**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**CIVIL APPEAL NO. 83 OF 2019**

**ORIGINAL CIVIL SUIT NAIROBI CHILDREN CASE NO. 105 OF 2017**

**KPM.....APPLICANT**

**VERSUS**

**JWK.....RESPONDENT**

**RULING**

**Introduction**

1. The applicant and respondent herein are parents to the minor the subject of these proceedings. The couple who are now living separately started cohabiting as husband and wife sometime 2012 but separated the year 2014 due to irreconcilable differences. During their stay together, they were blessed with a baby boy the subject of these proceedings who was born on 17th April 2012.

2. That after their separation, the respondent took away their son but abandoned him with her mother and sister after she purportedly left for Australia for further studies. Perturbed by the deteriorating health conditions of his son who was allegedly depressed and withdrawn, he took custody of the baby from his (baby) Aunt. Subsequently, he moved to court vide Nairobi Children's Court Case No. 105/2017 seeking actual custody of his son.

3. The orders sought were granted on 13th February 2017 (See Exh. KPM-B). Despite service of the said suit papers, the applicant did not file any response. Sometime early April, 2017 the maternal grandparents took the baby for a visit but to the applicant's surprise the baby was withdrawn from his custody. He again moved to court and had another order dated 20th April 2017 directing production of the child in court on 28th April 2017. The father-in-law however refused to produce the baby to court an act that culminated to an order for a warrant of his arrest to issue.

4. However, on 3rd May 2017, custody of the minor was again restored back to the applicant. Sometime on 2nd April 2018, the applicant met with the respondent and the baby. During that time, the two engaged in a disagreement consequences whereof the respondent claimed that the applicant was not the biological father to the baby and demanded for a DNA test.

5. Meanwhile, the respondent was given an opportunity to file defence to the main suit which she never did until the hearing date. When the matter came up for hearing of the main suit on 21st November 2018, the respondent sought an adjournment and orally demanded for an order for a DNA test to be conducted to determine paternity of the child before the hearing could proceed.

6. On the basis of that application, the court directed parties to negotiate and record a consent which they voluntarily did. Consequently, the court made orders that parties to avail themselves for DNA test within a week with the defendant meeting the attendant expenses. The respondent was given the right of access to the minor but upon depositing her passport in court and the schedules for access fixed.

7. Unfortunately, the DNA test did not take place on account of the respondent's resistance to turn up for the same and also withdrawing the baby from the applicant. Later, the applicant changed his mind and challenged the order directing him to undergo DNA to determine paternity in relation to his biological child an act he equated to intrusion to his rights on privacy and an order made in bad faith after he was ambushed to consent to it.

8. Unable to make a finding on the turn of events, the court once again gave the parties an opportunity to agree and then adjourned the main hearing up to 23 – 24 January 2019.

9. On 15th January 2019, the respondent filed a formal application seeking an order directing the applicant to undergo DNA test to determine paternity to the minor and that custody be given to her. The said application was fixed for hearing on 23rd January 2019 when the main suit was also scheduled for hearing. That day, hearing of the main suit was rescheduled paving way for the hearing of the application for DNA test to be heard first.

10. After considering the application, the court delivered its ruling on 12th July 2019 allowing the application for DNA test at the respondent's cost. It is this ruling that culminated to the filing of a memorandum of appeal dated 22nd July 2019 challenging the orders of the court. Contemporaneously filed with the said appeal is a notice of motion dated 24th July 2019 filed pursuant to Order 42 rule 6 of the Civil Procedure rules seeking orders as follows:

