REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. 128 OF 2018

IN THE MATTER OF S.K.K (MINOR)

EKG.....APPLICANT

VERSUS

JWK.....RESPONDENT

(Being an Appeal from part of the order of HON. G.M. Gitonga Senior Resident Magistrate, made on 28th November 2018 in the children's court)

Judgment

1. Vide a plaint dated 19th October 2018 and filed on 22nd , October 208, the respondent (plaintiff) sought orders against the appellant (defendant) interalia; legal custody, care and control of the minor the subject of the proceedings herein; the defendant (appellant) be ordered to provide for the minor to a tune of Kshs.246,200/= for school fees expenses and other related expenses as outlined in paragraph 10 of the plaint; costs of the suit and, any other relief that the court may deem fit.

2. The suit is anchored on the allegation that, the appellant and respondent had been living together since 2013 till September 2018 when the appellant allegedly chased the respondent out of their matrimonial home. According to the pleadings (plaint), the said relationship was blessed with a child the subject of these proceedings.

3. That after their separation, the respondent left with the baby whom the appellant has persistently neglected and refused to maintain or provide for. It was the respondent's claim that as a result of the appellant's conduct, the child has been subjected to untold suffering and hardship hence the suit and the prayers sought.

4. Contemporaneously filed with the plaint is a notice of motion of even date seeking Kshs.160,000/= monthly payment by the appellant towards maintenance and upkeep of the baby pending interpartes hearing of the application and, determination of the suit; an order directing payment of Kshs.86,200/= to cater for school fees and transport for the minor pending hearing of the application and determination of the suit and; costs of the suit.

5. Having certified the application urgent, the trial court fixed the same for hearing on 28th November 2018. Before then, the appellant/defendant had entered appearance, filed defence and a replying affidavit sworn on the 26th November 2018 denying paternity. He further dismissed the allegation of having engaged in a relationship with the respondent. Consequently, he filed a notice of motion of even date seeking to strike out the plaint on grounds of non-disclosure of reasonable cause of action, being frivolous, vexatious, scandalous and, lack of cause of action against the defendant.

6. Accompanying the aforesaid notice of motion is a notice of preliminary objection of even date challenging the institution of the suit on grounds that:

1. The suit was not instituted in the name of the minor as required under Order 32 rule 1 (1) of the Civil Procedure Rules.

2. The authority to act as guardian and next friend of the minor is invalid since it is improperly executed by the advocate instituting the suit instead of the next friend and

3. Plaintiff's suit is irredeemably defective and bad in law.

7. On 28th November 2018 when the respondent's (plaintiff's) application dated 19th October 2018 came up for interpartes hearing, and before parties could canvass the same, the court suomotto made directions as follows:

1. That the plaintiff to file a reply to the grounds of opposition on record simultaneously with written submissions on it within 14 days.

2. That the defendant/respondent to file written submissions within a further 14 days.

3. That parties with the help of their advocates to agree on the place and date for DNA testing.

4. That the defendant shall take care of the DNA costs subject to a refund by the plaintiff should the results show that he is not the biological father of the child.

5. That mention to confirm filing submissions and status of DNA testing on 15th January 2019.

8. Aggrieved by these directions, the respondent moved to this court by filing a memorandum of appeal dated 6th December 2018 and filed on 14th January 2018 citing the following grounds:

1. The learned magistrate erred in law and in fact when he ordered a paternity test in the absence of an application before the court for conducting the test;

2. The learned magistrate erred in law and fact when he made an order for a DNA test yet the respondent has not established a prima facie case against the appellant;

3. The learned magistrate erred in law and fact when he made an order for the appellant to undergo 'DNA Testing' without specifying what the test is about;

4. The learned magistrate erred in law and fact when he ordered 'DNA Testing' for the appellant as a matter of course;

5. The learned magistrate erred in law when he made the order without giving the appellant the right to be heard in accordance with the rules of natural justice and Article 47 of the Constitution of Kenya, 2010;

6. The learned magistrate erred in law and fact when he ordered for paternity test despite the inconsistency as to the identity of the sex of the alleged minor who is indicated as female in the respondent's pleadings whereas the Certificate of Birth identifies the minor as a male;

7. The learned magistrate erred in law and fact when he made the order which amounts to violation of the appellant's right to privacy under Article 31 of the Constitution of Kenya, 2010;

8. The learned magistrate erred in law and fact when he failed to appreciate the inherent dignity of the appellant and the right to have that dignity respected and protected under Article 28 of the Constitution of Kenya, 2010.

