PKM v Senior Principal Magistrate Children's Court at Nairobi (Civil Application NAI 249 of 2015) [2022] KECA 467 (KLR) (18 March 2022) (Ruling)

Neutral citation: [2022] KECA 467 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION NAI 249 OF 2015

HM OKWENGU, A MBOGHOLI-MSAGHA & KI LAIBUTA, JJA

MARCH 18, 2022

BETWEEN

PKM ..... APPLICANT

AND

SENIOR PRINCIPAL MAGISTRATE CHILDREN'S COURT AT NAIROBI ..... RESPONDENT

(Being an application for stay of execution of the Judgment and Order of the High Court of Kenya at Nairobi (Lenaola, J.) delivered on 21st March, 2014 in High Court Petition No. 138 of 2013)

RULING

[1] Before us is a notice of motion dated 30th September 2015 in which the applicant PKM (name withheld), seeks an order for temporary stay of execution of the judgment and order delivered on 21st March 2014 by the High Court (Lenaola, J. (as he then was) pending the hearing and determination of an intended appeal against the judgement. The applicant also seeks an order restraining the respondent from executing the judgment and decree or proceeding with a lower court matter in Children's Court, Civil Case No. 1020 of 2012.

[2] The application is supported by the grounds listed on the motion and in an affidavit sworn by the applicant, to which he has annexed a copy of the judgment, decree, and the notice of appeal.

[3] JW, an interested party, has filed a replying affidavit opposing the motion and contending that the motion is frivolous and an abuse of the process of the Court.

[4] The applicant was duly served with the hearing notice through email on 10th February 2022 at 3.57 p.m. and directed to serve the respondent and the interested party, as the Court did not have the respondent's and the interested party's email. However, when the matter came for hearing, neither the

applicant nor the respondent, nor the interested party were in Court. We are therefore constrained to determine the matter in accordance with the record before us.

[5] In the judgment subject of the intended appeal, the learned Judge rejected a petition filed by the applicant contesting an order made in the Children's court directing that he attends DNA testing to ascertain the paternity of a child known as JM (name withheld).

[6] The learned Judge ruled that balancing between the applicant's inconvenience at being subjected to DNA testing, and the need to conclusively determine the paternity of the child, the best interest of the child had to prevail, and he therefore ordered that the applicant and the interested party, and the child, to avail themselves for DNA testing at the government chemist on a date to be agreed upon, and in any event within 14 days of the judgment.

[7] The applicant sought orders of stay in regard to the orders made the learned judge directing him to attend DNA testing. The applicant argues that he has an arguable appeal with overwhelming chances of success, and that, unless the order of stay is granted, his intended appeal will be rendered nugatory, and a mere academic exercise.

[8] In her replying affidavit, JW has urged the Court to dismiss the motion contending that the applicant had failed to comply with several directives to attend the DNA testing, and that she had even applied for a warrant of arrest against the applicant, but the applicant has continuously frustrated those efforts. The interested party maintained that the delay in the applicant undergoing the DNA test is subjecting the minor to unnecessary anxiety and suffering, as the minor needs to know the biological father, and that DNA testing is the only way that will dispel the doubt regarding the child's paternity and open the way for the child to enjoy parental care. The interested party urged that it was in the interest of justice and fairness that the applicant obeys court orders, and that the interest of the child takes precedence and cannot be subjugated to any other rights including those of the applicant.

[9] We have considered the motion in light of the information before us together with the applicable law. In the first place, the applicant's motion is for dismissal under Rule 56(1) of the *Court of Appeal Rules* as the applicant failed to attend the court session despite having had due notice of the date for the hearing of the motion.

[10] Be that as it may. this Court has stated in numerous decisions the principles to be applied in applications under Rule 5(2)(b) of the Court of Appeal Rules. For instance, in *Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR*, this Court stated:

> "10. The principles governing the exercise of the court's jurisdiction under rule 5(2)(b) of our Rules are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. We need only restate these principles from *Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd* – Civil Appl. No. Nai. 93/02 (UR), thus: -
>
> > "Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely: -
> >
> > 1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,
> >
> > 2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed,

would have been rendered nugatory by the refusal to grant the stay or the injunction."

Lastly, both limbs must be demonstrated to exist before one can obtain relief under rule 5(2)(b). (See *Republic v. Kenya Anti-Corruption Commission & 2 others* [2009] KLR 31).

[11] In the circumstances herein, the applicant has not satisfied this Court that his intended appeal would be rendered nugatory if the order of stay that he seeks is not granted. The only thing that will happen is that the applicant will be subjected to the DNA testing which may either affirm or negate the allegation that he is the biological father of the child. We do not see how that would prejudice him or render his intended appeal nugatory. In addition, under Article 53(2) of the *Constitution*, "a child's best interests are of paramount importance in every matter concerning a child."** Thus the interest and right of the child JM to know who the biological father is, takes precedence over the applicant's right to privacy.

[12] For these reasons, we find that this application has no merit. It is accordingly dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MARCH, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR