



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**SUCCESSION CAUSE NO. 974 OF 2013**

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

**RULING**

[1] This Court by its order of 29<sup>th</sup> March 2016 upheld the best interest of the Child in granting an application for DNA testing on the remains of the deceased to establish the child's paternity by the deceased, or otherwise. The court considered 'that the best interest of the child lie in facilitating her judicial pursuit of the rights conferred upon a child under the constitution and the law' and that "*that there is sufficient evidence to link the applicant and the child to the deceased to warrant the exercise of discretion in favour of an order for DNA testing sought by the applicant. From the relationship between the deceased and the applicant as disclosed in the affidavit in support of the application, there is a real likelihood that the child the subject of this application was an issue of relationship between the applicant and the deceased.*"

[2] From this order the petitioners have sought to appeal by Summons for leave to appeal and for stay of execution dated 6<sup>th</sup> April 2016 which is opposed by the Objector sworn on 11<sup>th</sup> April 2016. The Court has considered the application and the replying affidavit and submissions made thereon by Counsel for the parties – Mr. Mwangi for the petitioners and Mr. Kamotho for the Objector.

[3] In determining an application for leave to appeal the Court must consider whether there is an arguable case or serious question to be presented before the appellate Court. As regards the application for stay of execution, the usual principles for demonstration of substantial loss and that the appeal if successful would be rendered nugatory, must be considered although Rules 63 of the Probate and Administration Rules have not expressly incorporated the provisions of Order 42 of the Civil Procedure Rules which provide for stay of execution and proceedings in Civil cases, as Section 89 of Civil Procedure Act applies the Civil Procedure to all cases of civil nature.

[4] The petitioners urge that that the Court was wrong in giving paramountcy to the best interest of the Child under Article 53 of the Constitution over the rights of dignity and privacy of the deceased's family under Articles 28 and 31 of the Constitution. This Court has already taken the view that the best interests of the Child trumps any perceived rights to dignity and privacy, and held:

“Accordingly, the supposed wishes of the deceased (see *Re. Matheson (deceased)* [1958] 1 ALL ER 202) and the discomfort of the family members or beneficiaries of a deceased person in the exhumation exercise, for which this court must sympathise with the deceased's family, must give way to the paramount consideration of the welfare of the child, the subject of this application.”

[5] Indeed, the Court sought to protect the petitioners' right to privacy (under Art.31(c)) in relation to **'information relating to their family or private affairs unnecessarily required or revealed'**, as follows:

“The interests of the minor child herein make it necessary to call for the information to be revealed by the DNA testing. However, the particulars of the parties herein, will be consistently with the nature of matter, be withheld and their names appearing only in initialized format.”

[6] However, the Court must accept that it could be wrong, and it has been held repeatedly by the Court of Appeal that an arguable case for purposes of stay of execution need not be a case that must in the end succeed. I think that the petitioners have an arguable case on the question whether the Article 53 right for the best interest of the child outstrips the rights to privacy and human dignity of others under Articles 28 and 31 of the Constitution. I would, accordingly, grant leave of court to appeal.

[7] If no stay of execution is granted, the exhumation and DNA testing, which is the very act objected to by the petitioners, will be done in accordance with the order of the Court made on 29<sup>th</sup> March 2016. Their appeal, should it eventually succeed, will have been rendered nugatory.

[8] However, the Court is always exhorted by the textual content of the constitutional right of the child under Article 53 (2) as follows:

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

[9] In balancing the interests of the child in an expedited determination of the civil process that leads to her enforcement of her right to inherit her deceased father, if that be the case, against the petitioners' right to pursuit of appellate remedies, the Court grants a stay of execution for **60 days only** by which time the petitioners must have moved the Court of Appeal for appropriate relief.

[10] Costs will abide the final determination of the matter.

**DATED AND DELIVERED THIS 25<sup>TH</sup> DAY OF APRIL 2016.**

**EDWARD M. MURIITHI**

**JUDGE**

**In the presence of:** -

N/A for the Objector

Ms. Akonga for Mr. Mwangi for the Petitioners

Ms. Doreen - Court Assistant.