REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 52 OF 2018

EK.....APPELLANT

VERSUS

MA

(MINOR SUING THROUGH) DK.....RESPONDENT

RULING

1. The applicant filed this application under notice of motion seeking for orders:-

i. THAT pending the hearing of this application interparties, there be a temporary stay of the court's judgment dated 5/4/2018 and any further proceedings therein.

ii. THAT pending the hearing and final determination of the appeal, there be a stay of the court's judgment dated 5/4/2018 and any other proceedings therein.

iii.THAT the judgment delivered against the appellant/applicant on 5/4/2018 and all other consequential orders including the ruling delivered on 30/8/2018 be stayed pending the hearing and final disposal of ELDORET HCCA NO. 52 OF 2018.

2. The application is based on the grounds that the respondent filed a suit against the applicant vide a plaint dated 3/5/2017 and obtained judgment on 5/4/2018 where the applicant was ordered to pay maintenance Kshs. 12,000 per month when the guardian ad litem had prayed for Kshs. 10,000 per month in her pleadings.

3. At the time of delivery of the said judgment, it read out maintenance costs of Kshs. 8,000 but the typed judgment that was released, had illegally and irregularly enhanced it to Kshs. 12,000.

4. The applicant was ordered to undergo a DNA test with the DNA costs divided equally among the parties despite the respondent not pleading it.

5. The guardian ad litem did not in any event produce documentary evidence that would have been used as prima facie evidence that the applicant is the biological father to the minor.

6. The respondent filed the suit 8 years after the birth of the minor therefore her existence is doubtful as she was never brought before the honorable court.

7. Following the said judgment, the respondent has commenced the execution process to the detriment of the applicant.

8. Lastly, that the honorable court is vested with jurisdiction and discretion to stay the said judgment and decree pending the hearing and final disposal of the appeal currently pending before the court.

9. The application was opposed through a replying affidavit sworn by DAK on the grounds that the application is res judicata since the allegations being raised in the instant application were determined by the trial court and dismissed, and the applicant ought to have appealed instead of filing the instant application.

10. Introducing the CD evidence at the appellate court is gimmick by the Appellant as the evidence was not availed before the trial court.

11. That she was present in court when judgment was read out and confirms that the court did not state a sum of Kshs. 8,000 as alleged but

Kshs. 10,000 as was ordered in the interlocutory judgment.

12. As regards to DNA, the children's court has unfettered powers to order for a DNA on its own motion as long as the pleadings of a party insinuates denial of paternity/maternity.

13. The Appellant has not demonstrated bias against him by the trial court to corroborate his allegations and in the contrary the trial court was very fair in that it ordered her to shoulder part of the DNA expense yet it was the appellant who had denied paternity.

14. Further, that the Appellant has not shown his inability to pay the monthly maintenance ordered by the court and as such there is no need to stay the orders in force as envisaged by the application now before the court.

15. Also, the appellant has not explained the inordinate delay in filing this application, his willingness to abide by the terms or conditions set by the court or demonstrated the substantial loss he stands to suffer should his application be declined.

16. Lastly, that her ability to refund the amount payable as monthly maintenance by the Appellant has also not been questioned to warrant the stay of the orders in force.

17. The Appellants in their submissions stated that under *Section 25(1)(a)* of the *Children's Act Cap 141* of the *Laws of Kenya,* it is provided that where a child's father and mother were not married at the time of his birth, the court may, on application of the father, order that he shall have parental responsibility for the child.

18. The appellant is suspicious and apprehensive of the manner in which the trial court has been handling his case. Doctoring of the judgment is one such instance.

19. Secondly, that there is no prayer for DNA testing and further the amount sought is Kshs. 10,000/=. The provisions of *order 42 rule 6* of the *Civil Procedure Rules 2010* provides that no appeal or second appeal shall operate as a stay of execution or proceedings under a degree or order appealed from except in so far as the court appealed from may order.

20. The appellant brought his application under the limb of stay of proceedings which invariably includes stay of execution but at the same time is exempt from the provisions of *Order 42 rule 6(2)* of the *Civil Procedure Rules, 2010.*

21. Lastly, that if the court so directs, the appellant is prepared to deposit the sum of Kshs. 30,000/= in court or in a joint interest earning account in the joint names of advocates to be held pending the hearing and final determination of the appeal.

22. The application is expressed under *Order 42* of the *Civil Procedure Rules 2010* and *Section **1A, 1B 3*** and ***3A*** of the *Civil Procedure Act.*

23. *Order **42** Rule **6 (1) & (2)*** provides as follows:-

> *1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 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 of stay 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 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*

24. The policy of the court is to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out.

25. However, it is necessary to consider the considerations for granting applications for stay pending hearing and determination of an appeal. The Court of appeal in the case of ***Butt vs Rent Restriction Tribunal*** ***Civil App No. NAI 6 of 1979*** **(Madan, Miller** and **Porter JJA)** whole considering an application of this nature had this to say:-

> *i. 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.*
>
> *ii. The general principal 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.*
>
> *iii. 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.*

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

26. *Oder 42 Rule 6 (1),* clearly states that for an applicant to succeed in an application of this nature, he must satisfy the following conditions, namely;

(a) *Substantial loss may result to the applicant unless the order is made;*

(b) The application has been made without undue delay;

(c) Such security as to costs has been given by the applicant.

27. The matter that was before the lower court involved a child. *Article 53(2)* of the *Constitution* and *Section 83 (j)* of the *Children's Act*, of which both were well invoked by the trial court, indicates vividly that of paramount importance in every matter concerning a child, is the best interest of the child.

28. The trial magistrate had basis upon which her findings and orders were made. A temporary order of stay if granted won't be at best interest of the child.

29. The applicant have not satisfied this court that unless the orders are granted he stands to suffer substantial loss.

30. I accordingly find the application unmerited and is dismissed with costs to the respondent.

S. M GITHINJI

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this **23rd** day of **October, 2019**

In the presence of:

Mr. C. F Otieno for the appellant

Mrs. Sawe for the respondent

Ms. Abigael – Court assistant