9. Contemporaneously filed with the memorandum of appeal is a notice of motion of even date seeking stay of execution of the impugned orders and or directions pending hearing and determination of the appeal and that further proceedings in respect to the Children's Case No. 1269/2018 be stayed. In response, the respondent filed a Preliminary Objection dated 20th December 2018 challenging the notice of motion.

10. On 31st July 2019, parties by consent compromised the hearing of the notice of motion together with the Preliminary Objection in favour of the hearing of the appeal. They further agreed to dispose of the appeal by way of written submissions.

Appellant's Submissions

11. The appellant relied on his submissions filed on 26th July 2019 through the firm of Kariuki Muigua & Co. Advocates who argued the appeal on four main grounds. The first ground was on whether the respondent had established a prima facie case against the applicant for grant of an order for DNA test. It was counsel's submission that the respondent did not establish in her pleadings or evidence sufficient nexus between the appellant and the minor in relation to the alleged paternity to justify such order. That the respondent did not prove the existence of any intimate relationship with the appellant and that the case was based on falsehood.

12. To bolster the above argument, counsel made reference to the decision in the case of **R.M.K. v A.K.G. and Another (2013) eKLR** where the court stated that:

"As I have observed, the burden remains on the petitioner to establish by the pleadings and evidence sufficient nexus between him and the respondent in order to persuade the court to grant the orders. In this case, there is no evidence to support such a cause".

13. Learned counsel further urged that, DNA test cannot be ordered as a matter of course and the order can only be granted where a strong prima facie case has been established. To support this proposition, reliance was placed on the decision in the case of **P.K.M. v Senior Principal Magistrate Children's Case at Nairobi and another (2014) eKLR** in which the court cited a decision from the **Supreme Court of India in Bhabani Prasad Jena v Canvener Sec Orissa, Civil Appeal Nos. 6222 – 6223 of 2016** where the court held that:

> **"…DNA in a matter relating to paternity of a child should not be directed by court as a matter of course or in a routine manner, in whenever such request is made…".**

14. On the second ground, counsel submitted that an order for DNA should not have been made before granting the appellant an opportunity to be heard. It was counsel's contention that, the appellant deserved the right to be heard before an order for DNA could be made in compliance with Article 50 of the Constitution.

15. Turning on to the 3rd ground, counsel urged the court to find that an order for DNA test amounts to a violation of the appellant's rights of Human Dignity and Privacy under Articles 28 and 31 of the Constitution Kenya 2010. It was counsel's submission that DNA testing is extremely a sensitive matter hence an invasion of the appellant's privacy and infringement into his human dignity. To bolster this position, the court was referred to the decision in the case of **S.W.M. v G.M.K. (2012) eKLR** and **D.N.M. v J.K. (2016) eKLR** where the court held that:

> **"The bid to establish the truth through scientific proof must however not be generalized and should never so lightly prevail over the right to bodily integrity and right to privacy until it is clear that such rights ought to be limited. The clarity is only established where an undoubted nexus is shown as well as a specified quest to protect or enforce specific rights".**

16. Concerning the issue on what orders to grant, counsel urged the court to allow the appeal with costs and set aside the orders made by the Hon. Magistrate on 28th January 2019

Respondent's Submissions

17. Appearing for the respondent, the firm of Nyangito and Company Advocates filed their submissions on 31st July 2019. The respondent argued the appeal on three issues. The first issue is whether the appeal should be dismissed for lack of leave to appeal from the trial court. It was counsel's submission that the appellant filed the appeal herein without first seeking leave to appeal from the trial court in compliance with Section 75 (1) of the Civil Procedure Act and Order 43 (3) of the Civil Procedure rules. Counsel urged that the order appealed against is not a ruling or a judgment against which an appeal can lie hence the appellant has no absolute right of appeal. To support this proposition counsel made reference to the decision in the case of **ABP and another v TZS (2019) eKLR** where the court found that the appellant ought to have sought leave to file an appeal against an order being challenged.

