REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. 83 OF 2019

K.P.M .....APPELLANT/ RESPONDENT

VERSUS

J.W.K.....RESPONDENT/APPLICANT

(Being an application for stay of execution and proceedings pending an appeal from the decision and ruling of Hon. G.M. Gitonga given on 12th July 2019 in Nairobi Children's Case No. 105 of 2017)

RULING

1. The appellant K.P.M. and the respondent J.W.K. cohabited between August 2012 and February 2014, but had an affair before that. On 17th April 2012 a son A.F.B. was born. There was no issue at the time about the paternity of the child, and all relevant documentation indicated the appellant as the father. The parties separated in 2014 following irreconcilable differences. The respondent took away the child. She eventually relocated to Australia, leaving the child with her mother and sister.

2. The appellant moved to the Children Court at Milimani in **Case No. 105 of 2017** seeking physical custody of the child, among other prayers. Custody was granted pending the hearing and determination of interlocutory application that he had filed. The dispute came up severally. At one point the respondent claimed that the appellant was not the biological father of the child, and made an oral application for DNA to determine paternity. The parties were allowed to negotiate the issue. They returned to court with a consent that a DNA test be conducted. An order was recorded. Subsequently, however, the appellant changed his mind and challenged the order directing him to undergo DNA test, saying it was an intrusion on his right to privacy. The respondent filed a formal application seeking a DNA test. The court heard the application and on 12th July 2019 directed that a DNA test be conducted at the respondent's cost.

3. The appellant was aggrieved by the order and filed an appeal to this court challenging the same. With the appeal, he sought the stay of the order for a DNA test. The application for stay was heard and a ruling delivered on 26th September 2019 allowing the same. The court then directed that the parties urgently fix the appeal for hearing.

4. The present, and quite unfortunate position, is that the main cause in the trial court has not been heard, and the appeal has also not been heard. For a dispute relating to a child to remain that long without resolution is a serious indictment both on the parties and on the two courts.

5. It is with that background that the present application can be dealt with. The respondent's application was dated 14th October 2019 and essentially sought that the appeal be fixed for hearing on a priority basis. She had gone to the registry to take a hearing date and had been told that the available dates were in the year 2020. She was in Kenya at the time and wanted the matter heard urgently before she returned to Australia. Depending on when she wanted to return to Australia, I am sure that had the 2020 date been taken the appeal would probably have been dealt with. I am aware of the right of a party to be present during the hearing of his or her matter, but appeals do not require the taking of oral evidence. Appeals proceed on the basis of the record of the lower court and written submissions by counsel. The record is available, and the parties are represented.

6. The best interests of the child herein would require, under **Article 53(2**) of the Constitution and **section 4(2)** and **(3)** of the **Children Act**, that the dispute over it be resolved expeditiously. Under **Article 159(2)(b)** of the Constitution, the courts are guided by the principle that justice shall not be delayed.

7. Further, the overriding objective under **section 1A(1)** of the **Civil Procedure Act** and **Rules** made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the **Act**. And it is the duty of the court under **section 1B(1)(d)** of the **Act** to ensure the timely disposal of proceedings at a cost affordable by the parties. As they say, time is money. The longer the dispute lingers on in this court the more expensive it will be to the parties. But more important, the confidence in the administration will be eroded.

8. Given all that I have said in the foregoing, I reiterate what Justice J.N. Onyiego directed on 26th September 2019 that this appeal be heard on a priority basis. But to go further, I direct that the appeal be admitted to hearing by a single judge for one day at the Family Division. The appeal shall be heard on the basis of the record and the written submissions of the parties. The appellant shall within 21 days from today file and serve written submissions on the appeal. Upon service, the respondent shall file and serve hers within 21 days. The appeal shall be mentioned on **22nd June 2022** to take a judgment date.

9. Costs shall abide the appeal.

DATED and DELIVERED at NAIROBI this 25TH day of APRIL 2022.

A.O. MUCHELULE

JUDGE