> **(1) Spent.**
>
> **(2) This application be certified and be heard exparte in the first instance.**
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> **(3) That pending the hearing and determination of this application inter partes, this honourable court do issue in the first instance, an exparte order of stay of execution of the decision and ruling of the court in Nairobi Children's Court Children's case No. 105 of 2017 KPM vs JWK to the extent that it directs the parties to avail themselves for the conduct of a DNA test.**
>
> **(4) This honourable court do issue an order of stay of execution of the decision and ruling of the court in Nairobi Children's Court Children's Case No. 105 of 2017 KPM vs JWK that the parties avail themselves and/or submit to the conduct of a DNA test pending the hearing and determination of this application.**
>
> **(5) This honourable court do issue an order of stay of proceedings in Nairobi Children's Court Children's Case No. 105 of 2017 KPM vs JWK pending hearing and determination of this application interpartes.**
>
> **(6) This honourable court do issue an order of Stay of Execution and proceedings in Nairobi Children's Court Children's Case No. 105 of 2017 KPM v JWK pending the hearing and determination of the appeal against the decision, ruling and orders of the subordinate court issued on 12th July 2019.**
>
> **(7) Costs of and incidental to this application be in the cause.**

11. The application is premised upon grounds on the face of it and an affidavit in support sworn by the applicant on 24th July 2019. A temporary order for stay of execution of the orders was granted on 5th August 2019 pending hearing and determination of the application.

12. In response, the respondent filed a replying affidavit sworn on 5th August 2019 opposing the application. In rejoinder to the replying affidavit the applicant filed a further affidavit sworn on 8th August 2019. The respondent also filed a further affidavit in reaction to the applicant's further affidavit stating that the applicant was not the biological father to the minor. She claimed that the real biological father was one DWK and that the applicant was a stranger.

13. Subsequently, parties filed their respective submissions. The applicant filed his submissions together with the list of authorities on 8th August 2019 through the firm of Julie Soweto. The respondent also filed hers on 7th August 2019 through the firm of Musyoki Mogaka and Co. Advocates.

**Applicant's Submissions**

14. It was M/s Soweto's submission that the appeal filed herein will be rendered nugatory if the orders for stay are not granted pending hearing and determination of the said appeal. That to safeguard the integrity and character of the appeal herein, there is need to grant a stay. Counsel relied on the decision in the case of the **Board of Governors, Moi High School Kabarak and Another vs Malcohm Bell and Another Supreme Court of Kenya Petition No. 6 and 7 (2013) eKLR**, and **Butt vs Rentt Restriction (1979) eKLR** where the court held that:

> **"if there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not be refused because the Judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceeding……."**

15. It is M/s Soweto's submission that an order for stay is issued at the discretion of the court after taking into account certain special circumstances interalia; that the application has been filed without undue delay; that the appeal will be rendered nugatory if not granted; that the applicant has an arguable case and, that substantial loss may result if the orders are not granted.

16. According to counsel, the application was filed within reasonable time and that the appeal will be rendered nugatory if not granted. Further, she urged that the applicant will suffer substantial loss as the applicant may be forced to undergo DNA before his appeal is determined hence denying him the right to appeal and an opportunity to be heard and determination made on merit.

17. It was counsel's further submission that the ultimate loser at this stage is the minor considering the harm likely to arise if the DNA test is not stopped. Learned counsel submitted that the applicant is the biological and known father to the minor and that the applicant has a right to exercise parental responsibility on the minor under Article 53 of the Constitution. That the issue on how parental responsibility was acquired is immaterial. To support this proposition counsel quoted the holding in the case of **ZAK and another vs MA & another (2013) eKLR**.

18. To prove that the appellant/applicant has a good appeal, counsel urged the court to consider factual and undisputed facts of the case as follows:

**(a) That at conception and birth of the child, the respondent named the applicant as the father to the baby.**

**(b) That the respondent registered the applicant as the father under the child's birth certificate.**

**(c) That for 7 years the respondent has presented the applicant as the father to the baby and**

**(d) That the respondent had sued the applicant through FIDA seeking maintenance of the child.**

19. Counsel asserted that the respondent is hell bent to capriciously and maliciously change the child's known paternal identity thus likely to affect the child emotionally and psychologically hence the need to protect the minor's best interest.

