



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO.59 OF 2010**

**JOHN GAKUO MIRURI.....APPELLANT**

**VERSUS**

**FELISTA WAMBUI.....RESPONDENT**

**RULING**

Before me is a notice of motion filed pursuant to the provisions of the then **Order XLI Rule 4** (now **Order 42 Rule 6**) of the **Civil procedure Rules** seeking orders from this court to stay the execution of the judgment and decree issued by the Children's Court in Nairobi Children's Court Civil Case No.376 of 2009. In the said judgment, the appellant was ordered to pay the sum of Kshs.8,000/- per month to the respondent for the maintenance of the two children that were the subject of the proceedings before the said court. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of the appellant. The application is opposed. The respondent filed grounds in opposition to the application.

At the hearing of the application, this court heard rival oral submissions made by Mr. Omondi for the appellant and by Miss Wambua for the respondent. I have carefully considered the said submissions. I have also read the pleadings filed by the parties herein in support of their respective opposing positions. The issue for determination by this court is whether the appellant made a case for this court to grant the orders sought in the application. Under **Order 42 Rule 6(2)** of the **Civil Procedure Rules**, the appellant must satisfy several conditions before the order staying execution craved for can be granted. The appellant must satisfy the court that he would suffer substantial loss if stay is not granted. He must make the application for stay without undue delay. He must also be prepared to provide security for the due performance of such order as the court may issue that may ultimately be binding on him. In the present application, apart from the above principles the court is required to take into account the provisions of **Article 53(2)** of the **Constitution** and **Section 4(3)** of the **Children Act** that mandates this court to take into account the best interest of the child in whatever decision that it will make in regard to the welfare of the child.

The dispute between the appellant and the respondent is a protracted one. The appellant and the respondent have been before the Children's Court for the past four years. The decision rendered by the Children's Court on 11<sup>th</sup> November 2010 was a culmination of those proceedings that at one stage resulted in the appellant being committed to civil jail for a few days for failure to pay maintenance for the upkeep of the child to the respondent. The appellant argued that he would suffer substantial loss if the order made by the Children's Court is executed. He has pleaded that he is unable to pay the sum of Kshs.8,000/- per month as maintenance as was ordered by the Children's Court. He has further stated that he could only pay the sum of Kshs.1,500/- in respect of the maintenance of one of the two children whom he is the biological father. On the other hand, the respondent submitted that the appellant had capacity to pay the said amount ordered by the court. Therefore, the court should dismiss the application with costs.

In determining an application for stay, this court is not being called upon to deal with the merits or otherwise of the appeal. That task is left for the court that will hear and determine the appeal. The substance of the application is in regard to the maintenance of children. The best interest of the children requires that they be provided for by their parents notwithstanding any dispute that exists between

them. In the present application, it was clear that the appellant was aggrieved by the decision of the Children's Court. He has pleaded with the court to reduce the amount that he is required to pay as maintenance pending the hearing and determination of the appeal. On the other hand, the respondent argues that even the amount ordered to be paid as maintenance is not sufficient to enable her maintain the children in regard to their education, clothing and food. In resolving these competing positions, it is evident that the appellant established that he would suffer substantial loss if he is required to pay an amount which, in his opinion, he cannot afford. However, the best interest of the child requires that this court fixes the amount to be paid by the appellant as maintenance pending the hearing and determination of the appeal.

In the premises therefore, this court will stay the execution of the judgment and decree of the Children's Court pending the hearing and determination of the appeal on condition that the appellant pays to the respondent monthly maintenance of Kshs.5,000/-. This amount shall be paid with effect from November 2010. If the appellant defaults in paying the said monthly maintenance, as ordered by the court, the order of staying execution now granted shall stand automatically dismissed. The respondent shall have the cost of application.

**DATED AT NAIROBI THIS 11<sup>TH</sup> DAY OF FEBRUARY, 2011**

**L. KIMARU**  
**JUDGE**