



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**CIVIL APPEAL NO. 126 OF 2019**

**PFB.....APPELLANT**

**VERSUS**

**EWK.....RESPONDENT**

**RULING**

1. Before this Court is the Notice of Motion Application dated **6<sup>th</sup> May 2021** by which **PFB** the Applicant seeks the following orders: -

**“1. Spent.**

**2. Spent**

**3. THAT the Honourable court be pleased to grant the Applicant as stay of execution of the order given on 18<sup>th</sup> October 2019 until the hearing and determination of this Appeal.**

**4. THAT the Honourable Court be pleased to vary, set aside the directions of the Court given on 24<sup>th</sup> March 2021 & on 3<sup>rd</sup> May 2021.**

**5. THAT the Honourable court be pleased to issue any such further orders it deems fit and convenient in the circumstances of this case.**

2. The Application which was premised upon **section 1A, 1B, 3A, 63 (e), 95 of the Civil Procedure Act, Order 10 Rule 11. Order 40 Rule 1 (a) and order 51 Rule (1) of the Civil Procedure Rules, Article 10, 25 (c ) 27, 28, 31 50(1) (2) and Article 159 (2) (c) of the Constitution of Kenya 2010** and all other enabling provisions of the law was supported by the Affidavit of even date sworn by the Applicant.

3. The Respondent **EWK** filed a Replying Affidavit dated **24<sup>th</sup> May 2021** in opposition to the Application. The application was canvassed by way of written submissions. The Applicant filed the written submissions dated **21<sup>st</sup> June 2021** whilst the Respondent relied upon her written submissions dated **22<sup>nd</sup> June 2021**.

**BACKGROUND**

4. This matter arises from a suit being **Civil Suit No. 7540 of 2019** which had been filed in the **Nairobi Children’s Court** by the Respondent against the Applicant seeking maintenance for the minor. In that suit the trial magistrate **Hon F. TERER** on **18<sup>th</sup> October 2019** made the following orders: -

**“1. THAT parties to undergo a second DNA test at a facility other than a government chemist.**

**2. THAT the plaintiff to meet the cost of the test in the first instance.**

**3. THAT should the result turn out to be positive, the defendant shall refund the costs of the test.**

**4. THAT each party to meet cost of the application.”**

5. The Applicant being aggrieved by the above order filed the Memorandum of Appeal dated **25<sup>th</sup> October 2019**. The Applicant did not comply with the orders of the court directing that he present himself for a second DNA test.

6. The Respondent then returned to court with an application dated **31<sup>st</sup> December 2020**. The same court on **25<sup>th</sup> March 2021** made the following orders: -

**“1 That parties to undertake a 2<sup>nd</sup> DNA test at a facility other than Kenyatta National Hospital;**

**2. THAT the parties to agree on the choice of facility and the modalities within 14 days herein;**

**3. THAT mention to confirm compliance and for further direction be on 19<sup>th</sup> April 2021;**

**4. THAT a notice to issue.”**

7. The Applicant still failed to comply with said orders and his Advocate instead wrote to the Respondents Advocate a letter dated **29<sup>th</sup> March 2021** proposing that the DNA be carried out at a facility utilized by the **American Embassy** or at a **German or South African** facility. This letter is (annexture ‘**EWK-IV**’).

8. The Respondent in opposing this Application stated that she was involved in a casual relationship with the Applicant which relationship resulted in the conception and birth of the minor. She stated though that the Applicant initially would send money for the maintenance of the minor, he later changed and sent less and less as the minor grew.

9. The Respondent stated that their court battles began when the Applicant filed a suit being **Civil Suit No.993 of 2019** seeking orders to restrain the Respondent from contacting him and demanding money for the upkeep of the minor.

10. The trial magistrate ordered that a DNA test be conducted to determine paternity. It appears that the first DNA test was conducted which results excluded the Applicant as the father. Based on protestation by the Respondent the matter was then taken up by the **Childrens Court** which has jurisdiction over Childrens matters. The proceedings in the **Childrens Court** has been narrated above.

11. On **3<sup>rd</sup> May 2021** the Subordinate court issued Warrant of Arrest against the Applicant. The Applicant then rushed to the **High Court** seeking a stay of the orders given by the subordinate court directing that a 2<sup>nd</sup> DNA test be conducted.

