



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 15 of 2006

DONALD KIPKORIR..... APPELLANT/APPLICANT

VERSUS

MIRIAM NJOKI KIRURI..... RESPONDENT

RULING

By notice of motion dated 12.04.06 and filed the same day, stated to be brought under Order XLI rule 4 of the Civil Procedure Rules, the appellant applied for the following orders:-

1. That the application be certified as urgent and heard ex-parte in the first instance.
2. That the court do issue an order staying execution of the Civil Case No.86 of 2005 on 24.02.06 pending the hearing and determination of this application.
3. That the court do issue an order staying execution of the order made in Children's Court Civil Case No.86 of 2005 on 24.02.06 pending the hearing and determination of the appeal filed by the applicant.
4. That there be a stay of the proceedings in Children's Court Civil Case No.86 of 2005 pending the hearing and determination of this application and the appeal filed by the applicant.
5. That costs of this application be provided for.

The grounds upon which the application is based are:-

- i. That the conduct of the DNA test of the applicant as ordered by the lower court would be an infringement of the applicant's fundamental human rights and freedoms as envisaged by sections 70 and 76 of the Constitution.
- ii. That if the stay of execution and stay of proceedings is not granted, the appeal if successful will be rendered nugatory and merely an academic exercise.
- iii. That the applicant is willing to abide by the court's directions regarding security.
- iv. That there has been no delay in bringing this application.
- v. That the appeal has good prospects of success.

The application is supported by the applicant's affidavit sworn on 12.04.06.

At the hearing of the application before me, the appellant/applicant was represented by learned counsel, Mr. G. Murugara while the respondent was represented by learned counsel, Miss G.S. Kalande.

Applicant's counsel said he relied on the grounds as on the face of the application and on the applicant's affidavit plus annexures thereto. He acknowledged that the court has discretion to grant stay of execution and stay of proceedings under Order XLI rule 4 (1) and that under sub-rule (2) thereof the applicant has to satisfy certain requirements, one of which is substantial loss if a stay is not granted. He referred the court to ground 5 in the appellant's/applicant's Memorandum of Appeal dated 24.04.06 and filed the same day which he said raises fundamental constitutional issues to be determined. It was applicant counsel's contention that there was no unreasonable delay in bringing the application, pointing out that the lower court order sought to be challenged was ON 24.02.06; that the appeal against the order was filed on 24.03.06; and that the present application was filed on 12.04.06. Applicant's counsel acknowledged the requirement for the appellant to provide security as stipulated in Order XLI rule 4 (2) if stay is granted and pointed out that the applicant has indicated [vide ground (iii)] that he is willing to abide by the court's directions regarding security.

Applicant's counsel cited the following authorities:-

- a) Butt -vs- Rent Restriction Tribunal [1982] KLR 417 (Court of Appeal) to make the point that the power of the court to grant or refuse an application for a stay of execution is a discretionary power and that the discretion should be exercised in such a way as not to prevent an appeal.
- b) Century Oil Trading Co. Ltd -vs- Kenya Shell Ltd [2003] 1 E.A. 30 (High Court) to make the point that a party should not normally be hindered in exercising his right of appeal but should furnish security.
- c) Unga Limited -vs- Amos Kinuthia & Gabriel Mwaura t/a Budget Spray works, Court Appeal Civil Application No. NAI. 175 of 1997 (NAI 71/97 UR) to make the point that an appeal should not be rendered nugatory, i.e. useless, by the court refusing to grant a stay.
- a) New Stanley Hotel Ltd -vs- Arcade Tobacconists Ltd [1986] KLR 757 (High Court) to make the point that before making an order staying the execution of judgment, the court has to be satisfied that substantial loss may result to the applicant unless the order for stay is made and that the application was made without unreasonable delay.
- b) Muthui -vs- Muthui [2003] KLR 276 (High Court) to make the point that a stay is meant to prevent a breach of a party's legal right before it takes place.

On the other hand, respondent's counsel opposed the application. He said the respondent filed a replying affidavit on 12.05.06 and also filed grounds of opposition on 15.06.06. It was respondent counsel's contention that the applicant had not complied with the provisions of Order XLI rule 4 (2) providing for evidence to be furnished that substantial loss may result if a stay is not granted, providing for an application for stay being filed without unreasonable delay and providing security for due performance of decree or order which may ultimately be binding on him. Respondent's counsel said that the applicant had initially obtained ex-parte orders staying execution of the lower court order of 24.02.06 for him (applicant) to submit himself for a DNA test; that the order of stay lapsed on 18.05.06 but the respondent had not taken any steps to execute the revived stay order; and that there was no threat by the respondent to execute the revived stay order.

Respondent's counsel pointed out that letters from the respondent's advocates on the issue of DNA test merely requested the applicant to avail himself for a DNA test but did not actually threaten the applicant with such test. Respondent's counsel said that the court had not been told what substantial loss would be suffered by the applicant if he does not submit himself to the lower court orders of 24.02.06 requiring him to submit himself to DNA test. In respondent counsel's view there ought to be a distinction between the applicant's rights and his duties under the Constitution. Respondent's counsel submitted that he saw no high chances of the applicant's appeal succeeding and that in any event if the appeal succeeds, the

applicant can be compensated by costs even if the lower court proceedings continue during pendency of the appeal.

