REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS – FAMILY DIVISION

HCCC CASE NO. 12 OF 2016

IN THE MATTER OF S T (MINOR)

BETWEEN

J M D …… APPELLANT

AND

G N M (SUED AS THE MOTHER AND NEXT

FRIEND TO THE MINOR…… RESPONDENT

RULING

INTRODUCTION

The facts giving rise to the present suit are largely undisputed. Through a Plaint dated 17th October 2014, the Plaintiff therein, G N M (hereafter 'the Respondent) instituted proceedings against J M D (hereafter 'the Applicant') in, **Children's Case No. 1360 of 2014, G N M vs J M D**, seeking various Orders including that the Applicant be ordered to pay a sum of Kshs 75, 500/= per month as maintenance of the minor and Kshs 85,000/= per term from the year 2015, as school fees and related expenses for the minor. Subsequently, the Respondent filed another Chamber Summons Application dated 22nd December 2014 in which she sought for Orders compelling the Applicant to pay Kshs. 40, 000/= per term as school fees and related expenses for the minor, and Kshs. 50,000/= as maintenance for the minor pending the hearing and determination of the said Application and the suit. In a Ruling delivered by the Chief Magistrate's Court, Hon. L. Gitari ordered the Applicant to pay the minor's school fees as well as school related expenses at [particulars withheld] Primary School, where the minor was admitted. The Learned Chief Magistrate further ordered the Applicant to pay the minor's medical expenses and monthly maintenance of Kshs. 10,000/= pending the hearing and determination of the suit.

The Applicant thereafter filed a Chamber Summons Application dated 6th May, 2015 in which he sought for Orders that the minor be enrolled in a Government public school and that his responsibility towards the minor be subject to the enrolment of the minor to a Government school. In that regard, in a Ruling delivered on 18th August 2015, the Learned Chief Magistrate, while dismissing the said Application, further ordered the Parties to go for a paternity test within 14 days from the date of the Ruling, which the Parties did and the Government Chemist released a report dated 30th October 2015 indicating that the Applicant is the minor's biological father. Aggrieved by the said Ruling, the Applicant filed an Appeal in regard to that decision vide **Civil Appeal No. 96 of 2015**, which is pending before this Court.

Subsequently, and based on the Government Chemist paternity test report, in a Ruling delivered on 11th February 2016, the Learned Chief Magistrate ordered the Applicant to pay the minor's school fees, school related expenses, and a monthly maintenance of Kshs. 10, 000/= pending the hearing and determination of the suit. The Applicant, again dissatisfied with the decision, filed the present Notice of Motion Application dated 17th February 2016, in which he seeks the following orders:

> ***(1)….***
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> ***(2) That the Honourable Court be pleased to stay execution of Ruling and Orders of the Chief Magistrate at Nairobi, Hon. L. Gitari in Children's Case No. 1360 of 2014, G N M vs J M D issued on the 11th February 2016 pending hearing and determination of this Application.***
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> ***(3)That the Honourable Court be pleased to stay execution of Ruling and Orders of the Chief Magistrate at Nairobi, Hon. L. Gitari in Children's Case No. 1360 of 2014, G N M vs J M D issued on the 11th February 2016 pending hearing and determination of the Appeal.***
>
> ***(4) That the Honourable Court be pleased to consolidate the instant Appeal with Civil Appeal No. 96 of 2015, J M D vs G N M and order that the minor herein be enrolled in public school or affordable private school.***
>
> ***(5) That this Honourable Court be pleased to issue Orders for the parties to conduct a confirmatory test of the Appellant's paternity to the minor.***
>
> ***(6) That the costs of this Application be provided for***.

The Notice of Motion Application dated 17th February 2016 is the subject of this Ruling.

