

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 47 OF 2018

S B.....APPLICANT

AND

P B O.....RESPONDENT

R U L I N G

1. The Respondent moved the Children’s Court in Case No. 174 of 2018, seeking from the Applicant, maintenance, school and related expenses for two children **K N N & S K N** whom she claims she sired the two with the Applicant.

2. The Respondent denied knowledge of the Applicant or having any relationship with the children and requested for a paternity test. The trial court granted the prayer for the paternity test and further specified in its order, the place, time and date when the Applicant and the two minors would undergo the test.

3. The Applicant did not show up for the paternity test and the reason he was later to explain to the court was that he had problems with his car while travelling to Nairobi. The trial court was not convinced by the excuse given and was of the view that lack of the paternity notwithstanding, it had *prima facie* evidence connecting the applicant to the children and in safeguard the best interest of the children, it gave interim orders requiring the Applicant to provide school fees, school related expenses and a further sum of Kshs.22,000/= to the respondent with effect from the 12th of April, 2018.

4. In an application dated 27th April, 2018, the applicant seeks to stay two rulings of the trial court dated 12th April, 2018 and 27th April 2018 respectively. The ruling of 27th April 2018 is not clear as not much was said of it. The said application is based on grounds that the issue of paternity is critical in the matter and needs to be settled yet the orders of maintenance were made while the said issue of paternity remains unsettled; it is in the best interest of the children that the issue is settled promptly to ensure justice for all; the Respondent is likely to execute the orders without the children knowing their biological father, and the appeal has high chances of success.

5. The Application was opposed by way of Preliminary Objection and a replying affidavit dated 8th May 2018 and 19th June, 2018. The Preliminary Objection as crafted did not raise issues of law *per se* and neither was it canvassed.

6. In the replying affidavit the Respondent deposed that the Applicant failed to comply with the court order directing for a DNA test without any plausible explanation which prompted the court to give interim orders; that the Applicant had previously taken up parental responsibility as he had been making provisions for the children and is therefore not likely to suffer loss or prejudice in obeying the interim orders; on the other hand the children are likely to suffer if the orders are not complied with; and the application lacks merit.

7. The circumstances upon which a court can grant stay are enumerated under **Order 42 Rule 6(2)** of the **Civil Procedure Rules**. The court can make an order staying execution if satisfied that substantial loss may result to the applicant and such an application has been made without undue delay, secondly where security has been offered for due performance.

8. The application herein was promptly made no doubt, however in my view taking into account the circumstances of this case; the evidence placed before court and in particular the averments of the Respondent made more than once, that the Applicant has previously assumed parental responsibility which averments remain uncontroverted; the fact that the applicant has not demonstrated the prejudice he is likely to suffer if he continues meeting his parental responsibilities pending further orders of the court, and equally weighing everything else against the best interest of the children , this application falls short of the requirements necessary to grant a stay of execution.

9. Consequently, the application stands dismissed with costs to the respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 25th DAY OF OCTOBER 2018.

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ALI-ARONI

JUDGE