Case Number:	Civil Appeal 50 of 2020
Date Delivered:	03 Nov 2021
Case Class:	Civil
Court:	High Court at Kisii
Case Action:	Judgment
Judge:	Rose Edwina Atieno Ougo
Citation:	PGM (Minor suing through her next friend LKM) v RMB [2021] eKLR
Advocates:	Mr. Nyambati For the Appellant Mr. Omwega For the Respondent
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Kisii
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal allowed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REBULIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 50 OF 2020

IN THE MATTER OF PGM (Minor suing through

her next friend LKM) .....APPELLANT

VERSUS

RMB.....RESPONDENT

(Being an appeal from the ruling of Hon. S.K. Onjoro (SRM) in Kisii Children Case No. 71 of 2017 dated 6th August 2020)

JUDGMENT

1. The appellant is aggrieved by the summary dismissal of her suit by the trial court on 6th August 2020. In her memorandum of appeal dated 3rd September 2020, she challenges the trial court's decision on the following grounds.;

1. That the learned trail magistrate erred in law and fact by dismissing the appellant's suit summarily;

2. That the learned trial magistrate erred in law and fact by denying the appellant the right of being heard;

3. That the learned trial magistrate erred in law and fact by relying on a DNA report which was manipulated by the respondent;

4. That the learned trial magistrate erred in law and fact by failing to take into account other mitigating factors in regard to the ongoing parental responsibility;

5. That the learned trial magistrate erred in law and fact by failing to appreciate the law and velocity of the pleadings;

6. That the learned trial magistrate erred in law and fact by making hast and un-judicious decision to the benefit of the respondent; and

7. That the learned trial magistrate erred in law by denying the appellant leave to file further documents.

2. The appellant had sued the respondent on behalf of the minor PGM who was born on 19th July 2015. She claimed that she had met and moved in with the respondent in May 2012 and they had been blessed with the minor during the subsistence of their marriage. She claimed that due to the respondent's cruelty, their marriage broke down and they separated informally in April 2016. She averred that the respondent was capable of contributing towards the maintenance of the minor and thus urged the court to compel him to provide maintenance for the minor and award her legal and actual custody of the child.

3. The respondent vehemently denied the claim that he had married the appellant or sired a child with her in his statement of defence

4. On 14th December 2017, the trial court ordered the parties to undergo a DNA test to ascertain paternity. Pursuant to the court's orders, the parties availed themselves at the Government Chemists Department for the test. The DNA report by the Government

Chemists Department dated 14th February 2018 indicated that the respondent was not the minor's father.

5. Being dissatisfied with the DNA results, the appellant moved the trial court through an application dated 12th July 2018 for a second DNA test to be conducted preferably at Lancet Laboratory Nairobi. The trial court found merit in the application and ordered the parties to undergo the test at Lancet Laboratories in Nairobi.

6. The pathology lab report prepared by Lancet Laboratory was filed in court on 26th June 2020. The DNA results once again indicated that the respondent was excluded from being the biological father of the minor. When the matter came up for mention before the court, the appellant's counsel urged the court to schedule the matter for hearing but the respondent's counsel opposed the application. He argued that fixing the matter for hearing would be an exercise in futility. He submitted that the DNA report had exonerated his client from being the father of the minor and stated the plaintiff ought to withdraw the matter. Having heard the submissions by both counsel, the trial court proceeded to dismiss the appellant's suit thus;

"I have considered the submissions of both counsels. The plaintiff requested for a 2nd DNA report as she indicated the 1st report may have been compromised. The report at the instance of the plaintiff still indicates the defendant is not the father of the child. In the premises I do not find the plaintiff to have any suit capable of succeeding against the defendant. I dismiss the suit. Each party shall bear own costs."

PARTIES SUBMISSIONS

7. The parties disposed of the appeal by way of written submissions. Both parties filed written submissions in support of their respective positions which they briefly highlighted when this appeal came up for hearing. The appellant's counsel argued that the trial court had erred by ordering the parties to submit themselves to a DNA test yet nobody had moved the court for the orders. He cited the cases of ***Re of SKK (minor)***, ***P.K.M. v Senior Principal Magistrate Children's Case at Nairobi and another [2014] eKLR*** and the case of ***S.W.M. v G.M.K. [2012] eKLR*** in support of his submissions that the trial court erred in moving suo motto and had disenfranchised the appellant's right to privacy.

8. He argued that the respondent had taken up parental responsibility of the minor and a person who assumed automatic parental responsibility to a child to whom he was not a biological father could be made to shoulder maintenance expenses pursuant to the provisions of **Section 25** of the **Children' s Act** which provides;

25. Acquisition of parental responsibility by father

(1) Where a child's father and mother were not married at the time of his birth—

(a) the court may, on application of the father, order that he shall have parental responsibility for the child; or

(b) the father and mother may by agreement ("a parental responsibility agreement") provide for the father to have parental responsibility for the child.

(2) Where a child's father and mother were not married to each other at the time of his birth but have subsequent to such birth cohabited for a period or periods which amount to not less than twelve months, or where the father has acknowledged paternity of the child or has maintained the child, he shall have acquired parental responsibility for the child, notwithstanding that a parental responsibility agreement has not been made by the mother and father of the child.

9. Counsel relied on the case of ***ZAK and another vs MA and another [2013] eKLR*** in support of the above position. Counsel claimed that the trial court's decision had disenfranchised the appellant's right to privacy when it directed to undergo DNA testing and her right to a fair trial when it denied her application to adduce further evidence.

