NKM v NJS (Suing on Behalf of Am) (Civil Appeal E167 of 2024)
[2025] KEHC 4851 (KLR) (25 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4851 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E167 OF 2024

JRA WANANDA, J

APRIL 25, 2025

BETWEEN

NKM ..... APPELLANT

AND

NJS ..... RESPONDENT

SUING ON BEHALF OF AM

(Appeal against the Ruling of Hon. Kesse Cherono-PM, delivered on 17th July 2024 in Eldoret Chief Magistrate's Court Children's Case No. E072 of 2024)

RULING

1. The subject of this Ruling is the Appellant's Notice of Motion dated 18/08/2024 filed through Messrs Cheptinga & Co. Advocates, and which seeks orders as follows:

   i. [.....] spent

   ii. [.....] spent

   iii. That pending the hearing and determination of this Application and the main appeal, the Honourable Court do grant a temporary stay of execution of the Courts orders in Eldoret Children's Case No. E072 OF 2024 vide the ruling delivered on 17/07/2024 and any consequential orders.

   iv. That pending the hearing and determination of thus application and the main appeal, the Honourable Court do grant stay of proceedings in Eldoret Children's Case No. E072 of 2024.

   v. That this Honourable Court may be pleased to issue any order it deems fit to grant in the circumstances.

   vi. That the costs of this application be provided for.

2. The genesis of the Application is the Ruling delivered in Eldoret CMCC Children Case No. E072 of 2024 on the 17/07/2024 wherein that Court made orders that pending the hearing and determination of the said suit, the Appellant do provide monthly child support contribution of Kshs 20,000/-, and submit to a DNA test at a Government Chemist within a reasonable time on a pre-agreed date with each party meeting their share of the costs, that in the event the test confirms the Appellant to be the biological father of the minor, he refunds to the Respondent her share of the costs spent in the test, the Appellant do immediately file an Affidavit of means to ascertain his true financial status, and he bears the costs of the Application.

3. The Application is supported by the Affidavit sworn by the Appellant, in which he deponed that aggrieved by the said Ruling, he filed this Appeal, that the paternity of the subject child is disputed and it is unfair for him to be condemned to pay for maintenance of a child who is not his, and that he is apprehensive that if the monthly payments are made to the Respondent, she would not be in no position to refund the same if the Appeal is successful. He further deponed that although the Court ordered that the parties do share the costs of the DNA, and that if he would be determined to be the father of the child, he is to reimburse the Respondent her costs, no corresponding order was made that he, too, would be reimbursed his costs if the DNA would find that he is not the father. According to him, being condemned to pay monthly maintenance without the paternity being determined is tantamount to being condemned unheard and is a travesty to justice, that he has an arguable appeal with a very high chance of success, that the Respondent works at Rivatex East Africa Ltd and can continue to provide for the needs of the child as she has been meeting the same and thus the child shall not suffer. He also deponed that he is ready and willing to undergo another DNA test, that the child is barely 1 year old and being condemned to pay a monthly maintenance of Kshs 20,000/- is excessive and he cannot afford the same and that if the payment is made to the Respondent, the Appeal will be rendered nugatory and he will suffer irreparable loss and damage.

4. The Application is opposed by the Respondent who relies on her Replying Affidavit sworn on 9/09/2024 and filed through Messrs Rotuk & Kisaka Advocates. In the Affidavit, she deponed that the Appellant is mistaken in approaching the issue as though he is being imposed with a new burden, yet the correct position is that he was simply directed to continue providing for the child after he unilaterally and unlawfully stopped all forms of support in December 2023, and that it appears that the Applicant views the rights in question as belonging to the mother rather than the child's individual rights to care and protection from both parents. She deponed further that these obligations cannot wait for a day, that the Appellant does not deny the existence of their marriage, which marriage continues to subsist and that the child is a product of the marriage, born during the existence of the marriage, and as such parental duties automatically flowed unless otherwise directed by a Court of law. She urged that the Appellant started raising issues after the birth of the child on 16/08/2023 and stopped paying any form of support in December 2023 but he was however directed to resume paying child support as from January 2024. She disputed the paternity test Report produced by the Appellant and deponed that if the Appellant wanted to be lawfully excused from his parental duties, the correct procedure should be to move the Court to make a finding on the issue of paternity but not to unilaterally stop providing support.

