



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL APPEAL NO.168 OF 2011**

N.O.O.....**APPELLANT**

**VERSUS**

M.A. O.....**RESPONDENT**

*(Being an appeal from the judgment delivered by Hon. C. A. Ocharo (Mrs) at Nairobi Children’s Court on 31<sup>st</sup> March, 2011 in Children’s Case No. 698 of 2011)*

**RULING**

*(Application for stay of execution pending appeal dated 26 April 2011)*

**1. INTRODUCTION**

1. N.O.O the appellant/applicant herein and M.A.O the respondent/respondent herein were married sometime in 2001. Their relationship was formalized some time in the year 2006. They had two issues N.J.O born on 12 October 2002 and G.A.O born on 29 October 2003.

2. M.A.O left the matrimonial home with the two children on grounds that the marriage had irreconcilable differences amongst other things.

3. She came to court at the children’s court on 9<sup>th</sup> September 2010 where she prayed for maintenance. The trial magistrate granted her the prayers prayed for. He was therefore required to cater for:

*help and amenity*

*school fees and related expenses for the children.*

*and medication was to be showed.*

*Kshs.10,000/= to assist the appellant (wife/mother).*

*(payments) was to be agreed upon by the parties.*

*shopping be catered for by the party in possession of the children.*

*remain to the children.*

- i. *Shelter, house*
- ii. *Continue to pay for*
- iii. *The costs of food*
- iv. *A monthly sum of*
- v. *The modalities of*
- vi. *Recreation and*
- vii. *The access orders do*

4. Being aggrieved with the orders of maintenance amounting to Kshs.10,000/= N.O.O filed this appeal before court and filed the application for stay of execution pending appeal. He did not wish to pay Kshs.10,000/= maintenance for the children as it was excessive and required to be waived in the meantime, no payment should be made pending the appeal being finalized.

5. In reply, the respondent M.A.O through her advocate stated that the principle with children’s law is that of the “best interest of the children” that should be paramount. She relied on the case of law of

**Adan Fugicha**  
**v**  
**Hadija Adayo & Another**  
**HCCA 72 of 2004**  
**Sitati Ag. J (Meru)**

In which the said Plaintiff applicant in that case seeking similar orders of stay of execution on being ordered to support the children. The Hon. Judge relied on the international and regional instruments to point out that “***the best interests of the child shall be the primary consideration***”.

6. She further argued that prior to her separation, the applicant had been supporting the children well. He was therefore misleading the court by insisting that he had no finances to maintain the children. From the bar, the applicant’s advocate stated the sum of Kshs.10,000/= per month was excessive. That this should be reduced and gave the figure of Kshs.6,000/=. It was not disputed that the applicant recently bought a new vehicle

7. I would find that the applicant is before this court on an interlocutory application orders by way of a ruling. The main suit still requires to be heard on the issue of maintenance. In the meantime, pending the herein of the main case, the magistrate ordered that maintenance be paid. This amount is not final till the trial of the children’s case on maintenance is finalized.

8. The best interest of the child requires to be taken into account. Whilst awaiting for the appeal to be determined, this court would decline to interfere with the discretion of the trial magistrate on the issue of maintenance (pending trial) being paid. The application is dismissed.

9. I grant costs to the respondent/original plaintiff in the children’s court.

**RULING DATED THIS 20<sup>TH</sup> DAY OF MAY 2011 AT NAIROBI.**

**M.A. ANG’AWA**  
**JUDGE**

**Advocates**

- c. *Kabue instructed by the firm of Kabue Thumi & co. Advocates for the Appellant – present*
- d. *Ogola instructed by the firm of M/s Saad M. Saad & Co. Advocates for the Respondent - present*