



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 105 OF 2019**

**MS.....APPLICANT**

**- VS-**

**JNM.....RESPONDENT**

**RULING**

1. The Applicant in the Notice of Motion dated 23.9.2019 filed under certificate of urgency is seeking orders suspending the Judgment and all consequential orders issued in Nairobi Children's Case No. 935 of 2017 pending the hearing of the said application and the appeal.
2. The Application is supported by the Affidavit of the Applicant in which she has deposed that she is suing on behalf of the minor the subject of Children's Case No. 935 of 2017.
3. The Applicant/Appellant is aggrieved by the orders and Judgment of the Children's Court delivered on 19.9.2019 and she has now lodged this appeal and she is seeking stay of the orders issued on 19.9.2019 pending the appeal.
4. The Respondent filed a Replying Affidavit dated 22.10.2019 to the application dated 23/9/2019 in which he has deposed that the orders issued on 19.9.2019 were granted in the best interest of the child.
5. The Respondent also said that the child is very happy to be with her father and further that the said orders have served them well since 21.9.2019.
6. The Respondent further deposed that the appellant had refused to let the minor talk to him even after he bought the child a cell phone and further that the situation the parties find themselves in is as a result of the Appellant's infidelity.
7. The parties filed written submissions in the application dated 19.9.2019 which I have duly considered.
8. The conditions to be met before stay is granted are provided by the **Order 42 Rule 6(2)** 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.”

9. The constitutional court of South Africa in **Cross-Border Road Transport Agency vs Central African Road Services (Pty) Ltd and Another** stated that:-

"A court's decision to suspend the effect of an order of invalidity entails the exercise of a wide power and can be utilized for numerous reasons provided it is just and equitable to do so. This often relates to giving the Legislature time to intervene but could equally relate to concerns of the effect an order might have on the administration of justice."

10. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion and held that:

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become *available to the applicant at the end of the proceedings*.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under **Order XLI rule 4(2)(b)** of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

11. I find that the Appellant meets the conditions for grant of stay and her Application dated 19.9.2019 be and is hereby allowed in the following terms.

**i. THAT stay of the Orders issued on 19.9.2019 be and is hereby granted pending the hearing and determination of the Appeal herein.**

**ii. THAT costs be in the Cause.**

**iii. THAT the Appellant is directed to file the record of Appeal within 30 days of this date.**

**iv. THAT the Appeal will be heard on 20.1.2020**

**DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2019**

**ASENATH ONGERI**

**JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.**