Case Number:	Civil Appeal 129 of 2019
Date Delivered:	03 Jun 2021
Case Class:	Civil
Court:	High Court at Eldoret
Case Action:	Ruling
Judge:	Hellen Amolo Omondi
Citation:	GT v EJT (Guardian Ad Litem of GJ & GK Adults) [2021] eKLR
Advocates:	Mr Momanyi for the Applicant
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Uasin Gishu
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dismissed.
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO.129 OF 2019

GT.....APPELLANT

VERSUS

EJT (GUARDIAN AD LITEM OF GJ & GK ADULTS).....RESPONDENT

RULING

Introduction & Background.

1. By a chamber summons dated the 18th of February 2021 and the supporting affidavit sworn by the applicant brought pursuant to **Order 42 rule 6 GT** (the appellant) seeks interalia the following orders;

a. The Notice to show cause issued in **Eldoret Chief Magistrate Court Children Case No. 146 of 2019** be suspended pending the hearing interpartes and the determination of the application,

b. The Notice to show cause issued in **Eldoret Chief Magistrate Court Children Case No. 146 of 2019** be suspended pending the hearing and the determination of the appeal.

2. The thrust of the application is that there is a warrant of arrest against the appellant **GT** to show cause why execution should not issue, following an order issued in **ELDORET CMCC Civil case No.146 of 2019** wherein the court on the 10th of September 2019 directed a DNA test be conducted within thirty days within which time the appellant did not show up for the DNA test.

3. The applicant contends that the trial court has erred in law and fact in failing to be an impartial arbiter thereby condemning the appellant unheard. The gravamen of the appellant's application is that the magistrate proceeded to order paternity test without hearing him yet the issue before court is whether he has parental responsibility over children who are now adults.

4. Directions were issued to the parties on the 17th of March 2021 to file their submissions, but as at the date of this ruling, the respondent is yet to file her submissions.

5. The applicant submits that the complaint in the appeal is the blatant violation of the appellant's right to be heard as enshrined under Article 50 of the Constitution. It pointed out that the learned magistrate delivered a ruling on the 10th of September 2019 directing that a DNA test be undertaken first before hearing the parties yet there was no application for DNA to be undertaken. He was aggrieved by the manner in which the decision was made without the parties being accorded a hearing on the same. It argued that the court should have advised the respondent to pursue an application for DNA in which case the appellant notes he would have been allowed to respond and thereafter a ruling rendered.

6. The appellant maintains that if the DNA test is undertaken while the appeal is pending, the appeal would be rendered an academic exercise, so it is imperative that the enforcement of the order for undertaking of the D.N.A be stayed as the appeal is heard and, in the alternative, the appeal be processed and heard expeditiously.

7. As regards the warrant of arrest, the appellant submits that he appeared in court for the notice to show cause on the 23rd of February 2021, upon which he was discharged. He states that the advocates were advised to try and agree on the issue of DNA later that afternoon but that his counsel was unable to attend the meeting. This resulted in the court issuing summons to him, and he laments that this was unfair as the same should have been issued to his advocate as he had no role to play in the advocates meeting. That in any event, the warrant of arrest was issued in execution of a decree yet there is none.

8. The appellant urges that the stay be granted drawing from **Duncan Kamau Kiriro v Japheth P Kimotho [2013] eKLR, Jane Murugi Kananu v Gabriel Gikonyo Ndirangu [2008] eKLR, SM v HE [2019] eKLR and Nairobi Court of Appeal Civil Application No. 224 of 2006 Standard Chartered Financial Services Ltd & another v Manchester Outfitters (Suiting Division) Limited (Now known as King Woollen Mills Ltd**

Analysis and Determination

9. ***Order 42 Rule 6(2*****) of the Civil Procedure rules** set out the principles that guide court in considering whether to grant Stay of Execution Pending Appeal.

The provision states:

"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."

10. The provisions of Order 42 Rule 6 indicate two things. First, the high court is empowered to order stay of execution pending appeal either in exercise of its inherent jurisdiction or under the provisions of Order 42 Rule 6 of the Civil Procedure Rules. This position finds support in **Singh v Runda Estates Ltd (1960) EA 263 and was reiterated by court in Paul Kamura Kirunge v John Peter Nganga [2019] eKLR.**

11. However, this power is discretionary and must be exercised judiciously as was held in **Canvass Manufacturers Ltd vs Stephen Reuben Karunditu, Civil Application No.158 of 1994, (1994) LLR 4853.** This is because in the exercise of this power, the court has to balance between the right of a successful litigant to enjoy the fruits of his/her Judgment with the right of appeal of a dissatisfied litigant whose appeal should not be rendered nugatory in case his or her appeal succeeds and the order of stay was not granted. After all the purpose of stay is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. **See Odunga's Digest on Civil Case law and Procedure, 2nd Edition, Volume 4, Law Africa 2010 at 3749**.

12. Secondly, the provisions of Order 42 Rule 6 anticipate that for an application for grant of stay to be successful, an applicant must prove the following conditions:

a. That substantial loss may result unless the order is made

b. That the application has been brought without undue delay and lastly

c. That such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

13. These conditions/criteria are central to the decision as to whether the order of stay of execution of decree/judgment may be granted by court. In **Civil Appeal No.107 of 2015, Masisi Mwita vs. Damaris Wanjiku Njeri (2016) eKLR,** the Court while affirming these criteria held that:

"The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another...Vs…Thornton & Turpin Ltd, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-

"The High Court's discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely; - Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay."