THE APPLICANT'S CASE

In his Affidavit sworn on 15th February 2016, the Applicant asserted that the Respondent instituted **Children's Case No. 1360 of 2014, G N M vs J M D** vide a Plaint dated 17th October 2014 seeking inter alia maintenance of the minor therein and that she further filed a Chamber Summons Application dated 22nd December 2014 in which she sought interim orders of maintenance at Kshs 50, 000/= per month and school fees and related expenses at a rate of Kshs 40, 000/ per term for the minor. That he subsequently lodged a Chamber Summons Application dated 6th May 2015 seeking inter alia that the minor be enrolled in a Government school where he would be able to cater for school fees and school related expenses. The Applicant asserted that the lower Court dismissed his Application and directed that the Parties go for a paternity test before his Application could be dealt with.

That following leave to Appeal against the order for dismissal of his Application, his advocates filed a Memorandum of Appeal dated 17th September, 2015 and he is yet to prosecute the same as he has not been furnished with the typed proceedings as he has sought through his letter dated 17th September 2015.

It was the Applicant's other contention that on 2nd October 2015, they attended the Government Chemist for sample collection and subsequent testing for paternity and a report subsequently issued on 30th October 2015 confirming that he is the minor's biological father. In that regard, it was his allegation that the Respondent and her advocates had access to the said report before a copy was furnished to the Court and hence, the same is highly un-procedural and suspect and in effect, casts doubt on its authenticity.

That based on the said report, the Court issued orders requiring him to solely provide for the minor's school fees and school related expenses at Advent Hill primary school at Kshs 40, 000/= per term, monthly maintenance of Kshs 10, 000/= and medical expenses of the minor pending the determination of the suit. Further, that the Court directed that the Parties therein file their respective Affidavits of means pending the hearing of the main suit.

The Applicant thus contended that the school where the minor is enrolled is very expensive and beyond his means as the yearly fee and related expenses, for the minor who is in baby class, is Kshs 120, 000 plus the additional monthly maintenance of Kshs 10, 000 totalling Kshs 120, 000 per year is very high and beyond his financial means. In that regard, he pointed out that whereas some of his dependents are enrolled in private schools, the said schools are not as expensive.

It was the Applicant's further position that he has since lodged an appeal and he has ten other dependents whom he is directly responsible for their housing, education, medical, daily upkeep and all other needs as he outlined in his Affidavit.

The Applicant additionally averred that he is not in any formal employment thus without a guaranteed source of income and his business engagements have not been doing well over a long period of time now. That he has previously identified schools that are convenient for the minor including [particulars withheld] Primary School, [particulars withheld] Primary School, and [particulars withheld] Primary School in respect of which he is willing to be responsible for learning materials, uniform, transportation and extracurricular and other non-government funded programs.

Further, that the parental responsibility of the minor ought to be apportioned in a manner taking into consideration of his pre-existing responsibilities, his circumstances, and the fact that the Respondent is working and capable of equally providing for the minor. That all his dependants are at risk of not being provided for and stand to suffer greatly if the orders of the lower Court are not varied accordingly.

In his Written Submissions dated 6th April, 2016, the Applicant asserted that the principles for the grant of orders of stay of execution are outlined under **Order 42 Rule 6** of the **Civil Procedure Rules** and he relied on the decision in **CORPORATE INSURANCE COMPANY LIMITED VS EMMY CHEPTOO LETTING AND ANOTHER [2015] eKLR**, to emphasise on the principles stipulated under the said provision. In that regard, it was his position that he has made out a case to warrant the grant of Orders of stay and hence the Court should grant the same.

While relying further on **URGENT CARGO HANDLING COMPANY LIMITED VS MAGDALINE KATHONI MWANGI [2016] eKLR**, it was his submission that his contention is with regard to the probity of the paternity test results which was the sole basis for the maintenance award granted by the Subordinate Court and as such, failure to order a confirmatory test will render his intended appeal nugatory.

While pointing out the provision of **Section 79G** of the **Civil Procedure Act**, the Applicant reiterated that the present Application has been filed without unreasonable delay and hence it is well before the Court.

