 60 days from today.**
- 3. The Appellant shall foot the DNA testing Bill for himself and the child.**
- 4. The Government Chemist shall provide the DNA results in sealed envelope to the Deputy Registrar Family Division and thereafter to the Chief Magistrate/Senior Principal Magistrate for reading of DNA results to the parties herein.**
- 5. Depending on the outcome of the DNA results if Appellant is found to be the biological father of the child then on the basis of affidavit of means to be filed, by both parents the Court shall determine the shared parental responsibilities roles and amounts by both parents to the child.**
- 6. In default of DNA testing not being conducted within 60 days; the earlier orders of the Appellant paying Ksh 25,000/- for the child’s maintenance during school holidays and School fees and expenses for the child to go to school shall be automatically reinstated.**
- 7. The Appeal succeeds in part and fails in part.**
- 8. Each party shall bear own costs.**

**DELIVERED SIGNED & DATED IN OPEN COURT ON 29<sup>TH</sup> JULY 2019.**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF;**

**DKK THE APPELLANT IN PERSON**

**RESPONDENT’S ADVOCATE - ABSENT**

**COURT ASSISTANT- ISAIAH OTIENO**