



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT EMBU**

**CIVIL APPEAL NO. 71 OF 2017**

**MNM.....APPELLANT**

**VERSUS**

**NWK.....RESPONDENT**

**J U D G M E N T**

**A. Introduction**

1. This is an appeal lodged against the judgment of Embu Senior Resident magistrate in Children's Case No. 39 of 2013. The respondents sued the appellant seeking among others; that the appellant pay Kshs. 280,000/= due and owing to her as maintenance, a monthly sum of Kshs. 10,000/= as ordered by court pending the determination of Embu civil appeal No. 33 of 2016 and that the said sum be paid pending determination of the suit. The trial court found in favour of the respondent and ordered the appellant to pay Kshs. 290,000/= owing to the respondent pursuant to the court order of 20/05/2015.

2. Being dissatisfied with the aforementioned court's ruling, the appellant filed the memorandum of appeal dated 11/12/2017 based on eight grounds that can be summarised as follows;

A. That the trial court erred by failing to consider the appellant's evidence on record and subsequently entering a ruling in favour of the respondent.

B. That the proceedings before the trial court were against the rules of natural justice and Articles 47 and 50 of the Constitution of Kenya.

3. The appellant thus sought to have the trial court's ruling set aside as well as consolidate the instant appeal with Embu HCCA 33 of 2016 and finally that L.R. title No. Euaso Nyiro/Suguroi – Block X/XXX be transferred for the benefit of the minor.

4. The parties disposed the appeal by way of written submissions.

**B. Appellant's Submissions**

5. It is submitted that trial magistrate was bias towards him as he was in communication with the respondents. The appellants submit that this is evidence by the fact that the last time the matter was before court on the 8/11/2017 when the respondents appeared before court the ruling was set for the 14/11/2017 however the ruling was delivered on the 15/11/2017, something that came to the appellants notice via a letter delivered to their office on the afternoon of 15/11/2017.

6. The appellant submits that he showed cause by offering L.R. title No. Euaso Nyiro/Suguroi – Block X/XXX as well as his evidence of his monthly Kshs. 11,237/= pension but the trial court proceeded to decide the case on the contents of a further affidavit filed by the respondent without leave of court thus demonstrating that the proceedings before the trial court were impartial, biased, irregular, unjudicial and contrary to the rules of natural justice. The appellant relied on the case of **Beatrice WANJIKU & Another v The Hon. Attorney General & Others – Petition No. 190 of 2011.**

**C. Respondent's Submissions**

7. The respondent submits that the trial court was right in ordering the appellant to pay the maintenance money as it was due and in arrears since May 2015 as the DNA test earlier ordered had confirmed that the minor was the appellant's child. It is further submitted that there is no need to order another DNA as the appellant has not advanced any reasons for the same to be carried out.

8. The respondent submits that to go into the interrogation of the value of L.R. title No. Euaso Nyiro/Suguroi – Block X/XXX is to lose focus of the objectives of the suit before the trial court which sought maintenance of the appellant’s child whose needs are continuous.

9. It is submitted that the instant appeal should be dismissed for lack of merit and further that this court should disregard procedural technicalities which do not go to the root of the case in keeping with Article 159 (2) (d) of the Constitution that provides for the administration of justice without undue regard to procedural technicalities.

#### **D. Analysis & Determination**

10. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. v Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni v Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348**).

11. I have considered the appeal and the submissions by learned counsel. The matter before the trial court subject of this appeal was an application dated 28<sup>th</sup> September 2017 in which the respondent herein sought that the appellant pay Kshs. 280,000/= due and owing to her as maintenance, the same having been ordered by court on the 20/5/2015; a monthly sum of Kshs. 10,000/= as ordered by court pending the determination of Embu civil appeal No. 33 of 2016.

12. The appellant on his part opposed the application on the grounds among others that he had been misadvised to go for the DNA test that proved the minor was his child and thus sought to undergo another DNA test. The appellant also stated that his monthly earnings were to the tune of Kshs. 11,237/= and thus he could not afford the maintenance. The appellant offered to transfer L.R. title No. Euaso Nyiro/Suguroi – Block X/XXX to the minor.

13. The respondent filed a further affidavit in which she opposed the appellant’s offer to transfer land to the minor as it was not adequate to satisfy the needs of the minor. The respondent further stated that the respondent was employed as a consultant and that he earned about Kshs. 50,000/= as a landlord from a three bed roomed house he owned.

14. The appellant now submits that the trial court failed to consider evidence he tendered before it and further that the trial magistrate was bias towards him as he was in communication with the respondents. The evidence tendered by the appellant to support this claim is the alleged change of delivery of the ruling from the 14/11/2017 to the 15/11/2017. The appellant also submitted that he showed cause by offering L.R. title No. Euaso Nyiro/Suguroi – Block X/XXX to the minor as well as his evidence of his monthly earnings of Kshs. 11,237/=.

15. The issue for consideration in my view is *whether this court should proceed to set aside the trial court’s ruling of 15/11/2017 for its failure to comply with the provisions of Order 51 Rule 14(3)*. It is my considered view that the issue for determination before the trial court was an application by the respondent herein seeking to enforce the court’s orders of maintenance that had been made on the 20/05/2015. It was a notice to show cause why the appellant should not be committed to civil jail for failure to satisfy the decree.

16. The filing of supplementary/further affidavit is provided for under Order 51 Rule 14(3) Civil Procedure Rules which provides for the filing of the same with the leave of the court. It provides;

**“Any application upon whom a replying affidavit or statement of grounds of opposition has been served under subrule (1) may, with leave of the court, file a supplementary affidavit”**

17. A perusal of the court record reflects that when the trial court delivered its ruling on the 15<sup>th</sup> November 2017 it heavily relied on the further affidavit filed by the respondent that claimed that the appellant was a person of means. It is my considered opinion that the trial magistrate ought to have struck out the respondent’s further affidavit for failure to seek leave of the court.

18. Regarding the appellant’s claim of bias against him by the trial magistrate and the fact that his trial against the rules of natural justice, I must note that indeed the last time the matter was before court on the 8/11/2017 the ruling was set for the 14/11/2017, however the ruling was delivered on the 15/11/2017. The record reveals nothing about the proceedings on 14/11/2017, the court appears to not have sat or the file was never before the court.

19. I find no evidence to demonstrate any bias on part fo the trial magistrate against the appellant. As such there is no merit in this ground of appeal.

20. Article 47(1) of the Constitution provides as follows:

**“(1) every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”**

21. Apart from that provision section 4(1) of the *Fair Administrative Action Act* provides as follows:

**“(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.”**

22. It is my considered view that the proceedings leading up to the ruling delivered on 15/11/2017 was based on defective proceedings specifically the further affidavit filed without leave of the court contrary to the provisions of Order 51 Rule 14(3). The appellant was also entitled to be served with the supplementary affidavit so as to prepare his arguments by way of submissions or otherwise before the court could embark on preparing its ruling. The appellant had already filed his submissions by the time the further affidavit was filed by the respondent.

23. The allegation that the applicant was misadvised to undergo DNA and other issues will be dealt with in the appeal No. 33 of 2016 challenging the judgment. In my view the issue is out of context in this appeal which is challenging a ruling on execution of judgment.

24. For the foregoing reasons, I find this appeal merited and it is hereby allowed in the following terms: -

**a. That the respondent further affidavit filed on 16/07/2017 without leave is hereby struck out for being improperly before the court.**

**b. That the application dated 18/07/2017 is hereby remitted to the magistrate's court for hearing and determination.**

25. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 3<sup>RD</sup> DAY OF DECEMBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Mutegi for Respondent**