REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO.51 OF 2009

H.K.O……………………........…..……..
……………………….....................APPELLANT

VERSUS

R. R.A……………......…………………..……….
…………………………….RESPONDENT

R U L I N G

Before me is a notice of motion made pursuant to the provisions of **Order XLI Rule 4** (now **Order 42 Rule 6**) of the **Civil Procedure Rules** seeking an order of this court to stay execution of the ruling delivered by the Nairobi Children's Court in Children's Case No.469 of 2008 pending the hearing and determination of the appeal. The grounds in support of the application are stated on the face of the application. The application is opposed. The respondent filed a replying affidavit in opposition to the application.

At the hearing of the application, this court heard the rival arguments made by Mr. M for the appellant and by Miss Namisi for the respondent. Mr. Msubmitted that the Children's Court had issued an order that the appellant submits himself for DNA examination to determine the paternity of the child that is a subject of the proceedings before the said court. Learned counsel argued that the Children's

Court had no jurisdiction to direct that the appellant undergo DNA examination in light of the provisions of **Section 22** of the **Children Act**. The appellant relied on the decision of **MW vs KC [2004] eKLR** wherein a court of concurrent jurisdiction held that it was only the High court which had jurisdiction to determine whether or not a father should be compelled to submit himself for a DNA test to determine the paternity of a child. Mr. M urged the court to find that the appellant had established a suitable case for this court to stay execution of the order of the subordinate court pending the hearing and determination of the intended appeal.

On her part, Miss N submitted that the decision whether or not to grant stay of execution of an order of the subordinate court is at the discretion of the appellate court. She argued that before stay can be ordered, the appellant must fulfill certain conditions, including the condition that the appeal has a high chance of success and that the intended appeal would not be rendered nugatory. It was her case that the appellant's appeal was made on the basis that the Children's Court did not have jurisdiction to compel the appellant to submit himself for a DNA test to determine the paternity of the child. Learned counsel argued that the appellant prior to the hearing and determination of the case before the Children's Court had not raised any issue in regard to the challenge of the jurisdiction of the Children's Court to issue the order that was eventually granted after the conclusion of the case. The respondent argued that the Children's Court had jurisdiction to issue the particular order. It was the respondent's case that the appellant would suffer no substantial loss if stay of execution is not granted. The respondent relied on the case of **Freda Gakii Nathan vs Richard Kinyua Karani [2007] eKLR** in support of her contention that the Children's Court had jurisdiction to hear and determine a dispute regarding paternity of the child. Miss Namisi urged the court to dismiss the application with costs.

This court has carefully considered the said rival arguments. The issue for determination by this court is whether the appellant made a case to entitle to this court grant the order staying execution that has been craved for by the appellant. The principles to be considered by this court in determining whether or not to grant stay of execution are well

settled. Under **Order 42 Rule 6(2)** of the **Civil Procedure Rules,** the applicant must establish that he would suffer substantial loss if stay is not granted. He must further establish that he would be prepared to deposit such security as the court may order for the due performance of such decree. The application for stay of execution must be made without undue delay. This being a case touching on the welfare of a child, **Article 53(2)** of the **Constitution** requires this court to take the best interest of the child as of paramount consideration in every decision that it renders. This Constitution requirement is reinforced by the provisions of **Section 4(3)** of the **Children Act** that compels this court to treat the interest of the child as of the first and paramount consideration to the extent that this is consistent with the adoption of a course of action calculated to safeguard and promote the rights and the welfare of the child. **Article 53(1)(e)** of the **Constitution** provides that:

"*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;"*

In the present application, the issue in dispute between the appellant and the respondent at the Children's Court is in regard to the maintenance of the child. The appellant has denied paternity. The Children's Court ordered the appellant to submit himself for DNA examination to determine whether his denial of paternity has any foundation. According to the appellant, the Children's Court did not have jurisdiction to make such an order. In particular, the appellant cited the provisions of **Section 22** of the **Children Act**, which, according to him, grants exclusive jurisdiction for the determination of such question by the High Court. The respondent is however of a contrary view. This court has read the said **Section 22 (1)** of the **Children Act**. It provides as follows:

"*Subject to subsection 2, if any person alleges that if any of the provisions of Sections 4 to 19 (inclusive) has been, is being or is likely to be contravened in relation to a child, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress on*

behalf of the child".

Sections 4 to **19** of the **Children Act** guarantees certain fundamental rights to every child. Such rights include, *inter alia*, the right to parental care, the right to education, and the right to health care. Under **Section 22(2)** of the said **Act**, the High Court has power, pursuant to **Section 22(1)** to make such orders, issue such writs and give such directions so as to enforce and give effect to the provisions of **Sections 4** to **19** of the **Act**. **Section 22** does not specifically address the question regarding whether the Children's Court has jurisdiction to compel a father who is denying paternity to submit himself to a DNA test. In my considered view, the applicable section of the **Children Act** which applies when paternity is disputed is **Section 76** of the **Children Act**. For instance, **Section 76(1)** of the **Act** provides as follows:

"*Subject to Section 4 where a court is considering whether or not to make one or more orders under this Act with respect to a child it shall not make the order or any other orders unless it considers that doing so would be more beneficial to the welfare of the child than making no order at all".*

Section 76(2) of the **Act** provides thus:

"*In any proceedings in which an issues on the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to be prejudicial to the welfare of the child".*

It is therefore clear that when the Children's Court ordered the appellant to undergo a DNA test to determine the paternity of the child, the said court was not acting under the provisions of **Section 22** of the **Children Act**, but rather under **Section 76** of the **Children Act**. As stated earlier in this ruling, all courts, including the present one, are required, in determining questions relating to the welfare of a child, to treat the interest of the child as of first and paramount consideration. In the present case, it is clear to the court that the issue

regarding who is legally required to maintain the child is of paramount consideration. That is the reason why, the Children's Court, correctly in my view, ordered the appellant to submit himself to DNA examination to determine the paternity of the child.

Will the appellant suffer substantial loss if he undergoes the said DNA examination as ordered by the Children's Court? I do not think so. In the present case, the right of the child to be taken care of by the parents as provided under **Section 6** of the **Children Act** far outweighs the appellant's right to refuse to undergo a DNA examination to determine the paternity of the child. This court is of the view that the appellant will not be prejudiced if he undergoes DNA test. His appeal will not be rendered nugatory.

For the above reasons, the appellant's application seeking orders to stay the execution of the Children's Court said order lacks merit and is hereby dismissed with costs.

DATED AT NAIROBI THIS 11TH DAY OF MARCH, 2011

L. KIMARU
JUDGE