CASE REPORT

Civil File No. 72/62

Yekatit 22nd, 1964

Addis Ababa High Court

3d Civil Division

Applicant: Ato Z.A. - tutor of Y.H.M.

Objectors: (1) Woizero Y.K.M.

(2) Woizero Y.K.M.

JUDGEMENT

The applicant-tutor of Y.H.M., in his applications of Meskerem 29th and Megabit 21st 1962, demanded the affirmation of Y.H.M.'s paternal filiation to Ato H.M.L. Y.H.M. was born in 1957 from Woizero M.E. and Ato H.M.L., who were married from 1955 to 1960. Ato H.M.L. died on Sene 17th 1961. With his application, Ato Z.A. (Y.H.M.'s tutor) submitted: (1) a document showing that Ato H.M.L. has, on Meskerem 29th 1959, agreed to provide E$ 20 per month for the up-bringing of Y.H.M., (2) a Meskerem 27th 1960 document by which W/M.E. and Ato H.M.L. agreed to stay separated until their marriage is dissolved, during which period Ato H.M.L. agreed to pay E$30 per month to W/M.E. and (3) a document of Hidar 30th 1960 by which W/M.E. and Ato H.M.L. dissolved their marriage.

In their objection of Guenbot 17th 1962, the objectors (H.M.L.'s aunts) stated that H.M.L. was their nephew. They further submitted that H.M.L. was castrated when he was six years old during the Italian Invasion by Rayas who came with the Italians. Thus, they stated that he could not perform sexual intercourse, get married, or beget a child. His relation with M.E. was that of master and servant and, therefore, Y.H.M. cannot be his child. Subsequently, they produced: (1) a certificate given by the Menilik 2nd Hospital asserting that Ato H.M.L. was a castrated person, (2) an application by H.M.L. to His Imperial Majesty on Hidar 26th 1946, requesting help because of his misfortune and (3) two documents (No. 487*63) from the office of the Ligaba dated Hidar 17th 1963, which contain the statements of three witnesses to the effect that Ato H.M.L. was castrated. They were the witnesses Ato H.M.L. produced when asked (on Tir 13th 1946) to prove his claim when requesting the Emperor's assistance.

The applicant (Y.M.H.'s tutor) submitted that no rebutting evidence may be produced since he has proved that Y.H.M. was born when Ato H.M.L. and W/M.E. were husband and wife. Since in such case paternal filiation is attributed by law, the objectors cannot submit such a contention amounting to an action to disown against this application for paternal filiation: actions to disown can be exercised only by (the father or the) persons enumerated under Art. 793 of the Civil Code. He finally submitted that the objectors cannot institute an action to disown since Ato H.M.L. himself has acknowledged paternity, provided for Y.H.M.'s up-bringing and declared that a son was born to him in the Amharic version of the "Voice of Ethiopia".

After examining the arguments of both parties, the court has ordered both parties to call four witnesses each. All four witnesses for the applicant have testified that Ato H.M.L. and W/M.E. were married and living together and that Y.H.M. was born during

their marriage. The objectors' three witnesses testified that Ato H.M.L. was castrated. Two of them (also) stated that Ato H.M.L. has told them that M.E. was his servant. The other witness testified that Ato H.M.L. and W/M.E. were sleeping in one room.

These, in brief, were the arguments set forth by the parties. *The first issue* to be decided is whether or not there was a valid marriage between W/M.E. and Ato H.M.L.

That there was a marriage between W/M.E. and Ato H.M.L., is proved by oral and documentary evidences. Nevertheless, Arts. 590-591(c) provide that a marriage can be invalidated if sexual intercourse is impossible. Application for the dissolution of (such a) marriage because of consent to it by error is open only to the spouse who consented by error (Art. 590), the family of such spouse (Art. 592(1) and 562) and the public prosecutor (Art. 592(2)). Art 592(3) of the civil code prohibits any other person from doing the same. And the public prosecutor can do that only at the time of the marriage (Art. 593(1)). The spouse who made the error can apply for dissolution only within six months after he (she) realizes the other party cannot perform sexual intercourse. In all circumstances, he cannot apply for such dissolution two years after the conclusion of the marriage (Art. 618(2)).

That Ato H.M.L. could not perform sexual intercourse is sufficiently proved by the objectors' evidences. But, the marriage was concluded in 1955 and until it was ended by agreement in 1960, neither W/M.E., nor her parents, nor the public prosecutor applied for its dissolution on the ground that Ato H.M.L. was incapable of performing sexual intercourse. The present objectors don't have the right to do that. Since the existence of the marriage is sufficiently proved by the applicant's witnesses, and because the objector's witnesses did not sufficiently prove the contrary, we find that there was a lawful marriage between Ato H.M.L. and W/M.E. from 1955 to 1960.

