REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.138 OF 2013

BETWEEN

P.K.M……..……..PETITIONER

AND

S.P.M. CHIILDREN'S COURT AT NAIROBI…….……RESPONDENT

J.W……..……..……INTERESTED PARTY

RULING

1. On 21st March 2014, I delivered a judgment in this matter and ordered that the Respondent/Applicant and the Interested Party together with the minor, subject of the proceedings in **Nairobi Children's Civil Case No.1020 of 2012,** should present themselves, on a date to be agreed, at the offices of the Government Chemist for DNA testing. I note from a letter dated 1st April 2014 from the Acting Government Chemist that on that day, having given due notice to the Applicant, the Interested Party and the minor presented themselves as ordered for DNA testing but the Applicant did not show up. Instead, on 3rd April 2014, he filed an Application purportedly premised on **Rules 5(2)(b)** and **42** of the Court of Appeal Rules seeking the following orders.

"(1) That Application be certified as urgent and heard ex parte in the first instance.

(2) That alternatively, this Application be certified urgent and it be heard inter partes on a priority basis on such a date as the Court may direct.

(3) That this Honourable Court be pleased to issue an order staying the execution of the Ruling delivered by Justice Lenaola dated the 21st day of March, 2014, in Patrick Kariuki Muiruri vs Senior Principal Magistrate, Children's Court at Nairobi and Joyce Wanjiku, Constitutional and Human Rights Division, Petition No.138 of 2012, pending the hearing and determination of the Appellant's intended Appeal.

(4) That this Court do issue any and other orders which will serve the interests of justice in the circumstances in this matter.

(5) That the costs of and incidental to this Application abide the result of the Intended

Appeal."

2. I have read the said Application, the grounds in support thereof as well as the Supporting Affidavit of the Applicant sworn on 3rd April 2014 and of relevance to the stay orders (much of what is stated therein is fit only for the Court of Appeal), it is the Applicant's case that being dissatisfied with the order to undergo a DNA test, he had exercised his right of appeal to challenge this Court's judgment which he has variously termed as erroneous, an intrusion into his bodily security and integrity, as well as an affront to his right to privacy. That the said decision has also caused him mental anguish, stress and anxiety. He has also averred that he stands to suffer irreparable harm and may incur great loss and injury which cannot be compensated in damages if the stay order as prayed is not granted.

3. It is also the Applicant's argument that he is being subjected to a process **"that appears biased towards the Interested Party …"** and that his Appeal shall be rendered nugatory and superfluous if the orders of this Court are executed. That the orders sought should therefore be granted as prayed.

4. In response to the Application and of relevance to the issue at hand, the Interested Party filed a Replying Affidavit on 17th April 2014. In it, she deponed that the Applicant, while the Parties were before the Children's Court, had openly defied that Court's orders in the same manner as this Court's orders. Further, that he is intent on delaying finalization of the case before the Children's Court and is subjecting the minor to unnecessary suffering.

5. She has also deponed that since the Applicant is disputing paternity, there is no other means of dispelling any doubts as to that issue except by subjecting himself to DNA testing and that the allegation that the Courts are favouring her is **"myopic"** and **"ill motivated".**

6. The Interested Party therefore prays that the Application be dismissed with costs.

7. I should begin by stating that the issue at the heart of the **Children's Court Case Civil Case No.1020 of 2012** is the parentage of the minor, J.M. The Applicant has contested and has denied the claim that he is the father of the said minor. Orders that he should undergo DNA testing were issued severally by the Children's Court but the Applicant has either challenged those orders and obtained orders stopping the testing or has defied those orders as he has done in the present case even without any stay orders in his favour. I also note that he had challenged the decisions of the Children's Court both in this Division and in the Civil Division of the High Court without success.

8. He has not succeeded in any of those Courts because the view of the Courts, including this one, has been that in the best interests of the child, a principled enshrined in **Article 53(2)** of the **Constitution**, DNA testing should be conducted to dispel any doubts as to the child's parentage. To submit that those decisions are biased and titled towards the Interest Party is both contemptuous of the Courts as well as the Constitution which the Applicant has so forcefully invoked in seeking justice for himself.

9. His submission in that regard ought and is dismissed as nothing more than the expressions of a dissatisfied litigant. He will be accorded justice in accord with the law and he has nothing to fear because this Court and otherwise will always invoke **Article 159(2)(a)** of the **Constitution** and do justice to all, irrespective of status and subject only to available facts and the law.

10. I also note that whereas the Applicant has invoked **Rules 5(2)(b)** and **42** of the **Court of Appeal Rules**, the applicable Rules of Procedure in a matter such as this one is the **Constitution** of Kenya **(Protection of Rights and Fundamental Freedoms) Practice** and Legal Notice No.117 of 2013 which in **Rule 32** provide as follows;

"(1) An appeal or a second appeal shall not operate as a stay of execution or proceedings under a decree or order appealed.

(2) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling and the Court may issue such orders as it deems fit and just.

(3) A formal application for stay may be filed within 14 days of the decision appealed from or within such time as the Court may direct."

11. In addition, in any application for stay orders, it is the law that an Applicant seeking such orders must show that;

i. That unless the orders are granted, the Applicant will suffer irreparable harm.
ii. That unless the orders are granted, the Intended Appeal would be rendered nugatory.
iii. That should the orders be granted, the Respondent will suffer no prejudice.

12. In applying the above considerations what really is the dispute between the Applicant and the Interested Party? It is whether, through a sexual liaison denied by the Applicant, he sired the minor, J.M. Other issues including maintenance are only consequential to that one question. If the Applicant denies paternity what other quicker way to resolve the dispute exists than to undergo a DNA test? Should the test confirm his position, he will walk away a free man and if not, then **Article 53(1)(e)** of the **Constitution** will have to be applied. That Article provides as follows;

"Every child has the right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not."

13. In that context, what irreparable harm will he suffer if the stay order is not granted? I see none at all and I have said why. In addition, I maintain my position expressed in my judgment aforesaid that;

"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."

14. On the first test therefore, I see no irreparable harm that the Applicant may suffer, if I decline to grant the orders that he seeks.

15. On whether his intended appeal would be rendered nugatory if no stay order is granted, it is obvious to me that the Appeal would not be rendered nugatory because upon a DNA test being conducted if it is found that he is the father of the child, all his protestations would be rendered meaningless and if he is found not to be the father of the minor, he has recourse in law to other remedies against the Interested Party.

16. Lastly, on any prejudice to be caused, the Applicant has battled the DNA testing for three years or so. I reiterate that the prejudice caused is as I have stated above; to the child. I again reiterate that the best interests of a child must supersede the Applicant's interests; these are not my words but of **Article 153(2)** of the **Constitution** which I am enjoined to uphold.

17. In a nutshell, I see no merit in the Application dated 3rd April 2014 which is dismissed with costs to the Interested Party only.

18. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 17TH DAY OF SEPTEMBER, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Miron – Court clerk

Mr. Onyancha for Petitioner

Mr. Sekwe for 1st Respondent

No appearance for 2nd Respondent

Order

Ruling duly delivered.

ISAAC LENAOLA

JUDGE

17/9/2015