5. She deponed that the Appellant's parental obligations have not been added by the Court but he has been merely directed to continue performing his duties which he had abdicated, that the paternity test of 16/01/2024 was a private test and which is only useful to the Appellant, and not the child whose interests are in jeopardy especially if the Appellant procured the Report through fraudulent means in order to match a predetermined end in divorce and escape his parental responsibilities. She urged that the needs of the child are ongoing and must override the rights and inconvenience of the parents,

and cannot wait as they have been in the dispute since December 2023 with zero support from the Appellant, that her monthly expenses exceed her monthly salary of Kshs 12,726/- which used to be supplemented by direct monthly rent payments made to the landlord by the Appellant and the Kshs 20,000/- awarded is therefore reasonable in the circumstances as it mirrors the support that she used to receive.

6. She contended that the Appellant's claim that he will suffer loss as a result of the Court order is unconscionable to come from a parent who has simply abdicated his parental duties for a child born legitimately within the confines of a valid marriage, and which is order is not final. Regarding the Appellant's grievance with the directive that he files an Affidavit of means, she urged that the Court can only rely on parties' pleadings, and at no time did the Appellant make such a request and therefore, there could not have been a determination on the issue. She then deponed that she has attached her modest payslip of her monthly total earnings of Kshs 12,276/- which, according to her, is at the minimum national wage and cannot sustain the child in full or meet all the expensive needs of a new born child, including a house help and reasonable accommodation, a fact which was not challenged by the Applicant at the lower Court, that the only time that the Appellant can be allowed to stop providing child support is when the Court makes a finding on the merits of the case but not on the Appellant's own volition. In conclusion, she deponed that there is nothing to be stayed as the Appellant was simply reminded by the lower Court to continue performing his parental duties and he will not suffer any prejudice or loss nor will the appeal be rendered nugatory.

Hearing of the Application

7. The Application was canvassed by way of written Submissions. The law firm of Messrs G&A Advocates filed the Notice of Change of Advocates dated 5/12/2024 taking over the Appellant's case and at the same time, filed the Submissions of the same date. On her part, the Respondent filed the Submissions dated 10/12/2024.

Applicant's Submissions

8. Regarding the Court's power to grant stay pending Appeal, the Appellant's Counsel cited the requirements listed in Order 42 Rule 6 of the Civil Procedure Rules, and on the Court's obligation to apply the principle of the "child's best interests" in litigation concerning children, he cited Article 53(2) of the *Constitution*, Section 8 of the *Children Act* 2022 and also the case of *AKK v AKR (Minor Suing Through Mother and Next Friend JC)* [2024] KEHC 4962 (KLR). On the Appellant's duty to demonstrate the existence of "substantial loss", he cited the case of *HKM v NJK* [2023] KEHC 26887 (KLR), and submitted that the "substantial loss" of the minor prevails over that of the Appellant. He then urged that the child will suffer "substantial loss" if the order of stay is not granted because an order of maintenance has been issued when her paternity remains unknown. He contended that the DNA test Report exhibited unequivocally excludes the Appellant from being the father yet the Appellant was ordered to provide for the child, and that Courts have consistently held that it is not in the best interest of a child to issue a maintenance order where parentage is uncertain. He cited the case of *NEO v HWK* [2017] KEHC 78 (KLR).

9. He contended further that if the order of stay is granted, the child will not suffer because the Respondent, who has custody of the child, is employed and is therefore capable of continuing to provide for the child as she been doing pending determination of the Appeal. On the definition of "substantial loss", he cited the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR and submitted that the Appellant has been unjustly burdened with the obligation to provide for a child that is not his and that this is exacerbated by the excessively high monthly maintenance amount of Kshs 20,000/-. He submitted further that the Appellant stands to suffer "substantial loss" because

he risks being jailed as the Respondent has already initiated contempt of Court proceedings against him before the lower Court. He reiterated that the Respondent will not be in a position to refund the monthly payments should the appeal succeed, that the appeal is arguable and has a high likelihood of success and will be rendered nugatory thus undermining the Appellant's right to appeal. He also cited the case of *E K C v. I K (Minor) Suing thro' T S* [2019] KEHC 9197 (KLR) in which and contended that where paternity is in dispute, the Court should grant an order of stay pending appeal. He further submitted that although the Respondent disputes the DNA test results on the grounds that she filed a complaint letter to the paternity test providers and pathologists, Lancet Kenya, alleging suspicious circumstances under which the test was conducted, in the absence of any Court order setting aside the test and in the absence of any contrary results, the Respondent is estopped from disputing it, and that "he who alleges must prove". He cited the case of *BAY v ABG & another* (Civil Appeal E019 of 2021) [2023] KEHC 25995 (KLR).