Now we have decided on the marriage, the next step is to examine its results. When child is born during the marriage of two persons, he(she) is deemed to be the child of the husband (Arts. 740(1), 741, 742). Since it is proved that Ato H.M.L. and W/M.E. were married from 1955 to 1960, and because Y.H.M. was born in 1957, we decide that Y.H.M. is Ato H.M.L.'s son pursuant to the Civil Code provisions mentioned above.

The paternal filiation of a child attributed to a person by the legal rules can be contested only by an action to disown. Thus, the *other issue* is whether or not an action to disown can be initiated upon an application for paternal filiation. According to Art. 782 and the following provisions, an action to disown can be initiated only where the law attributes paternity. Therefore since applicant Y.H.M. is applying that the court affirm that the is H.M.L.'s son, it is impossible to bring an action to disown him before the court decides that it is proved by legal presumption that H.M.L. is Y.H.M. father.

Though it is possible that an action to disown can be presented as a defence, *the last issue* we must decide is whether or not an action to disown the paternal filiation of Y.H.M. to Ato H.M.L. is possible as the objectors allege.

Art. 790 provides that only the person to whom the paternity of a child is attributed by the application of the legal rules, may initiate an action to disown. To this principle, however, Art. 793 provides exceptions whereby other persons can institute an action to disown. These persons are the descendants of the person to whom the paternity of the child is attributed (Art. 793 (3)). Nobody else can do it (Art. 793(1)). And because the present objectors are the aunts of (deceased) Ato H.M.L., and thus are not listed under Art. 793, we decide that they do not have a right to institute an action to disown.

Even the persons listed under Art. 793 can exercised this right only if the person to whom the paternity of the child is attributed by law dies or becomes incapacitated within the time fixed by law for instituting the action to disown (Art. 793(1)). This time is fixed by Art. 792(1) to be 180 days from the birth of the child. Thus, since Y.H.M. was born in 1957 and no action was instituted within 180 days of his birth, we hold that the objectors cannot institute this action now.

Due to these reasons, we hold that Y.H.M. is a lawful child of Ato H.M.L. and affirm his filiation (.).

CASE COMMENT

by George Krzeczunowicz*

FAMILY LAW, FILIATION:
PRESUMPTION OF PATERNITY AND ITS CONTESTATION

Y.H.M. v. Woiz. Y.K.M. and Y.K.M.

High Court Addis Ababa—Civ. Case No. 72/62.

In this case comment, we shall analyse the High Court decision appearing *above* with italics and words in brackets added.

In a prior filiation case,[1] the Supreme Court said:

"According to Art. 741 of the Civil Code, the father of any child conceived (or born) during married life is the lawful husband of the mother at the time", and "the choice whether to bring an action to disown the child . depends solely on the lawful husband's own discretion" (Art. 790 Civ. C.).

This exposition of the law is in principle correct[2] and is consistent with the outcome of the present case. Nevertheless, the latter's peculiarities call for special comments.

In the prior case a *child's* action to disown his "lawful" father was brought together with a paternity and succession claim against *another*, "alleged" father. This case was of a type which is not infrequent in Ethiopia.

Obversely, in this, less usual, case *the aunts* of the deceased lawful father contested his paternity of the child (who sought its recognition) prior to presumably claiming the succession *for themselves*. The fact that the lawful father was physically a "castrate" adds a special flavour to this case.

A painstaking scrutiny of the High Court's somewhat loose opinion shows that it has considered *three main issues*. We may spell them out, more precisely, as follows:

(1) At the time of the child's birth, was there a marriage-bond between the child's mother and the deceased, making the latter *legal* father of the child?[3]

(2) May an action to "disown" the child be brought *before* his legal filiation is ascertained under (1), above?

(3) Can an action to "disown" his child be brought *by the aunts* of the deceased?

