REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYAAT MERU

MISC CIVIL APPL NO. 59 OF 2016

G K M…..APPLICANT

-VERSUS-

A N…….RESPONDENT

RULING

DNA Testing

[1] The Notice of Motion Application before me was filed in court on 26th July 2016 and therein the Applicant seeks for the following orders:

> **1. THAT pending the inter partes hearing of the application further proceedings in Maua CMC Child Case No.8 of 2015 between the respondent as plaintiff and the applicant as defendant be stayed.**
>
> **2. THAT the applicant be granted extension of time to appeal against the order of Hon Mr. J Wanganga RM made in a ruling delivered on 17th June in Maua CMC CHILDREN CASE NO.8 OF 2015 between the respondent as the plaintiff and the applicant as the defendant.**
>
> **3. THAT pending filing, hearing and determination of the intended appeal, further proceedings in Maua CMC CHILDREN CASE NO.8 OF 2015 between the respondent as the plaintiff and the applicant as the defendant be stayed.**
>
> **4. THAT cost of this application to be provided for.**

[2] The Application is supported by the Supporting Affidavit sworn by the Applicant and the grounds set out on the face of it thereof.

[3] In a nutshell, the Applicant stated that he was not able to file an appeal on time against the order of Hon. J. Wanganga **RM** delivered on 17th June 2016 because from the said date of delivery of ruling, the court file was only available at the registry on 19th July 2016 when he obtained a copy of the impugned order. To him this was swift on his part and was without delay. He also sought to establish that his appeal has high chances of success because the certificates for the two minors which were tendered in evidence by his witness most undoubtedly confirmed that Makutho Mohammed was their father.He further contended that his said witnesses confirmed that the Respondent was married to the said Makutho Mohammed and that the said evidence was not challenged at all. Consequently he contended that he had a very strong appeal as per the Memorandum of Appeal.

Respondent opposed application

[4] The Respondent filed a Replying Affidavit filed in court on 5th October 2016 in opposition to the application herein. The Respondent averred that the intended appeal by the plaintiff /applicant was only an attempt to circumvent and delay the resolution of pertinent issues raised in the trial court. She also contended that no documentary or oral evidence can ascertain the true paternity of a child except a **DNA** test and that further the **DNA** had already been conducted and the results were expected in 21 days. She took issue with the arguments by the Applicant on one Makutho Mohammed, who she said was not a party in the suit originally filed in the magistrate court and did not feel compelled to testify in the case. Consequently, she urged that it was only apt and in line with good practice that the honourable court does direct the Applicant to submit to **DNA** at Kenyatta Hospital as already directed by court as it was the only way of determining paternity.

DETERMINATION

[5] I have carefully considered this Application and the rival contentions by the parties. This is essentially an application seeking extension of time to appeal against an order of the lower court where the Applicant was ordered to undergo a **DNA** test. The subject of extension of time is replete with judicial decisions which I do not wish to multiply except to cite a work of the court in the case of **GEORGE MWENDAMU THURI vs. MAMA DAY NURSERY AND PRIMARY SCHOOL LIMITED [2016] eKLR** in which the court stated that:-

> **Contrary to the submissions by the Respondent, under section 79G this court has jurisdiction to admit an appeal out of time as long as the appellant has satisfied the court that he had good and sufficient cause for not filing the appeal in time. But, that remedy is not granted as a matter of right; it is a matter of discretion of the court. And like any other discretion the court must exercise it upon defined principles of law; not capriciously or whimsically or out of sympathy. I will set out the principles of law which govern the exercise of discretion in extension of time which are now abundantly clear. I will summarize them to be:**
>
> **(a) The period of delay, and the reasons for the delay,**
>
> **(b) The degree of prejudice to the respondent and interested parties if the application is granted,**
>
> **(c) The possibility or chances of the success of the appeal, and**
>
> **(c) Whether the matter raises issues of public importance.**
>
> **On this see the case of NICHOLAS KIPTOO ARAP KORIR SALAT v INDEPENDENT ELECTORAL AND BOUNDARIES COMMISION & 7 OTHERS [2014] eKLR (Ibrahim, & Wanjala SCJJ); Court of Appeal CIVIL APPLICATION NO. NAI 259 OF 2014 NATIONAL CEREALS AND PRODUCE BOARD V PETER GITHINJI and COURT OF APPEAL PAUL WANJOHIi MATHENGE v DUNCAN GICHANE MATHENGE [2013] eKLR.**

[6] Accordingly, extension of time to file appeal out of time is not a matter of right but a matter of discretion of the court. **I** will, therefore, seek to establish:

(1) The length of the delay, and the reasons for the delay;

(2) The chances of the appeal succeeding, and

(3) The degree of prejudice to the respondent if the application is granted."

Length of delay

[7] This is the simple assignment. The order sought to be appealed from was made on 17thJune 2016 whereas this application was filed on 26thJuly 2016. This was a period of approximately one month and 9 days. The Appellant did not attempt to explain or give reasons for this delay. He only explained the delay between the date the ruling was delivered and the time he obtained copies thereof by stating that the said delay was because the file was not available in the registry until 19thJuly 2016. He, however, did not tender evidence to support those assertions. Accordingly, there is no sufficient explanation for the delay in filing the application. That notwithstanding, I may not sanctify myself to refuse this application on that ground alone. I will, therefore, proceed to determine the other grounds to see whether there is anything which may preclude the court from exercising its discretion in favour of the Applicant.