18. Turning to the second ground of appeal on whether the appellant should undergo DNA test, Mr. Nyangito asserted that the respondent has established a prima facie case against the appellant to warrant issuance of the orders sought. That the respondent has established existence of a romantic relationship with the appellant and that the minor was born out of that relationship.

19. It was further submitted that the court has powers to order for DNA Testing suo motto before the matter could proceed and that it was in the best interest of the child as there was a likelihood that the appellant was the father to the minor. The court was invited to a decision in the case of **M.W. v K.C. (2005) eKLR** where the court ordered for DNA testing on the basis that it had been established that there was a likelihood that the petitioner was the father of a child. Learned counsel submitted that there was prima facie evidence to support conducting a DNA test to determine paternity.

20. The 3rd issue argued by Mr. Nyangito is in relation to the orders sought. According to Mr. Nyangito, the appeal has no merit and the same should be dismissed with costs. That the court do grant the respondent interim orders in regard to maintenance in terms of food, shelter, clothing, medical allowances and school fees, pending hearing and determination of the matter. Finally, that the lower court proceedings to proceed immediately and that the appellant be ordered to undergo DNA test.

Determination

21. I have considered the appeal herein, proceedings before the trial court together with the impugned orders. I have also considered both counsel's rival submissions. I will consider the appeal on the following condensed grounds:

1. **Whether the appeal is properly before this court in the absence of the trial court's leave to appeal.**
2. **Whether there was a prima facie case established to warrant the order directing the appellant to undergo DNA testing.**
3. **Whether the appellant was denied the right to be heard before the orders for DNA were issued.**
4. **Whether the orders for DNA testing violated the appellant's rights to privacy.**

Whether the appeal is properly filed for lack of the trial court's leave to appeal

22. It was the respondent's argument that the appeal is not properly before this court and that the orders sought cannot issue. This argument

is anchored on the provisions of Order 43 of the Civil Procedure Rules and Section 75 (1) of the Civil Procedure Act which provides that:

> An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted-
>
> (a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;
>
> (b) an order on an award stated in the form of a special case;
>
> (c) an order modifying or correcting an award;
>
> (d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
>
> (e) an order filing or refusing to file an award in an arbitration without the intervention of the court;
>
> (f) an order under section 64;
>
> (g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
>
> (h) any order made under rules from by rules. an appeal is expressly allowed by
>
> (2) No appeal shall lie from any order passed in appeal under this section.

23. It is trite law that before any appeal is filed, the party intending to appeal must seek leave to appeal from the court whose orders the appeal seeks to challenge or from the court to which the appeal is preferred. **ABP and another v TZS(supra).** However, in children matters, rules of procedure are applied with reasonable degree of flexibility with the sole purpose of achieving the ultimate objective of serving the best interest of a child. It then follows that on such matters, courts are duty bound to determine children matters without undue regard to technicalities. This position is further solidified with Article 159 (2) (d) of the Constitution. For those reasons, failure to seek leave to file the appeal herein is not fatal nor prejudicial to the respondent.

24. As to whether there is no substantive ruling or judgment from which an appeal would lie, the same is not correct. Section 75 (1) of Civil Procedure Act provides that an appeal can arise or lie from any other order. The impugned order is therefore appealable because it has an adverse effect upon the litigant against whom execution for contempt can apply under Order 43. For the above stated reason that argument fails.

Whether there was a prima facie case established to warrant the order directing DNA testing by the appellant

25. From the pleadings, it is clear that a plaint was filed on 22nd October 2019 together with a notice of motion which was certified urgent and then scheduled for interpartes hearing on 28th November 2019. It is also not in dispute that the suit was challenged by the appellant/ defendant who filed a defence, replying affidavit and grounds of objection denying having engaged in any intimate affair with the respondent and paternity to the minor.

26. From the court record, it is clear that when the matter came up for interpartes hearing, parties did not canvass the applications or make any remarks on how they intended to proceed. Instead, the hon. Magistrate suo motto made what he referred to as directions thus ordering the appellant to submit himself for a DNA test at a time to be agreed by both counsel. Apparently, nobody moved the court for A DNA test either orally or formally to enable the court make such a serious decision which normally comes as a last result when all other avenues of determining parental responsibility fails or proves impossible.