Respondent's counsel said that on 14.12.05 the applicant herein applied orally before the lower court for a constitutional reference which the lower court refused. It was respondent counsel's contention that the applicant should have appealed against the refusal if he was aggrieved by it but he never appealed.

On the issue of deposit of Kshs.1million called for by the respondent towards security for costs and deposit for maintenance of the subject child, respondent's counsel relied on the undermentioned authorities:-

a) Southern Credit Banking Corporation -vs- Andrew Leteipa Sunkuli & Zilpah Ntemel Sunkuli, High Court (Milimani Commercial Courts) Civil Case No.394 of 2002 to make the point that provision by an applicant of security is vital.

b) Mohamed Ahmed Gaid -vs- Awo Shariff Mohamed, High Court (Milimani Commercial Courts) Civil Case No.84 of 2003 to make the point that the court's discretion in granting order of stay should be exercised rationally and that a stay was refused in that case since costs were considered to be adequate compensation.

Respondent's counsel urged this court to dismiss the present application.

In reply, applicant's counsel pointed out that the lower court order of 24.02.06 for the applicant to undergo a DNA test and the proceedings relating thereto are still pending and that the order can be enforced. In applicant counsel's view the deposit of at least Kshs.1 million called by the respondent in a joint interest earning account towards security for costs and maintenance of the subject child is abstract and that the court should exercise its discretion rationally in the matter and order reasonable security.

I have duly considered the rival submissions or arguments of the parties.

The court record shows that a Memorandum of Appeal was filed on 24.04.06 by the applicant in this case against the whole decision of the lower court on grounds of jurisdiction, errors of law and alleged breach of the applicants constitutional rights. Appellant's/applicant's counsel also faulted the respondent on the basis that the respondent did not lay any basis for the orders she sought to be granted. I here to observe that it is not yet time to consider the merits or demerits of the appellant's/applicant's appeal.

Appellant's/applicant's counsel described the figure of Kshs.1 million called for by the respondent towards security for costs and maintenance of the subject child as abstract. Applicant's counsel did not, however, suggest an alternative figure. I note from the respondent's replying affidavit sworn on 12.05.06, which was missing from the court file until this court asked for a copy which was furnished on or about 03.09.08, that the subject child is a minor said to be in dire need of care plus support and that the respondent was not fully able to meet the said child's educational needs and other basic needs. A photocopy of circular letter dated 25.11.04 from the Riara Group of Schools to parents/guardians (annexure 'MNK 5' to the respondent's aforesaid replying affidavit) announced upward adjustment of fees effective from 25.01.05 follows:-

| <u>Kindergarten</u> | <u>Per Term (Kshs)</u> |
|----------------------|------------------------|
| Ø Reception class | 24,500.00 |
| Ø Intermediate class | 25,500.00 |
| Ø Pre-primary class | <u>26,500.00</u> |
| Sub-total | <u>76,500.00</u> |

Primary

| | |
|------------------|-------------------|
| Ø Standard 1 - 2 | 32,000.00 |
| Ø Standard 3 – 4 | 35,000.00 |
| Ø Standard 5 – 6 | 37,500.00 |
| Ø Standard 7 – 8 | <u>41,000.00</u> |
| Sub-total | <u>146,000.00</u> |

High School

| | |
|--------------|-------------------|
| Ø Form 1 – 2 | 71,000.00 |
| Ø Form 3 – 4 | <u>75,000.00</u> |
| Sub-total | <u>146,000.00</u> |

The above indicative figures for fees work out at over Kshs.1 million in fees alone from Kindergarten to High School. Why the respondent chose The Riara Group of Schools, which look quite expensive, is not clear at this stage. To this extent there appears to be an element of arbitrariness in the level of deposit proposed by the respondent in respect of security within the meaning of Order XLI rule 4 (2) (b). This must be discouraged.

Applicant's counsel submitted that if no stay of execution of the lower court order is granted, the applicant may suffer substantial loss. I agree that if the lower court order is executed against the appellant/applicant during the pendency of his appeal and the appeal eventually succeeds, the appellant/applicant may well be deemed to have suffered substantial loss of protection of security of his person accorded by section 70 (c) of the Constitution of Kenya. The flipside of the arguments is, of course, that the subject child too his constitutional rights deserving to be protected. The merits or demerits of the appeal and the balancing of the competing rights in this case will have to be considered during the appeal itself. In the interim period, it seems sufficient to provide for a measure of security for the due performance of orders which may be made by the court against the appellant/applicant in the event of the respondent winning in the appeal.

I make the following orders;-

a) Prayers 1 and 2 in the notice of motion dated 12.04.06 are deemed as spent.

b) Prayers 3 and 4 of the aforesaid notice of motion seeking a stay of execution of the lower court order of 24.02.06 and a stay of the proceedings in the lower court, respectively, are granted pending the hearing and determination of the appeal filed by the appellant/applicant herein on condition that the appellant/applicant deposits Kshs.500,000/= in an interest-earning account in the joint names of the parties' advocates within 30 days of the date hereof otherwise the orders of stay lapse.

c) Costs of the present application shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 18th day of September, 2008.

B.P. KUBO

JUDGE