



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 919 OF 2018**

**IN THE MATTER OF THE ESTATE OF DWM (DECEASED)**

**MAO (Suing as next friend and mother of ABA (Minor)**

**and GHM (Minor).....OBJECTOR/APPLICANT**

**VERSUS**

**BCM.....1ST PETITIONER/RESPONDENT**

**FOA.....2ND PETITIONER/RESPONDENT**

**RULING**

1. The Application coming for consideration in this Ruling is the Notice of Motion dated 25.9.2019 seeking Stay of Execution of this Court's Judgment dated 5.7.2019 pending the hearing and determination of the Appeal filed therein
2. The Court directed that a DNA test be conducted to determine the paternity of the two minors the subject of this Case.
3. The Parties filed submissions which I have duly considered. The condition for granting Stay of Execution is provided for under order 42 rule (6) as follows:-

**Stay in case of appeal.**

**(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order**

**Of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**

**(2) No order for stay of execution shall be made under sub rule (1) unless—**

**(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**

**(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.**

**(3) Notwithstanding anything contained in sub rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.**

**(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.**

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

4. The Court of Appeal in Butt v Rent Restriction Tribunal [1982] KLR 417 gave guidance on how a court should exercise discretion and held that:

*“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*

*2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.*

*3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.*

*4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements....*

*5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”*

5. In this case, I find that Stay of Execution has been overtaken as the samples have already been taken and the DNA test done.

6. DNA samples of all the children were collected on the 19/11/2019.

7. The court has received a report from Lancet Kenya which compiled on the 08/01/2020.

8. The results of the DNA supported the relations between the following:

(i)ABA

(ii)GI H.

(iii)JNM.

(iv)MTM.

(v)AAM

9. The results suggested that all the above 5 are related as half siblings rather than being unrelated.

10. The report suggests that there is extremely strong evidence in favour of the alleged second degree biological relationships between the individuals tested.

11. The Court therefore adopts the report as a true reflection of the situation.

12. I accordingly direct the minors be included as dependants of the estate of the deceased as the DNA results confirm that they are the biological children of the deceased.

13. The Application dated 25.9.2019 be and is hereby dismissed as there is nothing to stay. However, the Applicant is at liberty to proceed with the Appeal filed herein.

14. This being a family dispute each party to bear its own costs of the Application.

**DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 31ST**

**DAY OF JANUARY, 2020**

**ASENATH ONGERI**

**JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.**