Prospects of appeal

[8] The intended appeal is against an order requiring him to undergo DNA test. The **DNA** test has already been conducted and results were to be out within 21 days; probably by the time of delivery of this ruling the results will be out. This fact may portend that the intended appeal may as well be overtaken by events. Nonetheless, let me sojourn further grounds.

Prejudice to respondent

[9] In considering the likely prejudice that may be occasioned upon the Respondent if the application is granted, it is not lost to the court that this application is a twinning of a request for enlargement of time and stay of proceedings. As I have stated already, the proceeding in the lower court relate to **DNA** Testing upon the Applicant for purposes of determining the paternity of the children the subject of the proceedings in **MAUA CMC CHILD CASE NO.8 OF 2015** between the respondent as plaintiff and the applicant as defendant. I am aware that the subject of **DNA** Testing has been subject of numerous court decisions but looking at those decisions, I think I am entitled to state that there is a dichotomy of opinion especially on whether **DNA** Testing; (1) should be refused on account of being an intrusion to right to privacy and security of body; or (2) allowed on the basis of the constitutional principle in article 53 of the Constitution that the child's best interests are of paramount importance in every matter concerning the child. For instance, see the decision of Lenaola J (as he then was) in the case of **P K M V SENIOR PRINCIPAL MAGISTRATE CHILDREN'S COURT AT NAIROBI & ANOTHER [2014] eKLR that:**

> **I agree and while I would be averse to classifying rights in order of priority, there is no doubt in my mind that between the Petitioner's inconvenience at being subjected to DNA testing and the need to conclusively determine the paternity of the child, in the child's interest and certainly in the Petitioner's interest, the child's interest must prevail. For the Petitioner, it would be a minor inconvenience if he attends to DNA testing once but for a child not to know its parents and benefit from their protection and care, the damage may linger for years to come. I choose to protect the baby as opposed to the Petitioner in such circumstances. It would have been very different if the person seeking DNA testing is another adult for the sake of knowing his parentage but the Constitution specifically protects a child and I am upholding that principle**.

Similarly, see the decision by Mumbi J in C**.M.S V I.A.K CONSTITUTIONAL APPLICATION NO. 526 OF 2008 that**:

In determining a matter such as this, the court must of necessity weigh the competing right of the child and the Petitioner who is alleged to be the biological father. The right of the child to parental care takes precedence, in my view, particularly in light of the cardinal principle set out in Article 53(2) that in matters such as this, the paramount consideration is the best interests of the child.

Superb analysis of the dichotomy

[10] I am delighted by the subtle critique and perspective on this dichotomy expounded by Onguto J in

the case of **DNM vs. JK [2016] eKLR**. The good judge went into real discriminating evaluation of the various cases on the subject of **DNA** Testing which I will not rehash except to state that as long as a prima facie basis for **DNA** Testing has been established by the Respondent, limitation of right to privacy and security of body may be allowed without violating the Constitution. The basis for this, in my view is that limitation upon right to privacy is not prohibited under the Constitution. On another front; there are two rights competing for recognition, and the court should be prepared to engage in a novel balancing act in order to settle such disputes fairly, and one such way of attaining almost symmetrical bound of such competing rights is by followingthe constitutional philosophy under article 259 of the Constitution whereat court's decision should strive to giveeffect to the principles, values, objects and purposes of the Constitution. In this context, the peremptory command of the Constitution and international instruments which Kenya has signed and ratified which should guide the court in resolving such disputes of **DNA** Testing is found in Article 53 (2) of the Constitution that;

> **…a child b est interests are of paramount importance in every matter concerning the child.**

Accordingly, upon meticulous consideration of all factors, if court is satisfied that the scale tilts towards upholding the best interest of the child, so be it; and this should not be seen as an act of discrimination or a contemptuous treatment of the right of privacy and security of body of the Applicant as the lesser or lighter; but judicial decision aimed at meeting the ends of justice. It is also true that the **DNA** Testing could also be refused because no basis has been laid for it especially where there is no sufficient nexus that is shown to exist or to have existed between the Applicant and Respondent as to justify a conclusion on prima facie basis that biological relationship between the Applicant and the child is a real possibility. On the novel balancing act of two competing rights of the parties, see a perfect analogy in the case of **ABSALOM DOVA vs. TARBO TRANSPORTERS [2013] eKLR that;**

> ‘’**The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination’’.**

Conclusions and orders

[11] From the **ci**rcumstances of this case, I am of the considered view that the fact that **DNA** Testing has already been carried out and results may be out is an important consideration in this application. I will couple that fact with the constitutional principle in article 53(2) of the Constitution that **DNA** Testing may be ordered by the court in the best interest of the minors herein- this fact has not been controverted. In that case, therefore, there will be great prejudice upon the children herein in granting this application. That is not all; the delay in filing this application after receiving the certified copies of the ruling on 19th July 2016 was not explained. Explanation for the delay is of great importance in applications such as this. When I put all these facts on the legal scale, I am convinced that the appellant has not satisfied the thresholds set for success of the requests he has put before the court. Accordingly, this Application wholly fails and is hereby dismissed. However, in light of the circumstances of the case, I will not condemn the Applicant to costs as his was a legitimate venture for legal redress. Therefore, I order that each party shall bear own costs of the application. It is so ordered.

Dated, signed and delivered in court at Meru this 22nd day of November 2016

F. GIKONYO

JUDGE

In the presence of:

Respondent – present

No appearance for appellant

F. GIKONYO

JUDGE