Although the result reached by the High Court is compatible with the law, the court's discussion of the above issues went far beyond what was necessary for the disposal of the case.[4] This in turn led to the imperfections

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1. *G. J. and J. B. v. T.* Supreme Imperial Court, Civ. Appeal No. 638/57, *J. Eth. L.* (1968) Vol. 5, p. 53.
2. The persons mentioned by Art. 793 Civ. C. may act "in his stead" only in the exceptional conditions contemplated by Art. 793(1). Incidentally, the English mistranslation of this Article's title is misleading. The title should read "Exceptional *Case*" (emphasis added).
3. Incidentally, would not the presumption of *Art.* 745, if raised, have made this "marriage-bond" issue immaterial?
4. Contrary to the rule of art followed by the judiciary in France (and most other "code" countries). Cf. J. Gillis Wetter, *The Styles of Appellate Judicial Decisions* (Uppsala 1960) and Folke Schmidt, *The Ratio Decidendi* (Uppsala 1965).

pointed out below. We shall consider the mentioned three issues in their order.

1st Issue

(a) No marriage deed or record was produced. The court ascertained the occurrence of the marriage from other evidence. Above all, the proof by four witnesses of (presumably)[5] the possession of marital status by the alleged spouses, which is required by Articles 699-700[6] (not explicitly referred to in the judgment), was exacted by the court and accepted as conclusive.[7]

(b) The court should have rested here. Instead, it unnecessarily added a requirement not present in Art. 741, that the marriage in question *be "valid"*. The law includes *no such condition.* A dissolution of marriage sanctioning the non-observance of common conditions of marriage (Arts. 608, 609, 612, 615, 617, 618) has, in contrast to Contract[8] Law (Art. 1815), no retroactive effects: see Art. 696, sub. (2)[9] and in sub. (3), the words "the interest of the children, if any, *born of the dissolved union*" (emphasis added)[10].

(c) *Even if* validity of the marriage ("wedlock") were required for the purposes of Art. 741, the aunts' "invalidity" objection might have been barred by stressing Art. 618(1)[11] alone. Even if it were not so barred, it could have been rejected on basis of Arts. 590 *cum* 591(c), which imply that only the spouse who was ignorant of the other spouse's sexual incapacity[12] can demand dissolution of the marriage affected by it. The court cited these provisions, but instead of stopping there it improperly discussed them together with provisions on "opposition" to marriage (Art. 592(1)(2)(3)) which are irrelevant to this case.[13] Besides, "opposition" cannot be brought after conclusion of the marriage (Art. 593), and, even if it was timely, it is no ground for dissolution of the marriage (Art. 619(3)).

2nd Issue

This "other issue", vaguely raised by the court, is superfluous in light of the outcome of the third issue (see below). Moreover, its discussion leads to redundancy *or* inconsistency. If, as the court stated in the light of Art. 782 ff.,[14] "it is not possible to bring an action to disown before the court decides that it is proved by legal presumption that H.M. is Y.H.M.'s father", then (a) Why state it if this decision is deemed already taken? or (b) If it is not yet taken, by what right discuss "disowning"?[15]

3rd Issue

In this "last issue", two questions are involved:

5. The judgment is vague on this point.

6. "Art." or "Article", where not qualified, denotes an Article of the Civil Code.

7. In face of counter-evidence by only three witnesses, who did not even refer to "possession of status" as defined by Art. 699 (2).

8. "Contract" as defined by Art. 1675.

9. "Divorce" is not retroactive and does not affect filiation.

10. *Law Revision Committee* 1, 1976 Draft, Art. 227(2), is even more explicit on this point. Cf. R. David (the drafter of our Civil Code), *Le droit de la famille dans le code civil éthiopien* (Milano, Giuffrè, 1967), p. 57, and K. O'Donovan, "Void and Voidable Marriages in Ethiopian Law", *J. Eth. L.* (1972), Vol. 8, pp. 442 and 454.

11. Correct the English version's "whosoever" (mistranslation from French master-text) to read *the person who* ("celui qui"). Cf. Amharic version.

12. (Translation from Amharic). Incidentally, the French and English versions of Art. 591(c) are more exacting: they require the lack of sexual *organs.*

13. Incidentally, the right to hinder the conclusion of a marriage by opposition does not depend on showing any "reasons" for it.

14. See, in particular, Arts. 783 and 785.

15. The court pointlessly alludes to the possibility that "an action to disown can be presented as a defence" Such possibility, open to the presumed father, can only arise in connection with an action to establish *maternity* (Art. 789).

(i) Can the deceased's aunts ever exercise his right to disown the child?[16] and

(ii) If so, have they raised it in time?

The court properly answered "no" to the first question.[17] But this precludes the (conditional) second question, whose discussion by the court is superfluous, since in the light of the first answer it is irrelevant to the aunts' position.