14. These conditions are cumulative and mandatory in nature. As such, should an applicant fail in establishing a single criterion, then stay of execution cannot not be granted. This position finds support in **Equity Bank Ltd –vs- Taiga Adams Company Ltd [2006] eKLR** it was held that: -

"of all the four, not one or some, must be met before this court can grant an order of stay...."

15. Additionally, the Applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted. This position was adopted by the High Court in **Butt vs. Rent Restriction Tribunal [1979]** and **Hassan Guyo Wakalo.vs.Strsaman EA Ltd (2013)** as follows:-

"In addition, the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory."

16. Preserving the subject matter so that the right of appeal can be exercised without prejudicing the applicant forms the key purpose of stay of execution pending appeal. It would otherwise frustrate an appellant and ultimately the ends of justice should the order of stay be denied and the appeal be allowed. The Court must therefore balance the interest of an applicant seeking to preserve status quo and opt for the lower rather than the higher risk of injustice as was affirmed by the court in **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

17. What amounts to substantial loss" Demonstrating that one is likely to suffer substantial loss in case an order of stay is not granted, is core in the grant of a stay order. In **James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR** the court observed:

"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. 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."

18. Similarly, in **Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007** the court stated that:

"The word "substantial" cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words "substantial loss" must mean something in addition to all different from that"

19. In my view, substantial loss must be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted. The applicant ought to establish that the execution of the decree/judgment will create a chain of events or state of affairs that will irreparably affect or negate the core of applicant as a successful party in the appeal. In ***Silverstein –vs-Chesoni [2002]1 KLR 867*** the Court held: -

"Substantial loss is what has to be prevented by preserving the status quo because such a loss would render the appeal nugatory."

20. In the instant application, the argument advanced is that if the order for DNA test is undertaken, the appeal would be rendered academic and therefore defeated. The crux of his appeal is that he was unheard at the magistrate's court which he argued is his entitlement. I also note that the defendant has denied paternity of the children herein as evidenced in his written submissions dated the 11th of November 2019. The question that this court must address itself to is whether the appellant has met the threshold for grant of stay. That is, whether substantial loss would occur if the order of stay is not granted.

21. As highlighted above, substantial loss must be assessed by the totality of the consequences which an applicant is likely to suffer

if stay of execution is not granted. The applicant ought to establish that the execution of the decree/judgment will create a chain of events or state of affairs that will irreparably affect or negate the core of applicant as a successful party in the appeal. I have tried to fathom how the order for DNA prejudices the appellant and or his appeal. On the contrary, it is my opinion that the DNA test could conclusively deal with the case. I also note that the trial court took into consideration this matter and noted that the party in whose favour the DNA test outcome would come, would be entitled to be refunded by the other party. I concur with the decision made by the trial court dated the 6th of December 2019 to the extent that the defendant (appellant herein) will not suffer any prejudice if he undergoes a DNA test as this will confirm the direction of both the case at trial and the appeal.

22. I also take Judicial Notice of the fact that there are children involved in this case, and the court ought to be guided by the best interest of the child. In this regard, I must point out that although the appellant has argued that the children are adults and not children, I recognize that **Section 28 of the Children's Act** provides for extension of parental responsibility beyond the 18th birthday of a child. The particular section provides:

28. Extension of responsibility beyond eighteenth birthday

(1) Parental responsibility in respect of a child may be extended by the court beyond the date of the child's eighteenth birthday if the court is satisfied upon application or of its own motion, that special circumstances exist with regard to the welfare of the child that would necessitate such extension being made:

Provided that the order may be applied for after the child's eighteenth birthday.

(2) An application under this section may be made by—

(a) the parent or relative of a child;

(b) any person who has parental responsibility for the child;

(c) the Director;

(d) the child.

23. In any case, **Article 53(1)(e) and (2) of the Constitution of Kenya (2010)** provides that:

(1) Every child has the right—

(e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.

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

24. This is further fortified by **section 4(2)(3) of the *Children's Act*** provides that:

(2). In all actions concerning children whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the 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 –

i. Safeguard and promote the rights and welfare of the child.

ii. Conserve and promote the welfare of the child.

25. I bear in mind that the issues revolving around safeguarding and promoting the rights and welfare of children have been the subject of legal proceedings finds a nesting place in development of jurisprudence,

for instance Lord **McDermott, *in* J vs. C (1970) AC 668,** while dealing with the issue of paramountcy of the child's interest being an overriding factor noted thus:

"A process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices, and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare. That is....the paramount consideration because it rules upon or determines the course to be followed."

26. In **ANM & another (suing in their own behalf and on behalf of AMM (Minor) as parents and next friend) v FPA & another [2019] eKLR** learned Odunga (J) aptly noted that:

"… an order that the parents of a child the subject of legal proceedings do undergo DNA test is not prima facie unconstitutional. In my view since every child has the right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not, it follows that a child has a right to know who his or her father is."

27. I am sufficiently persuaded that, where there exist reasonable grounds for believing that a child's right or fundamental freedom enshrined and/or guaranteed in the Bill of Rights has been denied, violated or infringed, or is threatened, any person may institute proceedings seeking redress on behalf of such a child.

In this instant case it is the mother of the children who has instituted the case on their behalf claiming among others that the children's education is at risk as they have obtained college vacancies and she no longer receives support from her relatives putting the right to education of the children at risk.

28. From the foregoing, the upshot is that the appellant has not met the criteria for grant of stay as there is no substantial loss that would result in undertaking the DNA. I decline to order for the suspension of the warrant of arrest issued against the appellant. The application be and is hereby dismissed with costs to the respondent

E-DELIVERED AND DATED THIS 3RD JUNE 2021 AT ELDORET

H. A. OMONDI

JUDGE

Mr Momanyi for applicant

N/a for respondent