



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**FAMILY DIVISION**  
**CIVIL APPEAL APPLICATION NO. 98 OF 2016**  
**F G W.....APPELLANT/ APPLICANT**  
**VERSUS**  
**G W T.....RESPONDENT**  
**(Suing as mother and next friend of the minor)**

(Being an application for stay of proceedings and stay of execution pending appeal against the whole of the Ruling of Hon. G.M. Gitonga – Resident Magistrate delivered on 16<sup>th</sup> September 2016 in the Chief Magistrate’s Court Milimani Children’s Cause No. 731 of 2016)

**RULING**

1. Following a ruling delivered on 16<sup>th</sup> September 2016 by the learned magistrate at the Chief Magistrate’s Children Court at Milimani the appellant appealed to this court seeking to have set aside the orders of the court. The appellant then filed an application seeking the stay of execution of the orders of the lower court and the stay of the proceedings of that court pending the hearing and determination for the appeal. This is the application that is the subject of this ruling. The application was argued before me by M/s Mwathe for the appellant and Mr. Saenya for the respondent.
2. The background of this matter is that the appellant and the respondent are husband and wife who lived together between 2006 and 2016, before they separated. They got a daughter who stays with the mother (the respondent) in a rented house at Kilimani, and whose rent the appellant pays. The child was born on 19<sup>th</sup> July 2008. She goes to [Particulars withheld] School. In April 2016 the appellant left the house due to irreconcilable differences with the respondent.
3. On 13<sup>th</sup> June 2016 the respondent filed a plaint at the Children Court at Milimani claiming that the appellant had stopped paying rent for the house until there was an eviction notice; had stopped paying fees for the child until she had been sent home; and had stopped paying for the child’s needs, including a medical cover, clothing, entertainment and shopping. The suit was filed seeking custody of the child and the payment of these items which were enumerated. With the suit was a chamber application for interim custody, care and control of the child and the payment of the interim maintenance.
4. On 14<sup>th</sup> June 2016 the leaned Resident Magistrate made an *exparte* order for the appellant to pay outstanding fees which, according to the annexed fees structure, was Kshs.233,600/=. For the rest of the

prayers the respondent was asked to serve the application for *interparte* hearing. The application was eventually heard, and on 16<sup>th</sup> September 2016 a ruling was delivered in which the following orders were made:-

- a) interim custody, care and control of the minor was granted to the respondent and unlimited but reasonable access given to the appellant whose modalities were to be agreed upon by the parties;
- b) the appellant to pay the minor's fees and related expenses directly to the school or another school to be agreed upon by the parties;
- c) the appellant to take out a medical insurance cover for the minor with a credible medical insurance provider whose minimum outpatient cover shall be Kshs.100,000/= and inpatient cover shall be Kshs.1,000,000/= immediately, but in any case not later than 60 days from the service of the order;
- d) the appellant to pay rent for the minor's current rental house in Kilimani or any other rental house whose cost is not less than Kshs.70,000/= per month; and
- e) the respondent to meet the costs for the minor's food and clothing as well as utility bills for electricity, water and house-help, if necessary.

5. On 7<sup>th</sup> October 2016 the appellant filed an appeal to this court to challenge the ruling. The grounds were that:-

- (a) the lower court had erred in law and fact and misdirected itself by ordering him to provide for the minor beyond his financial capacity and against the weight of evidence;
- (b) the court had erred by ordering him to provide for fees, school related expenses, medical cover and rent of not less than Kshs.70,000/= without any affidavit of means of the parties;
- (c) the court had erred by granting full custody, care and control of the minor to the respondent without asking for a Children Officer's report;
- (d) the court had put the interests of the respondent before those of the minor contrary to the provisions of the **Children Act No. 8 of 2001**;
- (e) the court's ruling was harsh, punitive and biased against the appellant and was against the weight of evidence and law; and
- (f) the lower court had failed to consider that parental responsibility was the obligation of both parents.

6. With the Memorandum of Appeal was filed the present motion under **Order 42 rules 6(1), (2), (3) and (6) and Order 51 rule 1** of the **Civil Procedure Rules** and **sections 1A and 1B** of the **Civil Procedure Act** for stay of execution of the ruling and stay of proceedings pending the hearing and determination of the appeal. The application was on the grounds that, although the appellant was ready and willing to provide for the minor, he could not satisfy the terms of the orders in the ruling because they were outside his financial capability. This was because his business had gone down, was in debt and his bank accounts showed negative balance. He stated that if the application is not granted he will suffer substantial loss. The couple have a house at South B whose rental income per month is Kshs.70,000/=. The applicant stated that this was his only monthly income which he uses to pay for the minor's fees and school related expenses. He had paid Kshs.100,000/= fees to the minor's school.