POLICY

In "The Law of Filiation under the Civil Code",[18] we observed that one policy aim of the Ethiopian Filiation Law is to reduce inheritance litigation and preserve the peace of stable households by protecting them against flimsy paternity claims or contestations.[19] Such aim is not surrendered to the sometimes incompatible aim of discovering the biological truth. This policy is reflected in the near-irrebuttability of the paternity presumption attached to marriage (or "irregular union").[20] The above case, correctly solved by the High Court, well illustrates the length to which flagrant disregard of patent biological truth (castration) may have to be carried to satisfy the law. But, in this exceptional case, was the main policy behind the law satisfied? In the light of the spouses' divorce occurring before the castrated husband's death, was it the peace of a stable household that was being preserved? Whatever our answer, clear law prevails over both truth and policy.[21] Nevertheless, the outcome of this case was not unfair: it preserved the interest of a child that was both treated and acknowledged as his own by the deceased (the case might have been solved by application of Art. 770!)

PROCEDURE

When a propertied man's intestate succession is "opened" (Art. 826), often paternity claims arise with a view to taking (or partaking in) the inheritance.[22] Alleged children not possessing that status (Art. 770) claim it pursuant to Art. 772 ff.,[23] invoking legal presumptions or acknowledgements of paternity. The procedures prescribed by the Law of Succession are often overlooked. Indeed, a claimant who *legally is* the deceased's child by virtue of Art. 741, 745 746, or 770 *need not distinctly claim* a judicial affirmation of paternity (see ftn. 23), but should directly apply for a certificate of heir (Art. 996) on basis of evidence showing the applicability to him of the said Articles. Where there are several children, the court should require that the rules (often overlooked) on liquidation of succession be followed by each child prior to his application. Pursuant to Art. 842 ff., the child is heir-at-law precluding non-descendant relatives. He is *ipso facto* liquidator of the succession (Art. 947). He therefore shall[24] make a search for a will (Art. 962) and, in its absence, notify interested persons how, in his view, the succession

16. By - in this case - raising the "absolute impossibility" (Art. 785) of their castrate nephew having begotten the child.

17. This negative answer is correct despite the court's obvious misreading of Art. 793.

18. *J. Eth. L.* (1966), Vol. 3. In particular, see pp. 511 *in fine* and 523 *in fine*.

19. *Ibid.*, ftn. 19.

20. *Ibid.*, pp. 513-514.

21. A deduction from the principle of Art. 1733, which *a fortiori* applies to interpretation of laws. The interest it fosters is public reliance on law. Without this principle, legislation would be pointless.

22. We can safely assume that this was the aim of Y.H.M.'s application in the commented case.

23. In disposing of those claims, the courts often unavoidably disregard (I) The "*act of notoriety*" requirement (Art. 772), (ii) the rule that such claim of his status by a child can be brought *only against the mother* or her heirs, the presumptive father being joined to the suit (Art. 777(2-3)),and (iii) the rule that judicial declarations of *paternity* alone are *limited to cases of rape or abduction* (Art. 761). A legislative clarification of these inept provisions is desirable: see "New Quizzes in Family Law", *J.Eth.L.* (1973), Vol. 9, p. 204.

24. Himself or, if minor, through his tutor (Art. 298(1) *cum* 949).

should devolve (Art. 972). "Interested persons" are only the other children of the deceased (cf. Art. 971(3)). Since all such children, whether alive or "represented" (Art. 842(3)), "share" equally (Art. 842(2)) and are co-liquidators (Art. 947), the filing of a joint petition for certification of their heirship and equal sharing pursuant to Art. 996 presents no difficulties unless one of them is challenged by the others'[25], in which case the court may require from him such additional evidence as it thinks fit (Art. 996(2)).

In the commented case, the child's situation was even simpler. As implied by the High Court judgment, he was the deceased's only child. Thus, being the only heir and liquidator, he had *no* "interested persons" to notify before being certified as sole heir. Assuming that his basic aim was to inherit, the child (through his tutor) should have chosen the direct procedure of Art. 996.

CONCLUSION

1. All above observations are submitted with full respect. The outcome of the above-discussed filiation case is quite correct, but the judgment's wording is not apt; neither is that of some other judicial decisions. But the courts' difficulties are largely not of their own making - often the Amharic and English versions of the Civil Code's French master-text (and, less often, that text itself) are ambiguous, and there is a lack of manuals clarifying the law.

2. To the best of our knowledge, the courts continue to stand firm on the rule excluding persons other than the legal father from contesting the paternity of his legal child (Art. 1790)[26].

25. *Not by remoter relatives* who, by definition, are not "interested persons" here (see above.)

26. Save in the exceptional case dealt with by Article 793.