



AWM v LNG (Suing as the mother and next friend of the Minors) (Civil Appeal E085 of 2023) [2024] KEHC 172 (KLR) (Family) (19 January 2024) (Ruling)

Neutral citation: [2024] KEHC 172 (KLR)

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

FAMILY

CIVIL APPEAL E085 OF 2023

PM NYAUNDI, J

JANUARY 19, 2024

IN THE MATTER OF LW AND LW (MINORS

BETWEEN

AWM APPELLANT

AND

LNG (SUING AS THE MOTHER AND NEXT FRIEND OF THE MINORS) RESPONDENT

RULING

1. The Application for determination is Notice of Motion dated August 30, 2023 presented under Section 10 of the Judicature Act, Rules 3 (1) & (2) of the High Court Practice and Procedure Rules, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Applicant seeks the following orders-
 - a. Spent
 - b. Spent
 - c. That there be a stay of proceedings in Children Cause No. E474 of 2023 filed at the Children’s Court at Nairobi Pending hearing and determination of the Applicant’s Appeal.
 - d. That costs of this Application be provided for.
2. The Application is supported by the Affidavit of the Applicant sworn on the 30th August, 2023. The Respondent opposes the Application by Replying Affidavit sworn on the 6th October 2023.



3. The Court directed that the Application be canvassed through written submissions. Both parties complied, the Applicants Submissions are dated October 11, 2023, while those of the Respondent are dated October 24, 2023.
4. The Appellant identifies the following as the issue for determination

Whether the Appellant is entitled to an order for stay of proceedings pending final determination of the Appellant's Appeal.
5. The Appellant submits that he has met the prerequisites for grant of orders of stay of proceedings as set out under Order 42 Rule 6(1) of the *Civil Procedure Rules*. He submits that he has established that he has an arguable appeal and that the Appeal will be rendered nugatory if the orders sought are not granted. The Appellant contends that paternity having been denied it was imperative that the Court direct a DNA Test be conducted to resolve the issue of paternity.
6. The Respondent on the other hand contends that the Application is intended to delay the finalisation of the matter and that in any event the main ground upon which the Appellant seeks to challenge the ruling is now redundant as she has withdrawn her prayer for maintenance. She argues that it is in the best interests of the minors that the matter in the lower court be expeditiously determined.

Analysis and Determination

7. Based on the pleadings and submissions filed herein I find the issue for determination to be whether it is in the minor's best interest for the Court to grant stay of the proceedings of the lower Court.
8. Article 45 (2) of *Constitution* of Kenya 2010 provides as follows: -"A child's best interests are of paramount importance in every matter concerning the child."
9. Likewise *Children Act* at Section 4(2) provides as follows:-

“(2) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”. (own emphasis)
10. In *Bhutt v Bhutt* HCCC No. 8 of 2014 (O.S.) at Mombasa, the High Court noted that the best interests of a child are superior to the rights and wishes of the parents, and they incorporate not just the physical comfort of the child but the welfare of the child in the widest sense.
11. In the instant case the Appellant submits in the impugned ruling the learned trial magistrate erred in declining to grant a DNA Test and yet the suit seeks to compel him to maintain the minors. On the other hand, the Respondent submits that she has withdrawn the claim for maintenance.
12. The question is then whether under these circumstances it is in the Child's best interests to stay the proceedings in the lower Court. One of the tenets of a rights based judicial system is that justice shall be dispensed without delay. This is especially so in matters touching on the welfare of children.
13. In the circumstances I find that the Respondent having withdrawn the claim for maintenance, the Appeal will not be rendered nugatory even if the lower court matter proceeds to hearing before the Appeal is heard and determined. For this reason, the Notice of Motion is dismissed in its entirety.



14. Stay is therefore declined. If the Appellant elects to pursue the Appeal, he shall file and serve record of appeal within 90 days. Mention before the Deputy Registrar, Family Division on April 23, 2024 to confirm compliance and take further directions.
15. The Applicant will pay costs of this Application assessed at Kshs 20000 within 30 days from the date hereof

It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF JANUARY, 2024.

P. NYAUNDI

JUDGE

In the presence of:

Ms Kamotho h/b Ms Kihika Advocates for the Applicant

Advocates for the Respondent

Sylvia Court Assistant