10. On whether the Application has been made without undue delay, he submitted that the impugned Ruling having been delivered on 17/07/2024 and the Application filed on 18/08/2024, the Application was filed without delay. He cited the case of *E K C v IK(Minor) Suing thro' TS*(*supra*). Regarding security for due performance, Counsel submitted that as a demonstration of good faith, the Appellant is willing to deposit in Court the total accrued maintenance amount from the date of the Ruling, that he has already commenced compliance with the Court order directing that he submits to another DNA test since, through his Advocates, he wrote to the Respondent proposing a date for conducting the test. He cited the case of *HKM vNJK*(*supra*).

Respondent's Submissions

11. Counsel for the Respondent submitted that the parties got married on 31/12/2020 and the marriage continues to subsist, that in the course of the marriage, the Respondent got pregnant and gave birth on 16/08/2023 and the Appellant continued supporting her by sending monthly financial support as her husband, that in December 2023, the Appellant, who is based in the USA, secretly jetted into the country and never bothered to even see the baby, and instead, began raising paternity issues, procured a questionable paternity test results and stopped sending any form of financial support. He submitted that the lower Court's order of 17/07/2024 directed the Appellant to continue providing child support and the same is an interim status quo order, and thus a negative order as it did not impose any new obligation on the Appellant. Counsel then repeated matters already deponed in the Replying Affidavit and urged that the order simply imposed a net zero change where parties have nothing to lose from maintaining the situation as it was before December 2023 when the Appellant unlawfully decided to stop any form of support to the child.

12. He submitted that an application for stay presupposes the existence of a positive order which creates a situation of stay where the order is yet to be complied with or partly complied with. He cited the case of *Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union (K)* (2017J eKLR and maintained that the subject order is not capable of being stayed because there is nothing the Appellant has lost. According to him therefore, the issue of "substantial loss" to be suffered by the Appellant or the appeal being rendered nugatory does not arise. He cited the case of *Kenya Commercial Bank v Tamarind Meadows Lid & 7 others* (2016) eKLRand contended that the Appellant has not demonstrated why the Court should disturb the proper exercise of discretion by the lower Court to give effect to the best interests of the minor.

13. Regarding the rights of a child of questionable paternity, Counsel submitted that there is a constitutional imperative to special/biased protection of a child's best interests as against the rights of the parents, and that the Court should issue orders that are in favour of the child even if at great cost,

disadvantage or inconvenience of any parent. He submitted that Article 53(1)(e) of the *Constitution* and Section 4(2) of the *Children Act* are clear that disputes between parents is not an important consideration in proceedings concerning children, that it is clear that the acrimony between the parents is what has resulted in the withdrawal of the support by the Appellant and which amounts to child abandonment and neglect. He cited the case of *ANM v FPA (suing as the father and next friend of the minor)* [2021] eKLR, and also the case of *CMS v IAK* HC Misc. Application No 526 of 2008. Counsel contended that the Respondent admits that he stopped giving financial contribution after conducting the private paternity test, which by itself does not permit him to abrogate the rights of the child to care and protection from the parents, that the fact of the child being born during the subsistence of the marriage is not disputed by the Respondent and that it is settled law that a child born during the subsistence of the marriage is a child of the union and as such, the parental duties are presumed automatically unless terminated by a Court of law. He cited the case of *DMK v FJM* (Civil Appeal 22 of 2019) [2022/KEHC 12760 (KLR).

14. On the requirements that an Applicant for stay pending Appeal has to meet, Counsel cited the case of *Public Service Commission & 72 others versus Okiyu Omtatah &4 others* [2021] eKLR and also the case of *Stanley Kangethe Kinyanjui versus Tony Ketter & 5 Others* [2013] eKLR and urged that the Appellant has to demonstrate that the appeal is arguable or that the appeal will be rendered nugatory should it ultimately succeed. He also cited the case of *Reliance Bank Ltd versus Norlake Investments Ltd* (2002/1 EA 227. He contended that there is doubt on whether the Appeal is arguable as he seems to be appealing against his own admissions in the lower Court that he stopped giving financial support to the child. On whether the appeal will be rendered nugatory, he contended that the Appellant has been providing for the child and his family for 5 years from 2020 and wondered what "substantial loss" would arise if he is directed to provide for the child on an interim basis. He contended that it is surprising that the Appellant is willing to deposit the money in Court, but not to pay child support, that the Court must not countenance this as it is against the best interests of the child when there is a valid Court order which the Appellant has refused or neglected to comply with from July 2024 to the continued disadvantage and hardship of the child, that nothing the Court will offer will compensate for the lost child support and the mental distress to the child, and the Appellant stands no such scale of prejudice with the scales overwhelmingly tilting in favour of the child.

