



**LOK v EWG (Civil Appeal E031 of 2023)
[2024] KEHC 15496 (KLR) (Family) (27 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 15496 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E031 OF 2023
EKO OGOLA, J
JUNE 27, 2024**

BETWEEN

LOK APPLICANT

AND

EWG RESPONDENT

RULING

1. The application before this court is dated 14th March 2024. The applicant prays for a stay of execution of the judgment dated 5th March 2024 pending the hearing and determination of the Appeal in the Court of Appeal.
2. The law governing the granting of orders for stay of execution pending appeal is codified under Order 42 Rule 6 (1) and 2 of the Civil Procedure Rules which stipulates as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 referred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (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. The aforementioned provision requires an applicant seeking orders for stay of execution to establish that he has a sufficient cause for seeking the orders, that he stands to suffer substantial loss if the orders are not granted and lastly, that he is willing to furnish security for the due performance of the decree. In addition to the above conditions, an application for stay of execution pending appeal must be made without unreasonable delay.
4. In this instant application, the applicant deposed that he has an arguable appeal since there was no scientific evidence challenging the DNA test result from the government analyst. Therefore, there is no reason that he should be subjected to a second DNA test. According to the applicant, the second DNA test is a fishing expedition that will expose him to torture, and cruel, inhumane and degrading treatment which he is protected from by Article 25 of *the Constitution*. Furthermore, the applicant stated that the second DNA test would infringe on his Constitutional right to privacy and dignity. The applicant deposed that if the second DNA test is conducted it will negate the applicant’s right to an appeal. According to the applicant, the inconvenience caused to him would be greater than that which would be caused to the respondent if the orders sought were not granted.
5. The respondent opposed the application vide a replying affidavit. She deposed that there is a need to have a second DNA test to establish the truth and bring the issue to a finality. The applicant further deposed that in determining matters involving children, the best interest of the child is paramount. According to the respondent, the applicant is causing unreasonable delay to cause frustration to the minor. Hence, any further delay will be highly prejudicial to the minor since he will continue to lack his basic needs. Furthermore, the respondent stated that the applicant has only stated that his right to privacy will be infringed but he has not demonstrated if there is any prejudice that will be suffered by the minor should the orders sought not be granted. The respondent deposed that the best interest of the child supersedes the wishes and rights of the parent.
6. There is a plethora of cases on what should be taken into consideration when determining an application for stay of execution of a judgment pending appeal in children matters. In *Bhutt vs Bhutt Mombasa HCCC No.8 of 2014 (OS)* and similarly in *ZMO vs EIM. [2013] eKLR* the courts have held that the best interest of the child should be considered above and beyond the prerequisite set out in Order 42 Rule 6 of the Civil Procedure Rules.
7. Furthermore, Article 53(2) of *the Constitution* and Section 4(3) of the Children’s Act provides that in determining matters involving children, the best interest of the child is of paramount importance.
8. So, has the applicant satisfied this court that he will suffer substantial loss if the orders sought are not granted and that this loss is over and above the best interest of the minor? The applicant has reiterated that if a second DNA test is conducted his right to privacy and dignity will be infringed also, that the test would expose him to torture, cruel, inhumane and degrading treatment. The applicant has not mentioned whether the orders sought would be prejudicial to the minor.
9. The applicant deposed that the DNA tests from the government analyst were not challenged by any scientific evidence. The onus is on the respondent to prove that the DNA test from the government



analyst was tampered with. The only way she could challenge the first DNA test is if a second DNA test is conducted. If this is done, then the experts' reports can be subjected to cross-examination. It must be appreciated that the court lacks the expertise to distinguish between actual DNA results and tampered DNA results without the assistance of experts.

10. In the meantime, the subject minor is growing. He needs parental care. This can only happen if the issue of DNA is finalized expeditiously. I reiterate that it is the child and not the applicant who stands to suffer substantial loss if the orders sought are not granted. The rights of the child override the rights of the applicant and the applicant has not demonstrated to this court what substantial loss the children stand to suffer if the orders for stay are not granted.
11. However, it must be appreciated that if an order of stay is not granted the appeal will be an academic exercise. The child can still receive parental care from the mother as the appeal is being determined.
12. From the foregoing, I allow the application dated 14th March 2024. There will be no orders as to costs. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JUNE 2024

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E.K. OGOLA

JUDGE

In the presence of:

Ms. Kilonzo for the Applicant

Ms. Martine for the Respondent

Gisiele Muthoni Court Assistant

