

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 4 OF 2014

A A I.....APPELLANT

VERSUS

H A D.....RESPONDENT

RULING

Before court is a Notice of Motion dated 11th March, 2014 seeking *inter alia* the following orders:

- “2. THAT this Honourable Court be pleased to issue a stay of execution of the Judgment and Decree of the Kadhi’s Court in Civil Suit No. 55 of 2013 H A D Vs. A A I delivered on 20th February, 2014 pending the hearing determination of the appellant/applicant’s appeal.**
- 3. THAT this Honourable Court be pleased to issue such orders as it may deem convenient in the circumstances.**
- 4. THAT costs of this application be provided for.”**

The application was supported by the affidavit of the applicant ‘A A I’ sworn on 11th March, 2014. The respondent opposed the application. The application was argued before the court on 23rd July, 2014. **MS. OSINO** Advocate appeared for the applicant whilst **MR. KHALID** acted for the respondent.

The parties were married under Islamic Sharia Law of 27th June, 2000 in Nairobi. Their union was blessed with three children all daughters. On 20th February, 2014 the Kadhi’s Court in Mombasa delivered a judgment dissolving the marriage between the two. The Hon. Kadhi went further and vested custody of all three children in the respondent and ordered that the applicant pay maintenance. Being aggrieved by the decision of the Hon. Kadhi the applicant has filed an appeal. He now seeks a stay of execution of the decision of the Kadhi pending the hearing and determination of that appeal.

It is not in dispute that since October, 2012 when the couple separated the children have all along been in the custody and care of the applicant. He has provided for their needs single handedly. Execution of the Kadhi’s order will require that the children move from their current residence to live with their mother the respondent. I have given careful consideration to the submissions made by counsel. In all matters relating to children a court is obliged to give priority to the ‘*best interests*’ of the child. At this point I would not wish to comment on the merits or otherwise of the intended appeal. All that this court is being required to consider is whether sufficient grounds exist to grant a stay at the present time. The children have lived with the applicant since 2012 when their mother left the matrimonial home. The court is told that they attend a school close to their home. I am fully aware of the general principle that girl children ought to be in the custody of their mother. However the fact is that the three girls have all lived away from their mother for the past two (2) years. There has been no allegation of abuse, neglect or ill-treatment of any of the children whilst in the custody of their father. Children are creatures of habit and comfort. It would be unnecessarily disruptive to have them move at this point only to have the High Court reach a different decision upon appeal. I have perused the intended appeal and I note that it raises pertinent and triable issues. It is my considered opinion that the best interests of the children dictate that the current status quo be maintained. I therefore allow prayer (2) of this Notice of Motion. I further order

that the respondent be allowed regular access to all the children on terms agreeable to both parties.
Hearing of the appeal to be expedited.

Dated and delivered in Mombasa this 26th day of August, 2014.

M. ODERO

JUDGE

In the presence of:

Ms. Osino for Applicant

Mr. Khalid for Respondent

Court Clerk Mutisya