



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL DIVISION.**

**CRIMINAL APPEAL NO. 113 OF 2016**

**BETWEEN**

**S A L.....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

**(Being an appeal from the judgment of the principal magistrate's court at Butere by Hon. M.I. Shimenga RM on 19.11.2016 in Juv.No. 135 of 2016)**

**R U L I N G**

**Introduction**

1. The applicant herein was found guilty of neglect of his children and in its judgment the learned trial court ordered that he pays Kshs.3,500/= per month as maintenance for the children. He was also ordered to cater for the school fees of the children and provide for NHIF cover. He was aggrieved by the said judgment, hence this appeal

**The Application**

2. Meanwhile the applicant filed the Notice of Motion dated 23.01.2017 where he seeks a stay of execution of the said judgment dated 9.11.2016 in Butere PMC J.C. N. 135 of 2016 pending the hearing of the appeal.

3. He claims that the trial magistrate made arbitrary orders against him and disregarded his opinion and was biased against him. He also denies giving consent to the impugned orders. He adds that there is a suit pending hearing and determination which he filed in Mumias being SPMCC children case No. 14 of 2015 and adds that the Juvenile case was instituted in bad faith. He maintains that his appeal has high chances of success and that in any event, no party will be prejudiced if the orders sought herein are granted. The application is supported by the applicants own affidavit wherein he reiterates what is contained on the grounds.

**Response**

4. The wife to the applicant filed a replying affidavit opposing the application. She states that the applicant's appeal was filed out of time without leave and further that it does not raise any triable issues. She adds that the applicant is evading his parental responsibility. She wants this court to order the

applicant to pay school fees for the 2 children and to comply with the trial court's orders issued on 9.11.2016. She also contends that consent orders cannot be reviewed.

### **Determination**

5. In determining the application herein this court will bear in mind the fact that there are children involved in the case and that the welfare of the child is paramount whether the parents are at logger heads or not. A Judgment passed in a case such as this one where children are forced into the dispute by virtue of being children to warring parties will have an impact on the parties in the case whether the impact is positive or negative, the opinions of the warring parties notwithstanding. It cannot therefore be argued that the judgment in the Butere children's case was passed against the appellant. There was a report placed before the trial court by the District Children's officer Butere D. Otuko. On the strength of the said report the learned trial court made its decision intended to safeguard the interests of the children.

6. It appears from the proceedings that the applicant agreed to pay kshs.3,500 pm as maintenance for the two children. He stated this: "I will be willing to pay Kshs.3,500 P.M as maintenance for the two children. I will ensure I get an NHIF card for the two children. I will ensure I also pay for their education. "With the above record, it is frivolous for applicant's counsel to submit that the applicant was not given a chance to be heard. He was heard and thereafter gave an undertaking by his own mouth as to what he would do in terms of the upkeep of the children.

7. I do agree with Mr. Ngetich's submissions that the appellant was present in court on the 09.11.2016 though the judgment in the court record cannot be said to have been by as consent there are no signatures by the parties.

8. Lastly in an application for stay of proceedings pending appeal or an intended appeal, the applicant has to satisfy the two basic and well known requirements

(i) That the applicants intended appeal is arguable, that is , it is not a frivolous appeal and

(ii) That unless the relief sought is granted the intended appeal, were it to succeed, the success would have been rendered nugatory. See J.K. **Industries Ltd. Vrs – Kenya Commercial Bank Ltd (1982 – 85) 1KAP 1688**

9. An arguable appeal is not one that must succeed. It is one that is worth of the court's interrogation. **See HASH Maklal Virchand & Another - Vrs investment & mortgages limited [2014] eKLR**

10. Having considered the application, I do find that yes, the appeal may be arguable but the same will not be rendered nugatory if the orders sought are not granted. Suffice it to say that the issues here involve two little children and their upkeep/maintenance. The applicant has not made any proposal on how he intends to cater for the said children. I therefore see no justification to stay the proceedings. I find no merit in the application dated 23.01.2017 and the same is dismissed.

Orders accordingly

Ruling delivered, read and signed in open court at Kakamega this 24<sup>th</sup> day of March 2017

**RUTH N. SITATI**

**JUDGE**

In the presence of;

Mr. Mukabwa for Mashete (present).....for Appellant

Mr. Juma(present).....for State

Polycap.....Court Assistant