27. Parental responsibility is not strictly tied to biological parenthood. Even a person who assumes automatic parental responsibility to a child to whom he is not a biological father pursuant to Section 25 of the Children's Act can be made to shoulder maintenance expenses to that child.

28. In the case of **ZAK and another vs MA and another (2013) eKLR** the court had this to say:

> **"looked at from the above perspective, should there be sufficient evidence to show that the 1st petitioner was in loco parentis to the two other children of the 1st respondent, he would have an obligation to support them in the same way as he is under obligation to support his biological children".**

29. Without the parties presenting their case on seriously contested facts, a prima facie case could not be said to have been established. The respondent had a duty to convince the court that there was sufficient evidence to find that the appellant was the biological father to the minor. In a situation where the relationship in question is that of 'a come we stay' which is disputed, further interrogation was necessary to lay a basis before the DNA testing orders could be made.

30. Indeed, courts should not step into the arena of litigation by making orders which parties have not even sought or prayed for. In the

absence of any canvassing of the applications pending before court or even taking any evidence and then subjected to cross examination, the court acted in error in suo motto directing for DNA testing.

31. In reaching this conclusion, I am guided by the reasoning in the case of **RMK vs AKG and Another (Supra)** where the court stated that it is incumbent upon the petitioner in this case the respondent to establish a primafacie case to link the appellant with a relationship that most likely gave rise to the subject herein. Similar position was held in the case of **PKM vs Senior Principal Magistrate Children's Court at Nairobi and another (Supra)** where the court quoted a decision from the **India Supreme Court Bhabani Prasad Jena vs Canvener Sec Orissa (Supra),** where the court held:

> **"…the court has to consider diverse aspects ... pros and cons of such order and the test of eminent need" whether it is not possible for the court to reach the truth without use of tests…. it has been laid down that courts in India cannot order blood test as a matter of course and such prayers cannot be granted to have a roving inquiry, there must be strong prima facie case and court must carefully examine as to what would be the consequence of ordering the blood test".**

32. It is my finding that the honourable magistrate did make the orders prematurely without first giving parties an opportunity to ventilate on their case and first establish a prima facie case to justify the orders issued.

33. I do agree with the appellant that the DNA testing orders ought not to have issued at that stage and to do so suo motto, would disenfranchise the appellant's right to a fair trial or hearing which is a constitutional imperative under Articles 25 and 50 of the Kenyan constitution.

Whether the appellant was condemned unheard

34. As stated above, the court make a unilateral decision even before considering either party's case. One of the tenets of the principal of natural justice is the right to be heard. This is a constitutional command enshrined under Article 50 (2) of the Constitution. Since nobody moved the court for DNA test, and, further considering that the appellant was not given an opportunity to comment on the need to conduct a DNA test, the appellant was unfairly shut out from enjoying his right to be heard before any decision affecting his interest could be made.

Whether the orders for DNA violated the appellant's rights to privacy and human dignity

35. The suit before the trial court has not moved an inch since inception. It is the DNA orders that interrupted the flow of proceedings which were then scheduled for interpartes hearing of the application dated 19th October 2019.

36. Having held that there was no prima facie case established before the orders could be made, and, further considering that the appellant was not given an opportunity to state his case prior to the pronouncement of the said orders, I would not delve onto the merits of the case at this stage. As to whether DNA test would eventually be ordered after due process, is matter to be determined at the appropriate time. I do not want to preempt the likely outcome after a proper case has been laid and the court finds that it will be necessary to order for DNA. I wish to restrain myself from making a final determination on the necessity for DNA. For those reasons this issue is not ripe for determination.

37. Having considered that the court erred in ordering for DNA test without hearing both sides, the inevitable and inescapable conclusion to make is that the appeal must succeed with orders that:

> **a. The orders of the trial court made on 28th November 2018 and issued on 4th April 2019 in particular order Nos. 3 and 4 requiring the appellant to undergo a DNA test be and are hereby set aside.**
>
> **b. That both parties shall be given an opportunity to ventilate their case and any order for DNA if found necessary to be made either orally or formally by either party upon hearing both parties.**
>
> **c. That the trial court shall proceed expeditiously with the hearing of the case from where the proceedings stopped.**
>
> **d. That each party shall bear own costs.**

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER, 2019.

J.N. ONYIEGO

(JUDGE)