Determination

15. The issues that arise for determination in this matter are evidently the following;

    a. Whether an order of stay of execution should be issued.

    b. Whether an order of stay of proceedings should be issued.

16. On the issue of stay pending Appeal, I must reiterate that in determining matters involving children, including an Application for stay of execution as herein, the "best interest" of the child is what is paramount. This is expressly provided under Article 53(2) of the *Constitution* and also in Section 8(1)(a) of the *Children Act* as follows:

    Article 53(2) of the *Constitution*

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

    Section 8(1)(a) of the *Children Act*

    > " In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—

a. the best interests of the child shall be the primary consideration;"

17. The principles applicable in handling Applications for stay of execution in children's matters were well set out by Murithi J in the case of *Bhutt v. Bhutt*, Mombasa HCCC NO. 8 of 2014 (O.S.) to be as follows:

> "In determining an application for stay of execution in cases involving children, the general principles for the grant of stay of execution Order 42 Rule 6 of the Civil Procedure Rules, must be complemented by overriding consideration of the best interest of the child in accordance with Article 53 (2) of the *Constitution*."

18. Generally, the principles guiding grant of stay of execution pending Appeal are well settled. In this respect, Order 42 Rule 6(2) of the *Civil Procedure Rules* provides as follows:

> "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."

19. From the foregoing, it is clear that an applicant for stay of execution pending appeal must satisfy 3 conditions, namely, (a) he will suffer substantial loss unless the order is granted, (b) the Application has been made without unreasonable delay, and (c) willingness to deposit security for the due performance of any orders so stayed.

20. On the first condition, namely, whether the Appeal was filed timeously, the impugned Ruling was delivered on 17/07/2024, while the Appeal was filed on 18/08/2024 simultaneously with the instant Application. The Application was therefore obviously filed without delay.

21. The second condition is whether there shall be any "substantial loss" should the order not be granted. As to what encompasses "substantial loss", F. Gikonyo J, in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, stated as follows:

> "..... The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

22. In this case, the Appellant did not anywhere in the body of his Application disclose to this Court that he is legally married to the Respondent and that the child was, in fact, born during the pendency of the marriage. He also did not disclose that he was all along religiously providing the support until December 2023 when he suddenly stopped the same citing paternity doubts. For this reason, the Court initially got the impression that the parties simply had a romantic relationship in terms of a boyfriend-girlfriend nature. Only after the Respondent filed her Replying Affidavit and exhibited a copy of the Marriage Certificate did the above facts come to this Court's attention. The said facts were not disputed by the Appellant. To my mind, this was non-disclosure by the Appellant of a material fact and disentitles him to any exercise of this Court's discretion in his favour. In any case, the impugned order

of the trial Court is simply an interim measure issued to ensure that the child's best interests and rights to maintenance are not violated. The orders are only in force temporary while awaiting determination of the whole case. It is simply an interim order to continue with the status quo ante.

23. It is important to always recall that in children's matters, the interests of the child supersede those of the parents. The "substantial loss" which prevails over and above that of a parent is therefore that of the child. The Court must thus look beyond the possible "loss" to be suffered by the parent and consider the "loss" that may be suffered by the child. In regard thereto, in the case of *LDT v PAO* [2021] eKLR, R. Ngetich J, stated as follows:

> " 18. While considering stay of execution in respect to children matters, beside the above, the Court has to consider the best interest of the child. The applicant is expected to demonstrate that the minors will suffer if a stay is not granted. I however note that the applicant averred that he will suffer great prejudice as he will be condemned to pay school fees twice if an order of stay is not granted.
>
> .....
>
> 20. The best interest of a child is superior to rights and wishes of parents; they should incorporate the welfare of the child in its widest sense. ....."

