



**In re Estate of JMM (Deceased) (Civil Appeal E007 of 2023)
[2023] KEHC 22950 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22950 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E007 OF 2023
EM MURIITHI, J
SEPTEMBER 28, 2023**

BETWEEN

JM APPELLANT

AND

RNM' RESPONDENT

RULING

1. The is a ruling on an application dated 30/3/2023 seeking principally an order that-
 - “ 3. The Honourable Court be pleased to stay execution of the ruling delivered on 22nd February 2023, by Hon. Tito Gesora in Maua Chief Magistrate’s Court Succession Cause No E73 of 2018 and proceedings in Succession Cause E73 of 2018 pending hearing and determination of the appeal.”
2. The apparent grievance of the appellant/applicant as shown in Submissions dated 10/5/2023 is that the trial court “ruled that DNA samples be collected and sibling paternity be conducted in respect to FN, JM and EM children of the Petitioner Applicant herein [while] the said children are now of age and consenting adults, [and that] the parties herein are not children so as to bring about the issue of the best interest of children[and] the DNA as therefore ordered on three non-consenting adults, the application having been filed in court in bad faith” [and] “the party ordered to provide the DNA sample is one PM who was not a party to the proceedings herein” and there was no prima facie evidence that PM is a son to the deceased.
3. For the proposition that DNA testing is an intrusion to a person’s bodily security and integrity and privacy and which should not be made unless there are clear circumstances that justify the making of an order, the appellant’s counsel cited the authorities of *SWM v GM* [2012] eKLR and *RK v JK & another* [2016] eKLR both quoted in *DNM v JK* [2016] eKLR (Onguto, J).



4. Counsel for the respondent opposed the application relying on Order 42 rule 6 of the *Civil Procedure Rules* urging want of substantial loss, citing *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, and failure to provide security in Submissions dated 24/7/2023 as follows:

“Substantial loss

....

The appellant has not shown what substantial loss she will suffer if her children go for DNA testing. Indeed there is nothing to show that the individuals who are undergoing the DNA analysis are opposed to it.

Security for due performance

The applicant has not offered any security for the due performance of the decree which is a mandatory requirement.”

5. Applications for stay of execution and proceedings in Succession Causes are not easily considered on the strict rubrics of substantial loss and provision of security. In some cases the damage and loss that may be inflicted by execution or refusal of stay of proceedings in succession causes may be so great in personal, emotional and social terms which may not easily be quantified in money or material terms. Such is the distress that a person compelled to undertake a DNA testing while not a party to a suit must surely endure.
6. And what security would one offer to the eventual performance of such decree or order as may eventually become binding in him upon determination of the appeal? A pledge to be bound and to comply with any such order at the pain of execution by contempt of court orders might suffice.
7. The court considers that in the application for stay before it the test must be the common law test whether there is an arguable case or serious questions to be presented on appeal and whether refusal of stay of execution and or proceedings would render nugatory the appeal if successful (see *Wilson v Church (No. 2)* [1879] 12 Ch D 454, 458), rather the strict Order 42 rule 6 provisions of the *Civil Procedure Rules*.
8. As shown in the Memorandum of Appeal dated 16th March set out below, there are serious questions to be presented for determination by the appellate court at the hearing of the appeal as follows:
- “1. The Learned Magistrate erred in law and in fact in finding that the parentage of FN, JM and EM can be determined by sibling DNA testing using samples from PM.
2. The Learned Magistrate erred in law and fact in failing to find that DNA testing to determine parentage can only be done in comparison with the principal (the main person).”
9. The Court will hold the *status quo* pending appeal by granting the stay of execution of trial court order for DNA testing and further proceeding in the Cause pending hearing and determination of the appeal.

Orders

10. Accordingly, for the reasons set out above, the Court makes the following orders:
1. The Appellant’s Application dated 30/3/2023 is granted as prayed.



2. Each party shall bear its own costs.

Order accordingly.

DATED AND DELIVERED ON THIS 28TH DAY OF SEPTEMBER, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Mutembei & Kimathi Advocates for the Appellant.

M/S Nkunja & Co. Advocates for the Respondent.