20. Lastly, counsel submitted that, an order subjecting the applicant to a paternity test through DNA will amount to intrusion to the right to privacy and body integrity. To buttress this position counsel referred to the case of **ANM and another(suing in their own behalf and on behalf of AMM (minor) as parents and next friend) vs FPA and another (2019) eKLR**.

**Submissions by the Respondent**

21. In response to the applicant's submissions, Mr. Omari for the respondent submitted that it was in the best interest of the child to know his biological father and that an order subjecting a parent of a child to undergo DNA test is not unconstitutional. To bolster this argument, counsel made reference to the case of **ANM and another vs FPA (Supra) and FMN vs Resident Magistrate's court Nairobi (Interested Party) (2019) eKLR** where both courts held that it was not illegal nor unconstitutional to order a parent to a child to undergo DNA test and that such order is in the best interest of the child.

22. Mr. Omari urged the court to find that the mere fact that a stranger has custody of the minor does not confer any rights over the child than those of a biological father. He contended that, stay of execution in favour of the appellant will greatly prejudice the best interest of the child.

**Determination**

23. I have considered the application herein, together with the materials placed before court. I have also considered parties' rival submissions. The only issue that arise from the pleadings and parties' submissions is whether the applicant has met the threshold for grant of stay orders.

24. The law governing grant of stay orders is underpinned under Order 42 rule 6 of the Civil Procedure rules. Under the said provision, it is incumbent upon the applicant to prove to the satisfaction of the court that; he is likely to suffer substantial loss in the event the order for stay is not granted; that the application seeking stay has been filed without unreasonable delay and, that the security in satisfaction of the decree has been furnished. Under the three elements, the applicant can as well prove that the appeal is arguable and that the same is likely to be rendered nugatory in the event that the application for stay is not allowed.

25. In the case of **Kenya Shell vs Kariga (1982 – 88) IKAR** the court of appeal had this to say:

**"if there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay".**

26. Before a court properly exercises its unfettered discretion in favour of an applicant, the applicant must persuade the court based on primafacie evidence, that he is likely to suffer substantial loss if the order is not granted. This position was succinctly captured in the case of **M/s Portreitz Maternity vs James Karanga Kabia Civil Appeal No. 63 of 1997** where the court stated that:

**"the right of appeal must be balanced against an equally weighty right that the plaintiff to enjoy the fruits of judgment delivered in his favour. There must be a just case for depriving the plaintiff of that right".**

27. The impugned orders herein were issued or made on 12th July 2019 and the application herein filed on 24th July 2019. It is my finding that the application was filed within reasonable time hence there was no unreasonable delay.

28. Regarding the element of suffering substantial loss, the applicant claimed that he is the biological father to the baby and that it will be unconstitutional to subject him to DNA test which amounts to intrusion to his right to privacy. This is a weighty issue which unless properly ventilated on merit on the main appeal, the applicant's rights may be in jeopardy should the DNA test continue before the appeal is heard and determined.

29. On the same vein, his appeal will be rendered nugatory should the stay orders sought be declined. The interest of justice will tilt the scales of justice in favour of the applicant. The respondent will not suffer any prejudice if the orders of stay are granted and the appeal which in my view raises very interesting constitutional issues canvassed and determined on merit.

30. Regarding furnishing security, this is not a monetary claim hence depositing security is not applicable in the circumstances. The arguments on whether DNA should be done or not is an issue for the main appeal and not at this interlocutory stage.

31. Having held that the applicant has an arguable appeal which may be rendered nugatory if the stay order is not granted, it is my holding that the applicant has met the criteria for grant of stay orders. Accordingly, the application is allowed and an order for stay of execution of the orders issued in the children's court on 12th July 2019 granted.

32. Parties to fix the appeal for hearing urgently to enable the lower court proceedings continue without undue delay. Proceedings before the lower court shall remain stayed pending the hearing and determination of this appeal.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2019.**

**J.N. ONYIEGO**

**(JUDGE)**