REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 61 of 2009

EDWARD KABIRU NDONGA ………………APPELLANT /APPELLANT

VERSUS

JULIET NYOKABI MURAYA ………………………………RESPONDENT

RULING

There is before me application dated 17th September 2009 by way of Notice of Motion filed by Kangethe Waitere & Company advocates for the applicant/appellant. The application was filed under Order XLI Rule 4(1) and (6) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act (Cap 21) as well as section 76, and 80 of the Children Act (No.8 of 2001). The orders sought are as follows-

1. That the application be certified as urgent and service thereof be dispensed with in the first instance.
2. That there be a stay of execution of the judgement and decree of Hon. Mr. P. W. Mutua Resident Magistrate delivered on 14th August 2009 in Children's case No.146 of 2007 and all subsequent orders/rulings of 14th September 2009 dismissing an application for stay of execution pending the hearing and determination of this application.
3. That there be a stay of execution of the judgement and decree delivered by Hon. Mr. P. W. Muturi Resident Magistrate on 14th August 2009 in Children's case No.146 of 2007 pending the hearing and determination of this Appeal.
4. That costs be provided for.

The application has grounds on the face of the Notice of Motion. The application was filed with an affidavit sworn by the applicant **EDWARD KABIRU NDONGA** on 17th September 2009. It was deposed in the said affidavit, inter alia, that the respondent and the applicant had separated in September 2005 after the respondent stabbed the applicant with a knife and was convicted in Makadara Chief Magistrate's Criminal Case No.5835 of 2005, and that the applicant has had custody and care of the boy child now 7 years old since then. It was deposed that the applicant filed children's Case No.146 of 2007 on 12th March 2007 for custody of the child and judgement was given on 14th August 2009. It was further deposed that in the said judgement custody of the child was given to the respondent, and the applicant ordered to pay Kshs.20,000/= per month to the respondent as maintenance for the child. It was further deposed that the applicant had filed an

appeal which had high chances of success.

This application was opposed and a replying affidavit sworn by the respondent **JULIET NYOKABI MURAYA** on 22nd September 2009 was field. It was deposed in the said affidavit, inter alia, that the averments in the supporting affidavit of the applicant are mere allegations, misrepresentations and baseless untruths. It was also deposed that the applicant had abducted the child from the custody of the mother (respondent) that was why after hearing the case, the magistrate entered judgement in favour of the respondent. It was deposed further that the exparte orders granted by Justice Nambuye on 17th September 2009 were in breach of the rules of natural justice as the respondent was not given a chance to be heard. It is deposed that the granting of stay (by the High Court) was tantamount to deciding the appeal. It was further deposed that the minor child should not be made to suffer because his father has decided to appeal.

Apparently, the exparte stay orders lapsed. The applicant therefore filed an application by way of Notice of Motion dated 28th September 2009 for reinstatement of the stay orders granted by Nambuye J, pending the hearing of the application dated 17th September 2009.

On 19th October 2009, I reinstated the interim stay orders granted by Nambuye J. I therefore, in my view the application dated 28th September 2009 has been spent.

Again, on 2nd December 2009 the applicant through his counsel filed a Chamber Summons for the child to be produced and returned to the applicant, and for the respondent to appear in court to show cause why she should not be cited for contempt of court and sent to civil jail for a period not exceeding six months.

Following that application, I ordered that the child must be produced in court, otherwise I will not hear the counsel for the respondent.

Consequently upon the above orders, two applications Miscellaneous 4 of 2010 by the applicant, and Miscellaneous No.7 of 2010 by the respondent were filed. These are for mention on 10th February 2010. However, the child and mother appeared and were present in court on 28th January 2010. Therefore on 1.2.2010 I directed that I will consider the respondent's filed documents in my ruling in this matter.

I should state here that in my view the application for contempt dated 2nd December 2009 has been spent, since the child was brought.

The appellant/applicant filed written submissions on 10th November 2009. Several authorities were relied upon. Inter alia, the case of **MC & ANOTHER VS PK Eldoret High Court Civil Appeal 62 of 2006** was relied upon, wherein Gacheche J stated:-

> **"It is in my humble opinion, imperative that the court takes into account several issues in determining whether this application is meritorious, the most important being that the interests of the minor is paramount and that, that of his parents or for that matter third parties is secondary".**

With regard to the stay of execution requested ,the case of **JETHWA VS SHAH (1989) KLR 198-200** was relied upon wherein

the Court of Appeal stated –

> **"The purpose of an application for stay is to preserve the subject matter in dispute so that the rights of an appellant who is exercising his undoubted right of appeal are safely guarded and the appeal, if successful is not rendered nugatory."**

The respondent filed written submissions on 8th December 2009. It was conceded in the submissions inter alia, that there was no unreasonable delay in filing the application for stay of execution. It was emphasised however, that all the requirements under Order 41 Rule 4 of the Civil Procedure Rules have to be met. Reliance was placed on the case of **EVANS NYALANGI VS SAMKEN** LTD Civil Appeal No.89 of 2006 wherein the court stated;

> **"This court has repeatedly held that all the four tenets of Order 41 Rule 4 of the Civil Procedure Rules, not one or some, but ALL must be satisfied before an order of stay of execution pending appeal can be granted".**

It was contended that the applicant must show that the appeal has high chances of success. It was contended that in the case of a minor child, such as the present case, the universal principle is that the custody of children of tender years should be with the mother, unless there are exceptional circumstances. Therefore it is contended that the applicant, who is the father, has no chances of success in the appeal.

It was also contended that the applicant has not established that substantial loss will be suffered. This is premised on the fact that the child is taken care of better while in the custody of the mother.

It was also contended that this is not a case where the court can determine sufficient security to be provided, as it is the interests of the child that are at stake.

I have considered the application dated 17th September 2009, as well as documents filed and the submissions.

The decision of the children court was made on 14th September 2009. Thereafter the applicant applied for stay. A ruling was delivered on 14th September 2009 declining stay. This application was filed on 17th September 2009. It was a period of 3 days. I find no inordinate delay in filing the application.

The second requirement for consideration by the court is whether the appeal has high chances of success. I have perused the memorandum of appeal. I have also perused the portion of typed proceedings, apparently filed by the respondent's counsel. In my view, the appeal raises strong arguable issues. On that account I consider that the applicant has satisfied the second requirement.

The third requirement is on substantial loss. In a case involving minor children like the present case, it is a difficult decision to make as to whether there might be substantial loss if stay is not granted. However, in the circumstances of the case where the applicant has stayed with the child previously for a number of years and educated him, I am of the view that the child could suffer substantial loss if he is taken to Mombasa where his welfare particulars are not known, pending the hearing of the appeal. I say this because it is contended, and agreed, that the mother stays in Mombasa and no further information has been given about the arrangements she has presently made for the child. Therefore in my view the applicant has satisfied the third requirement.

On security, probably the security required here is reasonable welfare for the child. I have no doubt that ,if the applicant has lived with the child for years already, he will be able to live and care for the child pending appeal. If any new facts arise that would tend to be to the disadvantage of the child that can be dealt with then, and parties are at liberty to apply.

Having considered all the facts before me, I am of the view that the application dated 17th September 2009 is for success. I allow the application and grant prayer 4 therein. Costs will await the decision of the appeal.

It is so ordered.

Dated and delivered at Nairobi this 4th day of February 2010.

GEORGE DULU

JUDGE

In the presence of –

Ms Kangethe for applicant/appellant

Ms Njuguna for respondent

David Mutisya – court clerk.