**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL APPEAL NO. 161 OF 2019**

**PMM.....APPELLANT/APPLICANT**

**VERSUS**

**L N (on behalf of CM.....RESPONDENT**

**RULING**

1. This matter relates to the Motion dated 13/01/2020 brought pursuant to ***Sections 1A, 3A and 79G of the Civil Procedure Act and Order 42 Rule 6 (1), Order 51 Rule 1 of the Civil Procedure Rules, Article 159 (2) (d) of the Constitution*** and all other enabling provisions of the laws of Kenya. The applicant seeks amongst other orders the stay of execution of the judgment/decree delivered on 3/12/2019 by Hon. M. A Adhiambo (RM) pending the hearing of determination of the appeal.

2. The grounds upon which the application is premised upon are in its body and the supporting and supplementary affidavit of PM Memo sworn on 13/01/2020 and 16/03/2020 respectively. It is contended that the appeal is meritorious as it raises triable issues for determination and would be rendered nugatory if stay is not granted for the respondent may proceed to execute. The respondent will not suffer any prejudice and that it is in the interest of justice that the orders sought are granted. He is willing to abide by any conditions set by the court.

3. This was opposed vide the Replying Affidavit and Further Affidavit of LN sworn on 7/03/2020 and 16/07/2020 respectively. She deponed that since judgment was delivered the appellant has only paid Kshs. 5,000/- . He is a man of means given that he earns a salary of Kshs. 60,000/-, owns a motor vehicle, cyber café, a photo studio and a fire extinguisher company in Nairobi. The application ought not to be granted for the child is likely to be prejudiced since he has various needs that need to be catered for. It is in the interest of justice that the application is dismissed.

4. This matter was canvassed by way of written submissions. The applicant submitted that he would suffer substantial loss if stay is not granted as the Respondent is no person of straw who is not capable of refunding the said sum if the same was paid to her and the appeal succeeds. He is ready and willing to stand by any condition set by the court. Moreover, he has filed the application without undue delay. He relied on **Superior Homes (Kenya) Limited v Musango Kithome [2018] eKLR**, **Amal Hauliers Limited v Abdulnasir Abukar Hassan [2017] eKLR** and **Focin Motorcycle Co. Limmited v Ann Wambui Wangui & another [2018] eKLR** to support his submissions.

5. The Respondent submitted that the case involves the affairs of a child. According to ***Section 4 (2) of the Children's Act*** the court is directed that the best interest of the child shall be the primary consideration in any action involving a child. The court ought to refuse the application based on the circumstance. Additionally, the applicant has not met the principles of stay of execution under ***Order 42 Rule 6(2) of the Civil Procedure Rules***. She relied on **Z M O v E I M [2013]eKLR**, **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR**, **Butt v Rent Restriction Tribunal [1979] eKLR** and **R B v H B & another [2015] eKLR** to support her submissions.

6. ***Order 42 Rule 6(2) of the Civil Procedure Rules*** states as follows:

> **"(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."**

7. The judgment the applicant seeks to appeal against was delivered on 18/12/2019. He then filed this instant application on 14/01/2020. This court finds that the application was made without unreasonable delay and thus the 1st Ingredient has been met by the Applicant.

8. The Applicant claims that he will suffer substantial loss if the application is not granted. He stated that his basic salary is Kshs. 51,600/-

but his net is Kshs. 17,112/- since he is paying different loans. When the matter was last in court on 3/02/2020 the court directed that he pays Kshs. 5,000/- on a monthly basis for maintenance of the child pending the hearing and determination of the application .

It is not enough for an applicant to claim substantial loss; s/he ought to prove and evidence to the court the loss that would be occasioned on him.

9. In this case, the applicant has claimed substantial loss. However, this matter relates to the maintenance of the parties child. Initially the Appellant had disputed paternity of the child but the Trial court ordered for a DNA test and by a report dated 25th October 2019, it was established that the Appellant was the biological father of the Minor herein. This court finds that since the Appellant/Applicant has constitutional and legal obligation as per Article 53(2) and Section 91 of the Children's Act, the claim that he would suffer substantial loss is not available to him.

10. According to the Applicant the amount is on the higher side. He stated that he is on a salary out which he gets to keep Kshs. Kshs. 17,112/- after deductions are made pertaining the loans he has taken. The Respondent refuted this; she stated that the Applicant's salary is not his only source of income. He has other businesses which she produced copies of the business searches. The Applicant did not controvert the averrements made by the Respondent in her Replying Affidavit as to his other sources of income and therefore, he did not satisfy the court that he would suffer substantial loss.

11. In the circumstances, it is the view of this court that the application does not have merit and the Applicant shall make good the orders made in the Judgement delivered on 3rd December 2019 by remitting Ksh. 15,000 per month for the maintenance of the Minor in question pending the hearing and determination of the Appeal herein. Cost of the Application shall be paid to the Respondent.

**HON.ANNE ADWERA ONG'INJO**

**JUDGE**

**RULING DATED AND DELIVERED AT MERU ON THIS 26th DAY OF AUGUST 2020.**

**HON.ANNE ADWERA ONG'INJO**

**JUDGE**

**In The presence of**

**Mr Mutea Advocate for Respondent**

**Ms Maitai Rimita Advocate for Appellant/Applicant- No appearance**

**HON.ANNE ADWERA ONG'INJO**

**JUDGE**