On the question of the consolidation of appeals, it was the Applicant's view that the prayer for consolidation herein is well in line with the provision of **Order 3 Rule 5 (1)** of the **Civil Procedure Rules** and in that regard, he relied on the case of **LAW SOCIETY OF KENYA VS CENTRE FOR HUMAN RIGHTS AND DEMOCRACY AND 12 OTHERS [2014] eKLR** and **GIDEON MBUVI KIOKO ALIAS SONKO AND 6 OTHERS VS ATTORNEY GENERAL AND 4 OTHERS, [2014] eKLR** to emphasises on the principles the Court ought to follow in determining whether it is proper for a matter to be consolidated with another.

Based on the foregoing reasons, the Applicant urged the Court to allow his Application and grant the orders sought therein.

THE RESPONDENT'S CASE

In response to the Application, the Respondent filed an Affidavit sworn on 3rd March 2016 in which she contended that the Report of the Government Chemist on paternity was prepared and paid for at the request of the Applicant and that she saw the report for the first time after reading the said Application. That when the matter came up for mention before the Subordinate Court, her advocate informed her that the said Report had been confidentially sent to the Court after which a Ruling date was reserved. In that

regard, it was her position that she knew of the paternity results after the Ruling delivered on 5th February 2016 through her advocates. In that context, she argued that the contentions as to the authenticity or otherwise of the results by the Applicant are baseless and he ought to be punished for forgery.

It was the Respondent's argument that the Applicant is the biological father of the minor and the request for a confirmatory test is baseless and a delay tactic. That the Applicant does not care about the minor and has placed his dependants needs before the minor's. Accordingly, that the Subordinate Court did not order that he pays Kshs 40, 000/= as school fees but for him to pay the school fees as per the fees structure.

The Respondent averred further that by seeking for orders of stay, the Applicant is in effect praying that the minor drops out of school and further not be provided with basic needs. That, she contended, would not be in the interest of the minor. That at the Subordinate Court, on 3rd March 2015, the Applicant offered to pay half of the minor's school fees pending the paternity test and yet, now that the results are out, the Applicant is unwilling to honour his obligations.

That the Applicant paid for the minor's upkeep in February, 2015 but has to date failed to make any further contributions and that the Applicant merely wants to discriminate against the minor and yet his other alleged children are in private schools and university. Further, that the Applicant's choice of school for the minor is not final, conclusive or binding and it ignores the fact that she lives in Ongata Rongai and that the minor is of tender years.

In her Written Submissions dated 22nd April 2016, the Respondent pointed out that the Applicant primarily seeks to have Orders of stay in regard to the provision of the minor's basic needs regarding education and health and furthermore, he has not shown or even made a bare statement that he will suffer substantial loss if the stay Orders sought are not granted. In that regard, it was her argument that the Applicant merely seeks to suspend his parental responsibilities and hence, that would not be in the interest of the minor.

The Respondent relied on the authorities in **Z.M.O. VS E.I.M., NAIROBI HCCA NO. 13 OF 2013**, in support of his proposition that the Applicant must demonstrate that he will suffer substantial loss if the orders are not granted; **F.W.N.M VS S.M.M, NAIROBI HCCA NO. 67 OF 2013**, for the position that staying orders made in favour of a minor is not in the interest of the minor, and **P.A.K VS S.A.K, NAIROBI HCCA NO. 64 OF 2015** for the position that in law, any matter concerning children must be considered in light of the paramount interest of the child and that Court orders ought to be obeyed whether the recipient agrees with them or not.

For the foregoing reasons, the Respondent urged the Court to dismiss the present Application and consider the best interests of the minor.

