



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**CIVIL APPEAL NO. 8 OF 2014**

**M H.....APPELLANT**

**VERSUS**

**H D.....RESPONDENT**

**RULING**

1. This application takes the form of a Notice of Motion dated 11<sup>th</sup> February, 2014 and taken out pursuant to Order XLI Rule 4, Order XXII Rule 22 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.
2. The applicant seeks for stay of execution of the orders issued on 10<sup>th</sup> January 2014 directing that the minor child be taken to **[particulars withheld]** Adventist School, a stay of execution of the decree made in the suit and all the consequential orders pending hearing and determination of this application, and the orders directing that the minor child, L M H, be taken to **[particulars withheld]** Adventist School be set aside pending hearing and determination of the appeal herein, and that the minor child do continue attending **[particulars withheld]** Mission School pending the hearing and determination of the appeal.
3. The applicant swore an affidavit on 11<sup>th</sup> February 2014. He avers that he could not afford the monies being claimed as he has fourteen (14) other children who are all of school-going age and that he only earns Kshs. 15,000.00 per month. He further avers that the court had, in its ruling on the Notice to Show Cause of 11<sup>th</sup> November 2013, directed that a children's officer do investigate if the child attended **[particulars withheld]** Adventist School and if any fees was payable. It was further ordered that he pays any fees charged by the school. It is averred that a children officer's report was duly filed and it was established that the child had never attended **[particulars withheld]** Adventist School but was attending **[particulars withheld]** Mission School, and the court on 24<sup>th</sup> December 2013 found that no school fees was payable at **[particulars withheld]** Adventist School. He avers that he spoke to the minor's teacher at **[particulars withheld]** Mission School and paid all the outstanding school fees. He states that he would suffer substantial loss unless the orders made on 10<sup>th</sup> January 2014 directing the minor child attend Adventist School **[particulars withheld]** are stayed, as he cannot afford to pay the school fees at that school. He also states that it is not in the best interests of the minor child that he goes to **[particulars withheld]** Adventist School since he is being forced to repeat Standard Two yet he is supposed to be going to Standard Four.
4. The respondent did not reply to the application despite being served. However, when this matter came up for hearing on 3<sup>rd</sup> April 2014, Mr. Kimani appeared for the respondent, and submitted that he had difficulty as his client signed the order papers. He further submitted that matter in the lower court has been opposed. As there is no reply to the application, the applicant's allegations are unchallenged.
5. I note that the order of stay of execution is a discretionary one, and each individual case is considered on its merit. The court is then called upon to consider whether there is any substantial loss that may be occasioned if stay is not granted, whether the application has been brought before

it without unreasonable delay and of course the provision for security for costs. I am satisfied in the circumstances of this case that if the grounds raised in the memorandum of appeal dated 24<sup>th</sup> of January 2014 are upheld by the appellate court, then the applicant is likely to suffer substantial loss should stay not be granted.

6. I am also satisfied that the instant application was made timeously, given that the order of the court being challenged was made on 10<sup>th</sup> January 2014 and application herein was filed on 11<sup>th</sup> February 2014, one month after the said order.
7. The court must exercise its judicial discretion in the interests of justice and considering the special circumstances of this particular case. As this is a matter concerning a child, I hold that it would be in the best interests of the said child that the application is allowed to avoid any disturbances that may be occasioned if the said intended appeal is successful. I find and hold that the application is merited and I therefore do hereby make the following orders:
  - a. That there shall be stay of execution of the order of the Children's Court in Nairobi Children's Case No. 723 of 2013 of 10<sup>th</sup> January 2014 pending hearing and determination of the appeal herein;
  - b. That the minor child shall continue attending *[particulars withheld]* Mission School pending the hearing and determination of the appeal;
  - c. That the applicant appellant shall meet the school fees and all other school related expenses at the said school; and
  - d. That there shall be liberty to apply.

**DATED, SIGNED and DELIVERED at NAIROBI this 26th DAY OF September, 2014.**

**W. MUSYOKA**

**JUDGE**