7. The respondent filed a replying affidavit to state that the appellant was a prominent businessman doing power energy and water systems supply contracts and tenders from major parastatals including Kenya Power, Geothermal Development Corporation and REA. He was also a real estate investor with a net

income of Kshs.1,000,000/= per month. He had several cars and had 50 acres of land. It was therefore not true that the only monthly income came from the rent of Kshs.70,000/=. She stated that the minor's welfare and provision were such that could not be held in abeyance or at the convenience of the appellant. Further, she annexed a financial demand dated 24<sup>th</sup> November 2016 from the school showing an outstanding fees balance of Kshs.155,950/=: and a proclamation of attachment from Jocet Auctioneers showing that Kshs.320,000/= was sought from the appellant following the ruling. Indeed, there is a notice to show cause in the lower court in which the appellant is threatened with arrest if he does not pay Kshs.552,000/= resulting from non-performance in respect of the terms of the ruling.

8. **Article 53(2)** of the Constitution of Kenya 2010 states that:-

**“A child’s best interests are of paramount importance in every matter concerning the child.”**

**Section 4(3)** of the **Children Act (Cap.141)** provides that:-

**“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 –**

- a) safeguard and promote the rights and welfare of the child;**
- b) conserve and promote the welfare of the child;**
- c) secure for the child such guidance and correction as is necessary for the welfare of the child in the public interest.”**

Under **section 6(1)** of the **Act** –

**“A child shall have the right to live with and be cared for by his parents.”**

A child has the right, under **Article 53(1)(e)** of the Constitution, 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. Kenya was ratified the United Nations Convention on the Rights of the Child (UNCRC) whose **Article 18** provides that:-

**“States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.”**

9. In **Butt –v- Bhutt HCCC No. 8 of 2014 (O.S.)** at Mombasa, the High Court noted that the best interests of a child are superior to the rights and wishes of the parents, and they incorporate not just the physical comfort of the child but the welfare of the child in the widest sense.

10. This application was made under **Order 42 rules 6(1), (2), (3) and (6) of the Civil Procedure Rules**. Under **Order 42 rule 6(2)**, before the Court can order stay of execution it has to be satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without unreasonable delay; and the applicant has provided such security for the due performance of such decree or order as may ultimately be binding on him.

11. In the case, the appellant is seeking to stay the orders granted by the lower court in respect of the payment of minor's fees, provision of medical cover and the payment of rent for the house in which it is staying with the mother. He is seeking the suspension of these payments and provision until the appeal is heard and determined. The reason is that he cannot afford them, and that this was a shared responsibility

which the court has loaded on him. Whether the lower court appreciated the principle of common and shared responsibility of the two parents, and properly applied it in this case, are matters that the appeal will deal with. For the time being, the court is being asked to suspend the provision. The child's rights to education, medical care and shelter are protected under **Article 53(1)(b)** and **(c)** of the Constitution of Kenya 2010. The provision of the child's education, medical care and shelter is a statutory and constitutional responsibility of the appellant from which he cannot escape. If the provision is suspended by order of stay it will mean that the child does not go to school, has no medical care and has no shelter. The court cannot expose the child to such eventuality given the circumstances of this case. Such exposure would not be in the best interests of the child.

12. On whether the appellant will suffer substantial loss if stay is not granted, the parties have each sworn an affidavit. The appellant states that he does not have sufficient means whereas the respondent has sworn that he has. All that I can say is that, it has not been sufficiently shown that any substantial loss will be occasioned to the appellant if the application is not granted. Lastly, there is no security for the due performance that the appellant has provided.

13. The result is that the application is disallowed. This is a family dispute. I make no order as to costs.

**DATED and SIGNED at NAIROBI this 22<sup>nd</sup> day of MARCH 2017.**

**A.O. MUCHELULE**

**JUDGE**

**DATED and DELIVERED at NAIROBI this 29<sup>TH</sup> day of MARCH 2017.**

**R.E. OUGO**

**JUDGE**