**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**CIVIL APPEAL NO. 41 OF 2012**

**R S H ……APPELLANT/APPLICANT**

**VERSUS**

**J K H ……...RESPONDENT**

**R U L I N G**

1. This Chamber Summons application dated 28th October 2015 is taken out under **Sections 4, 76, 87(3), 113, 114** and **117** of the Children **Act 2001, Rule 4** of the **Children (Practice and Procedure Parental Responsibility) Regulations.** It seeks orders in the main that pending the hearing and determination of this Appeal, this Court be pleased to stay the orders of the lower court made on 5th June, 2012 granting care, control and actual custody of the minor herein to the Respondent. The Appellant/Applicant (herein the Applicant) prays to be substituted therefor with the said custody of the minor.

2. The Applicant also seeks that the said orders of 5th June, 2012, requiring the Applicant to be solely responsible for paying the minor's school fees be stayed and parties ordered to share the responsibility on school fees, and that the cost of this Application be in the cause.

3. The application is predicated on grounds that the Respondent has deliberately denied the Applicant access to the minor despite the Applicant meeting school fees and maintenance needs of the minor. That the minor risks being alienated from her father, the Applicant and that the Applicant is capable of taking care of the minor since she is no longer of tender age.

4. The Applicant argues that the Respondent has visited the acrimony between the parties herein upon the minor, by being callous and using uncouth language towards the Applicant whenever he requests access to his daughter. That the Respondent has exhibited that she is unfit to take care of the parental needs of the minor by ignoring the fact that the minor requires the attention of both parents.

5. The application is supported by his affidavit sworn on 28th October 2015 in which he has made several averments. Salient among them are that he is aggrieved by the order of the Court made on 5th June, 2012 in which the Respondent was granted custody of the minor and that he was only granted access and visitation rights on Sundays between 10.00 a.m. and 5.00 p.m. for reasons that the child was of tender age.

6. The Applicant argues that the minor is now almost twelve years of age and there is no reason why he should not be granted his rights of custody as it is very clear that the Respondent has no intention of honouring the orders of this court to grant him access and visitation. That the Respondent lives with

children of a previous marriage who are above the age of the minor and they can expose her to abusive environment and lack of respect for her parent and other people.

7. The Applicant argues further that Respondent has impressed on the minor that she does not need her father while it is a constitutional and natural right of a child to both parents. That the Respondent took the minor to an expensive school beyond his means. That he has communicated his situation to the Respondent's lawyer who has threatened to apply for the Applicant's committal to civil jail in default of paying the school fees.

8. The Applicant urges that it would be fair and just for the court to allow him custody of the child and that the school fees be a joint responsibility between him and the Respondent who is also gainfully employed.

9. In reply J K H, the Respondent in her replying affidavit sworn on 19th January, 2016 deposes that the Appellant is abusing the court process since on 25th June, 2012, he filed a Memorandum of Appeal No. 41 of 2012, which did not contain any issue regarding the custody of the child. That earlier the same year, the Respondent had filed a memorandum of Appeal No. 2 of 2012 in which the court outlined a process of assisting the child as well as the Appellant and the Respondent through counseling. By mutual consent Dr. Kirindi was agreed upon to counsel the parties.

10. The Respondent averred that Appellant's attempt to use Appeal case No. 41 2012 to bring his present application without disclosing to the court the proceedings in Appeal No. 2 of 2012 is being dishonest. That Appellant wants to use force to have the child spend time with him, which method did not work before and that it is his forceful manner and impatience that has alienated him from the child.

11. The Respondent asserts that the children the Appellant mentioned above are the child's half-brothers, who have been in the child's life since she was born and they share a close bond which should not be broken by the mere fact that they do not share the same father. She contends that it is the Appellant who has continued to deny the child his parenting by being impatient and forceful and destroying the child's self-esteem by making fun of her body size.

12. The Respondent contends that the Appellant has raised in this forum issues of maintenance, which are currently before the Children's Court with a view to escaping the orders of implementation that are likely to be made against him in the Children's court.

13. It is the Respondent's argument that the Appellant is not interested in the best interest of the child but rather is intent on settling personal scores in court and hiding behind this Appeal matter to run away from his responsibility of paying maintenance for his daughter as ordered by the Children's Court.

14. The respondent urges that the Appellant has not fully complied with the order of the maintenance of the child, and as a result there is an application in the children's court for him to show cause why his property should not be attached for failure to comply with the said order.

15. Having carefully considered the application, the affidavit on record and the submissions by the Applicant, I have determined that the issue for consideration is whether the Applicant has made out a case to warrant being granted stay of execution pending appeal.

16. For the stay of execution to be granted, the applicant must satisfy the three conditions stated in **rule 6(2)** of the **Civil Procedure Rules**. First the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed. Secondly, the Applicant must show that he will suffer substantial loss if the orders of stay is not granted, and lastly the applicant offers such security as the court may order to bind him to satisfy any unlimited orders the court may make binding upon him.

17. On the first limb, the court finds that this application was not brought with due dispatch. There being unreasonable delay from the date of the order sought to be stayed the court finds that the Applicant has not satisfied the second limb set out in **sub-rule (a) of Order 42 Rule 6(2),** as the application was made

five months from the time the lower court orders were issued.

18. On the second limb of substantial loss, the decisions which lend themselves to the circumstances of this case are to be found in the cases of **Adah Nyabok -vs- Uganda Holding Properties Limited (2012)**, in which Mwera J (as he then was) stated that:

> ***"Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending Appeal"***

and of **Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368** of **2001**, in which **Musinga, J** (as he then was) explained substantial loss in the following terms:

> ***'...substantial loss" is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.'***

19. In the circumstances of this case it is Baby C.M.M and not the two protagonists who stand to suffer loss since we are not dealing with a material claim. **Section 4(2)** of the **Children Act** provides that in *all actions concerning children, whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

20. Therefore the starting point is that the orders sought pertain to a child and it is worth repeating, that the interests of the child who is at the centre of the dispute are superior to the rights and wishes of her parents over her custody. Her welfare must be considered in its widest sense. *This provision of the law gives expression to the guiding principle encapsulated in **Article 53(2)** of the **Constitution 2010**.*

**21. This** court is not satisfied that the Applicant will suffer substantial loss if stay of execution is not granted. The child in the centre of this dispute has been in the custody of the mother since the decision of the court on 5th June, 2012. There is absolutely nothing in the Applicant's supporting affidavit to demonstrate that an emergency has arisen that requires the court to issue different orders pertaining to the custody of the child before his appeal is heard. The likelihood of the Applicant suffering substantial loss if stay is not granted has not been demonstrated.

22. It is the considered view of this court that to issue the stay orders, would not serve the best interest of the child whose welfare is paramount to all other considerations.

23. In view of the foregoing the court orders the Applicant to continue paying the money ordered in the Children's Court and in the meantime move with alacrity to set down his appeal for expedited hearing.

**SIGNED DATED** and **DELIVERED** in open court this **9th day** of **August 2016**.

…….

**L. A. ACHODE**

**JUDGE**