24. Similarly, in the case of *IMR v RNM* [2022] eKLR, M. Odero J, held as follows:

> " 18. The Applicant claims that he stands to suffer great prejudice if the orders are not stayed as the amount awarded as maintenance were in his view excessive and that he is not able to afford to make the said payments.
>
> 19. The question of whether or not the maintenance awarded is excessive is one which cannot be determined at this interim stage. That is a matter, which can only be determined upon a full hearing of the Appeal.
>
> 20. The orders which the Applicant seeks to stay relate to the maintenance of the minors. It cannot be in the best interests of the minors to stay the said orders. The Applicant has not denied paternity and as such, he together with the Children's mother has an obligation to provide for the needs of their children.
>
> 21. It has been revealed that the Applicant has not complied with the orders of maintenance made by the Children Court. The Applicant has not denied this allegation. The Applicant is reminded that courts do not make orders in vain. Parties are obliged to obey court orders even when they do not agree with said orders.
>
> 22. It is trite that he who comes to equity must come with clean hands. It is duplicitous of the Applicant to approach this court seeking to stay orders, which he has in any event disobeyed.
>
> 23. .....
>
> The appellant has applied to the court for a discretionary relief, yet he is not ready to obey the orders that he is seeking relief against it. He has therefore come to court with unclean hands. The court cannot exercise discretion in favour of such a litigant who has no respect for the rule of law" (own emphasis)."

24. .....

25. I find no valid grounds to stay the orders made on 2nd September 2021. The welfare of the children is paramount consideration and cannot be stayed, as this would be detrimental to the welfare of the said children."

25. There is also the decision of W. Musyoka J, who in the case of *ZM v EIM* [2013] eKLR, held as follows:

> "As a matter of principle, grant of stay of execution of maintenance orders in children's cases should be made in very rare cases. I say so because parents have a statutory and mandatory duty to provide for the upkeep of their minor children. There are no two ways about it. Suspension of a maintenance order is not in the best interests of the child, particularly in cases such as this one, where paternity is not in dispute. To my mind once a maintenance order is made where parentage is undisputed it should not be suspended pending appeal, where the appeal is on the quantum payable. The solution ideally lies in expediting the disposal of the appeal and staying the matter before the Children's Court to wait the outcome of the appeal. Tinkering with the quantum at this stage would amount to determining the appeal before arguments are heard from both sides on the merits of the same". (Own emphasis)".

26. In associating myself with the reasoning adopted in the said decisions, I find that, there being no denial that the child was born during the pendency of the marriage, the issue of "substantial loss" merely because of doubts on the child's paternity, should not arise. The foundation of the Appeal is the issue of paternity which issue cannot be determined at this stage, and the Court cannot, in the interim, leave the child without upkeep.

27. The Appellant has also not denied the Respondent's allegations that he has not made any effort to pay any upkeep as ordered by the lower Court since December 2023. In the premises, I am also not convinced that the Appellant has approached this Court with "clean hands" and which therefore renders him undeserving of the orders sought.

28. For the above reason, I will not even consider the Appellant's offer to deposit security in Court.

29. Regarding the arguability of the appeal, I am hesitant to comment on the merits thereof as I may be deemed to have prematurely prejudged the Appeal before the hearing thereof. However, having perused the Memorandum of Appeal, it is clear that the two key issues raised in the grounds of Appeal are in respect to the issue of maintenance and the paternity of the child. Clearly, the matters raised cannot be termed as being frivolous or not raising substantive points of law for consideration by an appellate Court. However, the order appealed against is simply an interim directive to remain in force only temporarily pending determination of the suit before the lower Court. It is not a final order. In the circumstances, and although the Appellant cannot be denied his right to pursue the appeal, being a mere interlocutory order, interim in nature, I have my reservations on the arguability of the Appeal. Would it not perhaps have been wiser for the Appellant to have pushed for fast-tracking or expedition of the full trial of the suit in which all matters arising would be determined once and for all, instead of insisting on an interlocutory Appeal whose consequence is basically to only delay and/or stall the trial before the lower Court? Further, nothing stops the Appellant, if the trial Court determines that he did not sire the child, to seek for a refund of the money he would have paid in monthly upkeep if he presents justifiable grounds.

30. For the foregoing reasons, I believe that I have said enough to indicate that the prayer for stay pending Appeal, is not tenable and cannot therefore succeed.