DETERMINATION

The key issue for determination is whether the Orders of Stay ought to be granted pending the hearing and determination of the Applicant's intended Appeal. In that regard, the law on stay of execution is outlined under **Order 42 Rule 6** of the **Civil Procedure Rules** in the following terms:

> ***(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***
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> ***(2) No order for stay of execution shall be made under sub-rule (1) unless-***

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

(3) Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) …

(5) …

(6) Notwithstanding anything contained in sub-rule (1) of this rule, the High Court shall have power in the exercise of its appellate jurisdiction to grant temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

It therefore follows that in an Application such as this, an Applicant must satisfy three key ingredients namely; that substantial loss may result to the Applicant unless the order is made, the Application has been made without unreasonable delay, and the Court may require an Applicant to furnish such security for the due performance of such a decree or order as may ultimately be binding upon such terms as it may deem fit a stay of execution pending the hearing of the Appeal. This position was reiterated by the Court in the case of **CORPORTATE INSURANCE COMPANY LIMITED VS EMMY CHEPTOO LETTING AND ANOTHER (supra)**.

On the question of substantial loss, in **REPUBLIC VS THE COMMISSIONER FOR INVESTIGATIONS AND ENFORCEMENT 'EX-PARTE' WANANCHI GROUP KENYA LIMITED, MISCELLANEOUS CIVIL APPLICATION NO. 51 OF 2013, it was pointed out that:**

"*[43] *It is therefore not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted since by granting stay would mean that the status quo should remain as it were before the judgement and that would be denying a successful litigant of the fruits of his judgement which should not be done if the applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay." (Emphasis added)

Applying the foregoing to the present case, it should be firstly noted that the matter at hand primarily concerns a minor and in that regard, the Parties should not lose sight of the provisions of **Article 53 (2)** of the **Constitution** which is to the effect that:

A child's best interests are of paramount importance in every matter concerning the child.

On that note, the Court notes that the Subordinate Court in granted the following orders:

(1) That the Defendant do pay school fees for the minor as well as all other school related expenses.

(2) That the fees and related expenses be paid at Advent Hill Primary School where the child was admitted and be paid in accordance with the school fees structure.

(3) That pending hearing and determination of the suit, the Defendant in addition to paying school fees and school related expenses do pay medical expenses as and when they arise or take out a medical cover for the minor.

(4) That the Defendant do pay a monthly maintenance of Kshs. 10, 000/=.

(5) That each Party do bear its own costs.

(6) That either Party be at liberty to apply.

It is thus apparent that the effect of the above orders is to have the child's educational; health and well-being catered for. Thus the orders were in effect geared towards the parental responsibilities bestowed by law on the Applicant towards the minor. The Court notes further that in the above Orders, nowhere is it stated that the Applicant is to pay a sum of Kshs 40, 000/= as school fees per term and hence the Applicant is misleading this Court. The Order by the Subordinate Court is to the effect that the Applicant pays school fees as per the fee structure, and the fee structure adduced as annexure "GNM II" in the Respondent's Affidavit, does not indicate that the minor's school fees is Kshs 40, 000/= per term.

Furthermore, it will be noted that whereas the said Orders were issued on 11th February, 2016, and the Applicant has not rebutted the assertions that he has not complied with the same ever since and hence the minor's interests remain compromised.

It appears that the Applicant seeks to have the said Orders stayed and hence he has not made attempts to comply with the same. It should be remembered that Court Orders ought to be complied with even if a Party is dissatisfied. This position was affirmed by Ibrahim J. in **ECONET WIRELESS KENYA LTD VS MINISTER FOR INFORMATION &AND COMMUNICATION OF KENYA AND ANOTHER [2005] 1 KLR 828,** where the Learned Judge expressed the view thus:

> ***"It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void."***

On the question of substantive loss, the Applicant has contended that he stands to suffer greatly if the said orders are enforced. As the Court has observed elsewhere, the Applicant has not made any attempts to comply the same and as such he cannot seek the protection of this Court as he has come not with clean hands. That notwithstanding, it behoves on this Court to uphold the best interest of the minor, which is to have the minor attain its education, health and well-being and hence the staying of the orders would jeopardise the child's growth and development. I must reiterate the dictum by the Learned Judge in **F.W.N.M VS S.M.M (supra)** where it was held that:

