



**Tergat v Siparo (Civil Appeal E075 of 2021)
[2024] KEHC 2084 (KLR) (Civ) (27 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 2084 (KLR)

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

**CIVIL
CIVIL APPEAL E075 OF 2021**

SN RIECHI, J

FEBRUARY 27, 2024

BETWEEN

PAUL KIBII TERGAT APPELLANT

AND

ANGELINE YIAMITON SIPARO RESPONDENT

RULING

1. By the Notice of Motion application dated 1st February 2023. The Appellant/Applicant seeks the following orders: -
 1. Spent
 2. That this honourable court be pleased to order stay of execution of the judgement and decree made by Hon. Justice S.N. Riechi on 5.12.2022 pending the hearing and determination of this application.
 3. That this honourable court be pleased to order stay of execution of the judgement and decree made by Hon. Justice S.N. Riechi on 5.12.2022 pending the hearing and determination of this application of the appeal filed herein.
 4. That costs of this application be provided for.
2. The application is premised on the grounds set out therein and is supported by affidavit of Donald B. Kipkorir sworn on even date.
3. The applicant's case is that he is an Advocate of High Court of Kenya and has conduct of this appeal. He deponed that appellant is the president of the National Olympic Committee of Kenya



and a Member of the Executive Committee of International Olympic Committee and he is currently engaged in global assignments.

4. The applicant deponed that the respondent filed the petition in Nairobi HC Petition No.E001 which was dismissed and she filed appeal in Nairobi Civil Application No.E 457 OF 2021 which is still pending.
5. The applicant deponed that respondent's aforesaid appeal is still pending and the respondent has again filed Nairobi Cause No.E 599 of 2021 along with an application seeking similar orders of,inter alia.,that the court compel the appellant to take a DNA test pending the hearing and determination of the suit.
6. The applicant deponed that the trial magistrate Hon.F.Terer delivered a ruling on 6th August 2021 directing the parties to avail themselves at a medical facility to be agreed upon to undergo a DNA test within 7 days of delivery of the ruling.
7. The applicant deponed that being aggrieved by the above ruling they filed appeal to this court which was dismissed on 5.12.2023. He deponed further that in dismissing the appeal the judgement herein completely ignored the glaring disregard for doctrine of res judicata and the law relating to estoppel in pais and issue estoppel.
8. The applicant deposed that in filing Nairobi Children's Cause No.269 of 2012,Nairobi HC.Petition No.E.001 and Nairobi Children's Cause No.E 599 is both gaming the judicial system and to engage in forum shopping. The applicant deponed that the appellant stands to suffer irreparable personal injury if stay is not granted.
9. The application is opposed by the respondent who has filed a replying affidavit dated 10th February 2023. It is the respondent's case that the affidavit in support of the application is sworn by appellant's counsel and not the appellant himself.
10. She stated that the appellant's counsel is a stranger to the DNA test ordered by the trial court. She stated that the appellant's Advocate is incapable of demonstrating any personal prejudice in this matter. The respondent stated that application is therefore incompetent, incurably defective and liable for a peremptory order of dismissal for being an abuse of the court process. The respondent deponed that the appellant has shown no regard but contempt for welfare of the minor who is at the epicenter of the dispute. The respondent averred that this is conduct that should not merit the court's exercise of its discretion. The respondent stated that the instant application lacks merit and the stay sought ought not be granted.
11. By consent of parties, the application was canvassed by way of written submissions. The applicant filed written submissions dated 23rd February 2023 whilst the respondent filed written submissions dated 16th March 2023.
12. Mr.Kipkorir counsel for the applicant in his submissions reiterated the averment in his affidavit. On whether the applicant has satisfied the condition for stay, he submitted that due to the special circumstances of this case, substantial loss will be occasioned on the applicant as the execution of the orders by trial court will cause a great inconvenience to the Applicant and a violation of his right to bodily security and integrity and also the right of privacy which cannot be compensated and/or restored should the appeal be successful. He relied on the decision *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others*[2013]Eklr in support. Mr. Kipkorir submitted on sufficient cause that the applicant has established sufficient cause as required and relied on the case law of the Supreme Court of India in Parimal Vs. Venna as quoted in *FWNM V SMM*[2019]Eklr in support.



13. On whether it is proper for counsel for applicant to swear the supporting affidavit, he submitted that he only deponed matters of alluded to. He submitted that the applicant has arguable appeal and it is in the interest of justice that this application be allowed.
14. Mr. Kemboy for respondent in his submissions reiterated the averments in the respondent's replying affidavit. Counsel submitted further that this being a matter affecting a child, court is obligated in law to ensure the best interests of the child are protected. Mr. Kemboy submitted that the order emanating from the judgement of 5th December 2022 is by nature a negative order by way of dismissal and consequently incapable of execution. The respondent submitted that in dismissing the appellant's appeal this court placed the appellant back in the original position he was before he filed the appeal. He submitted that this court has not obligated him to perform any act or to refrain from doing anything. Counsel submitted that there is therefore nothing that requires intervention by way of a stay. He relied on court decision in the case of [JKM vs. MAC](#)[2019]eKLR in support.
15. Mr. Kemboy submitted that the applicant has not demonstrated that he stand to suffer substantial loss or irreparable harm if stay sought is not granted. He submitted that how DNA test is unlikely to cause substantial loss on the appellant. He relied on decision in [GT Vs. EJT\(Guardian ad Litem of GJ and GK Adults](#)[2021]Eklr in support.
16. Mr. Kemboi submitted that no prejudice could possibly be envisioned in the circumstances of the case and urged this court to dismiss the application.
17. From the application, affidavits and submissions filed by respective parties which I have considered. The issue arising for determination is whether the Applicant has satisfied the requirements set out in Order 42 Rule 6 of the [Civil Procedure Rules](#).
18. It is trite law that for application seeking stay pending appeal the Applicant must meet the statutory requirements set out in Order 42 Rule 6 which are: -
 - (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.
19. With regard to substantial loss, the applicant has submitted that substantial loss will be occasioned on the applicant as the execution of the orders by trial court will cause a great inconvenience to the Applicant and a violation of his right to bodily security and integrity and also the right of privacy which cannot be compensated and/or restored should the appeal be successful.
20. This dispute revolves around the rights of two children under Article 53(2) of [the Constitution](#) and section 8 of the [Children Act](#), this court should determine whether the trial court, in reaching the decision it did, considered the principle of what is in the best interest of the children.
21. I have analyzed the judgment delivered on 5.12.2022. It is my find that the appellant is seeking to stay a negative order. I agree with the respondent's submission that the order emanating from the judgement of 5th December 2022 is by nature a negative order by way of dismissal of suit and consequently incapable of execution. There is therefore nothing in the judgement that can be stayed as it is his appeal that was dismissed, In the result, the application dated 1st February 2023 is without merit and dismissed with costs.



DATED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2024.

S. N. RIECHI

JUDGE