31. In respect to the prayer for stay of proceedings of the lower Court pending the hearing and determination of the Appeal herein, it is generally agreed that when determining an Application of such nature, the Court is required to exercise its discretion but after due consideration of the merits of the case and the likely effect on the ends of justice. Needless to state, exercise of discretion must be grounded on judicious principles. On this issue, Ringera J in the case of *Global Tours & Travels Limited*, Nairobi HC Winding Up Cause No. 43 of 2000 (supra) held as follows:

> " As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice ..... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is so, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously."

32. Further, the principles to be applied when considering an Application to stay proceedings were reiterated by Hon. F. Gikonyo J in the case of *Christopher Ndolo Mutuku & Another vs CFC Stanbic Bank Limited* (2015) eKLR as follows:

> " ..... what matters in an application for stay of proceedings pending appeal is the overall impression the Court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice..."

33. Similarly, *Halsbury's Law of England*, 4th Edition, Vol. 37 page 330 and 332 gives guidelines on the threshold to be met in Applications for stay of proceedings as follows:

> " The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the Court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.
>
> This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.
>
> It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The appellant for a stay on this ground must show merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case."

34. Further, in the case of *Kenya Wildlife Services v Jane Mutembi* (2019) eKLR, again, F. Gikonyo J, held that:

> " stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without

delay and overall right to fair trial. Therefore, the test for stay of proceedings is high and stringent."

35. In line with the foregoing guidelines, it is generally agreed that in an Application for grant of stay of proceedings, the matters that the Court must satisfy itself upon are that (a) the applicant has established a prima facie arguable case; (b) the application was filed expeditiously; and (c) the applicant has established sufficient cause to the satisfaction of the Court that it is in the interest of justice to grant the orders sought.

36. On whether the Appellants have established a prima facie arguable case, it is settled that in Applications of this nature, an "arguable appeal" need only raise a single bona fide point worthy of consideration by the Appellate Court and that it need not be one that must necessarily succeed. This was restated by the Court of Appeal in the case of *Co-operative Bank of Kenya Ltd vs Banking Insurance of Finance Union (Kenya)* [2015] eKLR). Similarly, in the case of *Kenya Commercial Bank Limited v Nicholas Ombija* [2009] eKLR, the Court of Appeal observed that an "arguable" appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court.

37. I have already held hereinabove that although the matters raised in this Appeal are not of a nature that can be described as frivolous, the fact that a child's "best interests" are at stake, the fact that it is not denied that the child was born during the pendency of the marriage between the parties, and which marriage is still subsisting, and the fact that the order appealed against is simply an interim order to remain in force only temporarily, leaves me with a lot of doubts on whether the Appeal is really arguable in the circumstances.

38. On whether the Application was filed expeditiously, I have already made a finding that there was no delay. However, having registered my reservations on the arguability of the Appeal, the timeous filing of the Application may not be relevant any more.

39. The third consideration is whether the Appellant has established sufficient cause to the satisfaction of the Court that it is in the interest of justice to grant the orders of stay of proceedings. As already stated hereinabove, my view is that it would have been wiser for the Appellant to have pushed for fast-tracking or expedition of the full trial of the lower Court suit in which all matters arising would then be determined once and for all, instead of insisting on an interlocutory Appeal whose consequence is basically only to cause delay and/or stalling of the trial before the lower Court. Further, as also aforesaid, nothing bars the Appellant, if the trial Court eventually determines that he is not the child's biological father, to seek for a refund of the moneys he would have paid in monthly upkeep should he present sufficient grounds for making such Application. My other finding that the Appellant's failure to disclose to this Court that he and the Respondent are in fact man-and wife, legally married, and not just boyfriend-girlfriend, and also that the child was born during the pendency of the marriage, amounts to non-disclosure and/or suppression of material facts and demonstrates that the Appellant has not approached with clean hands, also militates against the prayer for stay of proceedings.

Final Orders

40. The upshot of my findings above is as follows:

    i. The Appellant's Notice of Motion dated 18/07/2024 is hereby dismissed with costs to the Respondent.

    ii. Consequently, any and all interlocutory orders earlier issued herein, including the interim order staying the contempt proceedings pending before the trial Court, are hereby lifted and/or vacated.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 25TH DAY OF APRIL 2025

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Ms. Omala for the Appellant/Applicant

N/A for the Respondent

Court Assistant: Brian Kimathi