> **"[14]** ***This Court has in several decisions stated its reluctance to stay orders made for the benefit of minors. It has repeatedly been stated that staying an order made in favour of a child will not be in the best interests of the child. The orders I am invited to stay were made in that respect. The Applicant has not satisfied me that the said orders were not geared to serve the interests of the minor."***

To that, the Court wishes to add that each and every case ought to be looked at in its own special circumstances and in the circumstance of the present case, it would not be in the interest of justice and that of the child to grant the orders of stay sought herein. Weighing the Applicant's right to challenge the decision of the Subordinate Court and that of the best interests of the minor, the minor's rights must prevail.

On whether the present intended Appeal ought to be consolidated with **Civil Appeal No. 96 of 2015, Joel Meitamei Dapash vs Grace Naipei Mpaayei,** the Court notes that the said Appeal was prompted by the holding in a Ruling delivered pertaining to the Chamber Summons Application dated 6th May 2015 in which the Applicant had sought for the following orders:

(1) That the minor herein be enrolled in a Government public school forthwith.

(2) That the Applicant's responsibility towards the minor herein be subject to enrolment of the minor to a Government school.

(3) That the costs of this Application be borne by the Respondent.

According to the Memorandum of Appeal filed in that regard, the Applicant is dissatisfied with the decision of the Subordinate Court in dismissing the said Application and in the grounds outlined therein it is evidence that the key grievance is in regard to the decision pertaining his liabilities towards the upkeep of the minor from school fees, school related expenses etc. In his intended Appeal herein, the Applicant as well challenges the decision of the Subordinate Court and the key grievance is also in regard to his responsibilities in regard to the minor. Based on the foregoing, and keeping in mind the provisions of **Article 48** of the **Constitution**, which guarantees the right to access justice, it would therefore be in the interest of justice to have the matters consolidated so that the same can be substantively determined and disposed. Furthermore, the parties are the same and any orders arising in both shall have a direct effect on the minor. It is therefore in the interest of justice to have both matters heard and determined together substantively.

On whether this Court should order for another paternity test, based on the material before the Court, no evidence has been adduced for instance showing that the Applicant objected to the admissibility of the Report by the Government chemist nor has the Applicant adduced any evidence indicating that he drew to the attention of the Learned Chief Magistrate his doubts as to the authenticity of the paternity results. That notwithstanding, the Applicant has merely asserted that the Respondent and her Advocates had access to the said report before a copy was furnished to the Court, but he has not however adduced any evidence in support of those assertions. In any event, the Applicant has not rebutted the assertions that the Respondent only learnt of the results of the paternity test.

In conclusion and for the above stated reasons, the interests of the minor override that of the Applicant and great injustice will be suffered by the minor if the orders sought in the present Application are issued. The Court is duly guided by **Section 4 (2) (3)** of the **Children Act** which outlines the principle that ought to guide the Courts in determining matters where the welfare of children is at stake. The said provision states as follows:

(1) Every child shall have an inherent right to life and it shall be the responsibility of the Government and the family to ensure the survival and development of the child.

(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.

(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to-

(a) Safeguard and promote the rights and welfare of the child;

(b) Conserve and promote the welfare of the child;

(c) Secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.

(4) ….

For the aforestated reasons, the Court declines to issue the Orders sought in the present Application and

the same is hereby dismissed.

DISPOSITION

In light of my findings above:

(1) The Application dated 17th February 2016 is hereby dismissed.

(2) The present matter shall be consolidated with Civil Appeal No. 96 of 2015, J M D vs G N M.

(3) Let each Party bear its own costs.

READ, SIGNED AND DATED IN OPEN COURT AT NAIROBI THIS 6TH DAY OF OCTOBER, 2016.

M. W. MUIGAI

JUDGE

In the presence of:

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