10. For his part, the respondent's counsel defended the trial court's decision to direct the parties to undergo DNA testing. He submitted that the paternity of the minor was essential in the determination of the case and also pointed out that the appellant did not raise an objection when the court gave directions for her to undergo the test.

11. Counsel argued that the trial court was well guided in dismissing the suit as it did not disclose any cause of action.

12. Counsel further submitted that a close reading of the decision of ***ZAK & another v M.A. & Another [2013] eKLR*** which had been cited by the appellant showed that **section 25** of the **Children's Act** had been declared unconstitutional by the court. He pointed to section 94 which provided the factors which a court needed to consider before it could order a person who was not a parent to take up responsibility. Counsel submitted that the minor in this case had never been accepted by the respondent and therefore the provisions of section 94 (1) had not been met.

13. The respondent counsel argued that the trial court had exercised its discretion appropriately as it was empowered to summarily dismiss a case based on **Order 2 Rule 15** of the **Civil Procedure Rules**. He submitted that the insistence to subject the respondent to further litigation when the DNA tests had exonerated him would cause the respondent unnecessary anxiety, trouble and expenses which should not be entertained by the court.

ISSUES, ANALYSIS AND DETERMINATION

14. Having considered the material before this court, I find that the main issues for determination in this appeal can be distilled into the following two issues;

a. Whether the trial court erred in directing the parties to undergo DNA testing;

b. Whether the trial court's decision to summarily dismiss the appellant's suit was flawed.

15. On the first issue, the appellant argued that trial court had erred in moving *suo motto* and ordering the parties to submit themselves to a DNA test yet nobody had moved the court for the orders, which were normally given as a last resort. She was of the view that the order for DNA testing had caused an infringement of her right to privacy and she had been denied a right to be heard before the orders were made.

16. Before a court makes an order for DNA testing, it must ascertain that sufficient nexus has been established between the parties required to undergo the test. A basis of a biological relationship must be established to warrant the orders as ordering parties to provide DNA may amount to an intrusion of their right to bodily security and integrity and their right to privacy. This is especially true where the orders for DNA testing are issued at interlocutory stage. (See ***S.W.M vs. G.M.K [2012] eKLR*** and ***D N M v J K Petition No. 133 of 2015 [2016] eKLR)***

17. On 14th December 2017, the trial court issued interlocutory orders of its own motion for the parties to undergo a DNA test. The appellant did not raise any objection to those orders. She submitted to a DNA test at the Government Chemists Department and when the results eliminated the respondent as the minor's father, she moved the court vide an application dated 12th July 2018 for a second DNA test which was conducted at Lancet Laboratory Nairobi.

18. The appellant is estopped from challenging the trial court's as she not only failed to raise an objection at the time the orders were made but also made an application for a second test which was argued before the court and allowed. She cannot therefore argue that a *prima facie* case had not been established to warrant the order directing the parties to undergo the test and that her right to privacy was violated.

19. The second issue concerns the summary dismissal of the suit by the trial court. **Order 2 Rule 15 of the Civil Procedure Rules** empowers courts to strike out a pleading at any stage of the proceedings if it discloses no reasonable cause of action or defence in law; or it is scandalous, frivolous or vexatious; or it may prejudice, embarrass or delay the fair trial of the action; or it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

20. The court must take caution in exercising its powers to strike out pleadings as striking out a pleading denies such a party his right to be heard. The court should therefore aim at sustaining rather than terminating a suit. In the case ***of D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another Civil Appeal 37 of 1978 [1980] eKLR*** by Madan JA held as follows on the

exercise of the power to strike out pleadings;

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that 'is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way". (Sellers, L.J. (supra)). As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right.

If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.

21. The trial court in this case moved on its own motion to strike out the appellant’s suit without giving the appellant a chance to defend her suit. The matter had not been heard at that stage and by striking it out, the court denied the appellant an opportunity to have the suit heard on its merits.

22. The appellant has sought to rely on the doctrine of loco parentis. She relied on the case of **ZAK and another vs MA and another [2013] eKLR** where the court held that step parents could assume parental responsibility in certain circumstances based on Article 53 (2) of the Constitution and sections 23 and 94 of the Children Act. **Section 23** defines what constitutes parental responsibility while **section 94** provides the factors to be considered by the court in directing step parents *inter alia* to make financial provision for a child accepted as a child of the family. The appellant had no opportunity to pursue this line of argument before the trial court, as the court dismissed her suit before it could be heard.

23. The court in the case of ***Patel v E.A. Cargo Handling Services Ltd. [1974] E.A. 75 At P. 76*** defined a triable issue as an issue which raised a *prima facie* case which could go to trial for adjudication. The appellant was only required to establish a *prima facie* case and needed not have raised an issue which had to succeed upon trial. On perusal of the pleadings and without saying much, I find that the case raises triable issues and is not a frivolous one. I therefore find that the trial court dismissed the suit prematurely.

24. Accordingly, this appeal is found to be merited and is hereby allowed. The trial court’s decision to strike out the suit is hereby set aside. Children Case No. 71 of 2017 shall be heard by any magistrate other than Hon. S.K. Onjoro. The lower court file shall be placed before the CM’s court for directions. No order as to costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 3RD DAY OF NOVEMBER, 2021

R.E. OUGO

JUDGE

In the presence of:

Mr. Nyambati For the Appellant

Mr. Omwega For the Respondent

Ms. Rael Court Assistant