



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 51 OF 2014
IN THE MATTER OF THE CHILDREN ACT 2001
AND
IN THE MATTER OF CUSTODY AND MAINTENANCE OF M H (MINOR)
J M O..... APPELLANT/APPLICANT
VERSUS
F A D RESPONDENT
RULING

1. By a Notice of Motion dated 20th March 2015, the appellant seeks two principal orders as follows:
 - a. ***That this Honourable Court be pleased to stay execution of the court ruling issued by the Children Magistrate on the 25/11/2014 pending hearing and determination of this application; and***
 - b. ***That this Honourable Court be pleased to set aside and or review and vary the Ruling granted by the Children Magistrate on 25/11/2014 and the defendant be allowed to continue paying Ksh.5,000/- as interim maintenance for the child.***
2. In the ruling appealed from, the Children Court ordered that the appellant pays for the child's maintenance as follows:
 - c. Ksh. 10,000/- for food.
 - d. Ksh3,500/- per term for School fees
 - e. Ksh. 5,000/- for school related expenses.

These amount to Ksh.15,000 per month plus a termly school fee of Ksh.3,500/- .

3. This being an application for stay of execution of an order in a Children matter, the Court is enjoined to, in addition to considering the regular principles for grant of stay of execution under Order 42 of the Civil Procedure Rules, give the best interest of the child paramount consideration in terms of Article 53 (2) of the Constitution and section 4 of the Children Act 2001.
4. The right of the appellant to appeal the decision of the Children Court is not contested. However, in giving paramountcy to the best interest of the child, the provision for the needs of the child by way of food and schooling being urgent continuing needs must be catered for to a reasonable extent while

awaiting the hearing and determination of the appeal on the quantum of the maintenance.

5. Order 42 Rules 6 (2) of the Civil Procedure Rules requires an applicant for stay of execution to comply with two conditions, namely to demonstrate substantial loss if the stay is not granted and to provide security for due performance of the decree or order that may eventually be made against him. Order 42 rule 6 (2) is in the following express terms:

“(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.”

6. On the question of substantial loss, I have considered the effect on the appellant’s ability to provide for his other children as deponed to in his affidavit and the respective means of the appellant and the respondent. On the question of security for the due performance of the eventual decree or order of the court, the appellant will be required through his counsel to give a professional undertaking to pay such amount as may ultimately be binding on him by the Court upon determination of the appeal.

7. On the facts of this case, I consider that the justice of the matter having regard to the best of interest of the Child and having regard to the appellant’s right of appeal and the parties respective financial abilities would be served by the following orders:

- f. An Order for stay of execution of the Ruling and Order made on the 25th November 2014 by the Children’s Court, Tononoka in Children Case No. 125 of 2014 is granted pending the hearing and determination of the appeal.
- g. As a condition for the stay of execution, the appellant will pay for, as interim maintenance for the child, on account and without prejudice to the respective parties' cases in the appeal and the trial court, the school fees at **Ksh.3,500/- directly to the Child’s School** and the sum of **Ksh.7,500/- per month** equivalent to 50% of the sum of Ksh. 15,000/- ordered by the trial court in monthly payments for food and school related expenses, the said monthly payments falling due on the 5th every month commencing the 5th May 2015.
- h. As a further condition for the stay of the execution, the appellant will through his counsel give within seven (7) days a professional undertaking to pay such amounts as may ultimately be binding on him upon the determination of the appeal.
- i. Costs of the application will be in appeal.

8. The issue of the change of name of the child taken up in the submissions on the application for stay of execution will, being a substantial ground of appeal at Ground No. 5 of the Memorandum of Appeal dated 28th November 2014, be dealt with in the appeal.

DATED AND DELIVERED THIS 30TH DAY OF APRIL 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Ms. Kariuki for Mrs. Kisang for the Appellant

Respondent in person

Ms. Linda - Court Assistant.