



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**FAMILY DIVISION**  
**CIVIL APPEAL NO. 78 OF 2014**

S W .....APPELLANT/APPLICANT

**VERSUS**

H W .....RESPONDENT

**RULING**

1. This Notice of Motion application seeks orders in the main that pending the hearing and determination of this application and the Appeal herein, this Honourable Court be pleased to order a stay of execution of the order of the Court given on 23<sup>rd</sup> September, 2014 on such terms as it deems fit. It also seeks such further or other orders as the court may deem fit in the interest of justice and that the cost of this Application be in the cause.
2. It is taken out under **Article 25 (c)** and **Article 159(2) (d)** of the **Constitution**, **Order 42, Rule 6** of the **Civil Procedure Rules** and **Section 3** and **3A** of the **Civil Procedure Act** and is predicated on the grounds to be found on the face.
3. The application is further supported by the annexed affidavit of S W. The Deponent has made several averments in his affidavit, salient among them are that he is aggrieved by the order of the Court made on 23<sup>rd</sup> September, 2014 and he has filed the Appeal herein, which has merit. He avers that the applications he had been served with had indication that they would be heard on 23<sup>rd</sup> September, 2014 and that it would only be fair and constitutional that he be heard before any orders are made.
4. It is his averment that he is a salaried employee who relies on wages paid at the end of the month and for the magistrate to order that he pays Kshs. 16,000 by 30<sup>th</sup> September, 2014 is punitive and arbitrary and he needs the protection of this Honourable Court. Further, that the interest of the children shall not be served by refusing to grant him a hearing. The Deponent prays that this Honourable Court do stay the execution of the Orders of 23<sup>rd</sup>, September, 2014 until the Appeal is heard and determined.
5. He avers that he is willing and ready to abide by any order and or directions of this court to be granted pending the hearing of this Appeal. He has however, not indicated how much he earns and how much, if anything he expends towards the upkeep of the children in question.
6. The Affidavit of Service sworn by AMBROSE ONYANCHA on 9<sup>th</sup> March, 2014 reveals that the Respondent was duly served. I note however, that the Respondent, did not file any reply.

Therefore, the Application is unopposed.

7. The Applicant filed his written submissions on 29<sup>th</sup> May, 2015. He submits that from the application and the supporting affidavit, there is evidence that the Applicant has never been heard in the Children Court. That he has never been heard on any of the various applications filed before that court and yet his salary is now being attached.
8. Relying on the case of **TABRO TRANSPORTERS LTD V ABSALOM DOVA LUMBASI (2012) eKLR**, it is submitted that the attachment of the Applicant's salary negates the essential core of the Applicant and he is confident that he will be successful on appeal. He prays that the same be stayed while the Court looks into the issues raised in the Appeal.
9. He contends that, of major concern is the best interest of the children and the court, while coming up with a decision, should consider the interest of the children in this matter. He further contends that the children are entitled to food, education, shelter, good health and clothing and the duty to provide for the said children is upon both the Applicant and the Respondent.
10. 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.
11. The conditions for granting a stay of execution pending appeal are well settled. An order for stay is a discretionary remedy which discretion is however fettered by the conditions set out under **Order 42, Rule 6 of the Civil Procedure Rules**. These are that the application should be made without undue delay; show that substantial loss may be suffered by the applicant unless the order is made and finally that the applicant should offer such security as may be ordered by the court.
12. It is noteworthy to point out that the orders the Applicant seeks to stay were made on 23<sup>rd</sup> September, 2014. The instant application seeking stay was filed on 30<sup>th</sup> September, 2014 some seven days after delivery of the said orders. In the circumstances, this court is satisfied that the application was made timeously and therefore has met the first limb of Order 42 Rule 6 of the Civil Procedure Rules.
13. However, the Applicant has not demonstrated what substantial loss he is likely to suffer. Indeed, there is nothing in the Applicant's affidavit that demonstrates the substantial loss he is likely to suffer if the sought orders are not granted.
14. In **Adah Nyabok -vs- Uganda Holding Properties Limited (2102) Mwera, J** (as he then was) stated thus:

***“Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending Appeal.”***

Further, in establishing substantial loss, **Musinga, J** (as he then was) in **Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001** held that;

***“..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.”***

15. **This** court is not satisfied that the Applicant may suffer substantial loss if stay of execution is not granted. There is absolutely nothing in his supporting affidavit that demonstrates that there is the likelihood of the applicant suffering substantial loss if stay is not granted.
16. The court must exercise its judicial discretion in the interests of justice, and this being a matter concerning children, the court is inclined not to issue the stay orders, for to do so would not serve

the best interest of the said children. The welfare of the said children is paramount to all other considerations.

17. 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 set down his appeal for expedited hearing.

**SIGNED DATED and DELIVERED** in open court this **28<sup>th</sup> day of July 2015.**

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**L. A. ACHODE**

**JUDGE**