#### **ANAYSIS AND DETERMINATION**

12. I have carefully considered the present application, the Replying Affidavit as well as the submissions filed by both parties.

13. The Applicant submits that the Warrant of Arrest issued by the Subordinate court on **3<sup>rd</sup> May 2021** were unwarranted. That the same was issued *ex parte* and thus he now seeks the setting aside of the said Warrants of Arrest.

14. The Applicant further submits that there is no plausible reason for a second DNA test to be conducted given that a first test had already been conducted at **Kenyatta National Hospital** which is a reputable Government Institution. He insists that the child in question was fathered not by himself but by a certain Greek pilot with whom the Respondent had an intimate relationship. The Applicant avers that a second DNA test would be invasive and would violate his constitutional rights to privacy.

15. The Respondent insists that the Applicant had deliberately disobeyed the orders made by the subordinate court and that in the circumstances the Warrant of Arrest issued against to the Applicant were proper and warranted. She states that the appeal filed by the Applicant is merely a tactic aimed at delaying determination of the matter. She urges the court to dismiss in its entirety this application.

16. The issues for determination are:-

**(i) Whether the Warrant of Arrest should be set aside.**

**(ii) Whether the orders made by the Children’s Court should be stayed.**

(i) **Warrant of Arrest**

17. The Applicant submits that the Warrant of Arrest issued against him on **3<sup>rd</sup> May 2021** were unwarranted. The Applicant stated that a 2<sup>nd</sup> DNA test amounted to a violation of his constitutional rights. He further alleges that the said Warrants were issued *Ex parte* without his having an opportunity to be heard.

18. The Respondent submits that the Applicant has deliberately ignored the various orders made by the subordinate court. That after filing and serving his Notice of Appeal the Applicant took a back seat and took no steps to prosecute the Appeal. That the orders were all served upon the Applicant and therefore the Warrants of Arrest were necessary.

19. I have carefully perused the record. The fact of the matter is that the Applicant was fully aware of the Courts Orders directing that he

undergo a 2<sup>nd</sup> DNA test. Indeed the Applicant through his Advocate wrote the letter dated **29<sup>th</sup> March 2021** protesting the said order and demanding that the 2<sup>nd</sup> DNA test be conducted at a medical facility used by the **American Embassy**. The letter is proof that the Applicant was aware of the said orders.

20. Courts do not make orders in vain. A party to whom an order is directed has a legal obligation to obey those orders whether he agrees with them or not and no matter how unpalatable the order may be.

21. In the case of **Teachers Service Commission – vs – Kenya National Union of Teachers 2 others (2013) eKLR**, the court held that:-

**“A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.”**

22. The respondent having willfully defied a valid court order now comes before the same court seeking that the court exercise its discretion in his favour. In the case of **MN –VS – TAN & ANOTHER (2015) eKLR** the court held as follows: -

**“A valid court order has to be obeyed or complied with regardless of how aggrieved a party is about it. The order has the force of law. It is not a mere wish or proposition. Disobedience or non-compliance with it attracts severe consequences. It would appear to me that the appellant believes that the orders of 30<sup>th</sup> July 2013 are not valid, and has explained why he has chosen to disregard or disobey them. Yet he is bound to obey the orders for as long as they are still in force. He has no choice, he cannot decide when and how to obey or comply with them”.**

23. In the of **MN –VS – TAN & ANOTHER** case (Supra) the court stated as follows: -

**The appellant has applied to the court for a discretionary relief, yet he is not ready to obey the orders that he is seeking relief against it. He has therefore come to court with unclean hands. The court cannot exercise discretion in favour of such a litigant who has no respect for the rule of law. (own emphasis)**

24. It is trite that he who comes to equity must come with clean hands. The Applicant is now before this court praying that it exercise its discretion in his favour. Yet the very same applicant has disdainfully ignored the orders made by the Children’s Court requiring him to undergo a second DNA test. Those orders having not been set aside were binding upon the Applicant.

25. Instead of writing to the Respondents Advocate to rant against the orders made by the subordinate court, the Applicant ought to have gone back to the trial court to seek the review and/or setting aside the orders. The Applicant did not do so. Instead, he filed an appeal and sat back.

26. Given his persistence in disobeying valid court orders the Applicant does not deserve favourable consideration from this court. I find that the Applicants sustained and deliberate refusal to obey the orders issued by the Children’s court on **18<sup>th</sup> October 2019** and on **24<sup>th</sup> May 2021** amounted to contempt of court.

27. **Section 4 of the Judicature Act Cap 8, Laws of Kenya** which grants the High Court power to punish for contempt of court provides as follows:-

**“5(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England and that power shall extend to upholding the authority and dignity of subordinate courts.”**

28. Therefore I find that the Warrants of Arrest issued on **3<sup>rd</sup> May 2021** were warranted. I decline to set aside the said Warrants of Arrest. Having said that I will vary the said orders of **3<sup>rd</sup> May 2021** and direct instead that the Applicant pay a fine of **Kshs 50,000/-** in order to purge his contempt. The Applicant to pay the said fine within **fourteen (14)** days of today’s date failing which he will be imprisoned for a period of **three (3)** months.

(ii) **Stay of Orders**

29. The Applicant has filed a Memorandum of Appeal dated **25<sup>th</sup> October 2019** seeking to have the orders made in the **Childrens Court** on **18<sup>th</sup> October 2019** set aside. The Applicant by this application seeks a stay of said orders pending the hearing and determination of said Appeal.

30. The powers of the court to grant orders of stay pending appeal are set aside in **order 42 Rule 6(2) Civil Procedure Rules 2010** which provides as follows:-

**“In exercising its jurisdiction to grant stay of execution, the High Court is required by order 42 rule 6(2) of the Civil Procedure Rules to be satisfied that-**

- i. The applicant will suffer substantial loss if stay is not granted;**
- ii. The application for stay has been brought without undue delay; and**
- iii. The applicant has provided security for the due performance of the decree”.**

31. The Applicant submits that a DNA test is invasive and would amount to a violation of his constitutional rights. He submits that he has an arguable appeal. That to conduct a second DNA test amounts to inhuman and degrading treatment. The Applicant suggests that the Greek Pilot be compelled to undergo a DNA test as well.

32. **Firstly**, in my view, DNA is **not** an invasive procedure – it only involves a prick on the thumb or extraction of a strand of hair. Secondly, the courts find it interesting that while on the one hand he objects to the 2<sup>nd</sup> DNA test, on the other hand the Applicant vide the letter dated **29<sup>th</sup> March 2021** written by his lawyer proceeds to give suggestion on where the 2<sup>nd</sup> DNA test ought to be conducted. The Applicant is blowing hot and cold on this issue. No orders can be made by this court in respect of the Greek pilot who is **not** a party to this suit.

33. It is pertinent to note that this matter concerns the maintenance and welfare of a minor. **Article 53(2)** of the **Constitution of Kenya 2010** provides that-

**“A child’s best interests are of paramount importance in every matter concerning the child.”**

34. Similarly **Section 4(2)** of the **Children Act 2001** provides that-

**“In all actions concerning Children, whether undertaken by public or private, social welfare institutions courts of law, administration authorities or legislative bodies, the best interest of the child shall be a primary consideration.”**

35. This court is obliged to give priority to the best interest of the minor. It would be prejudicial to the minor to stay the orders made on **18<sup>th</sup> October 2019** while fine legal points are ventilated in an appeal. The minors rights to maintenance and upkeep and dare I say the minors right to know conclusively who his/her father is trumps any of the rights being claimed by the Applicant.

36. In the circumstances, based on the foregoing I decline to grant a stay of the orders made by the **Childrens Court** on **18<sup>th</sup> October 2019**. This application is therefore dismissed in it’s entirety.

37. Finally and in conclusion this court makes the following orders:-

- (1) The Applicant is found to be in contempt of the orders issued by the trial court on 18<sup>th</sup> October 2019.**
- (2) In order to purge said contempt the Applicant is fined Kshs 50,000/- in default to serve three (3) months imprisonment.**
- (3) The Applicant is granted fourteen (14) days within which to pay the fine in (2) above.**
- (4) The prayer to stay the orders of 18<sup>th</sup> October 2019 pending hearing and determination of the Appeal filed by the Applicant is dismissed.**
- (5) Each party to bear its own costs.**

**DATED IN NAIROBI THIS 19TH DAY OF NOVEMBER 2021.**

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**MAUREEN A. ODERO**

**JUDGE**