



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL APPEAL NO.34 OF 2009**

A.M.S.....APPELLANT

VERSUS

S.A.S.....RESPONDENT

**R U L I N G**

On 19<sup>th</sup> May 2009, the Children's Court rendered judgment in favour of the respondent in respect of certain orders that the respondent had sought in regard to the custody and maintenance of the children. The Children's Court granted custody of the children to the respondent and further ordered the appellant to, inter alia, pay maintenance of Kshs.50,000/- per month for the upkeep of the children. The court further ordered the plaintiff to pay school fees and medical for the children. The appellant was granted weekly access to the children. Apparently, the appellant was aggrieved by this decision of the Children's Court. On 22<sup>nd</sup> May 2009, the appellant filed appeal against the said decision to this court.

Contemporaneous with filing the appeal, the appellant moved this court by notice of motion pursuant to the provisions of **Sections 4, 76, 98, 113 and 117** of the **Children Act** and **Order XLI Rule 4** of the **Civil Procedure Rules** essentially seeking orders from this court to stay the execution of the judgment of the Children's Court pending the hearing and determination of the appeal. The appellant further prayed that the court issues any order that it may deem with circumstances with a view to rendering justice to the parties. The grounds in support of application are stated on the face of the application. The application is supported by the annexed affidavit of the appellant. The thrust of the appellant's application is that the Children's Court had made an order compelling him to pay maintenance that is onerous in the circumstances as it did not take into account the appellant's financial means.

The application is opposed. The respondent swore a replying affidavit in opposition to the application. In the said affidavit, she swore that the appellant had been in contempt of the orders of this court in that he had failed to comply with the orders issued by the Children's Court on 29<sup>th</sup> November 2007 and 19<sup>th</sup> May 2009 respectively. The respondent was of the view that the appellant should not be granted audience before this court before he purges the contempt. The respondent further swore that the appellant had not demonstrated that he would suffer substantial loss if stay is not granted; neither had he offered any

security for the due performance of the decree. The respondent was of the view that if this court wants to stay the orders of the Children's Court, it would be contrary to the best interest of the children as provided by the law. In the circumstances therefore, the respondent urged the court to dismiss the appellant's application with costs.

At the hearing of the application, I heard oral rival arguments made by the respective counsel for the appellant and 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 established sufficient grounds to enable this court stay the judgment of the subordinate court pending the hearing and determination of the appeal. The principles considered by this court in determining whether or not to grant stay of execution of a decree or order pending the hearing and determination of the appeal are well settled. The appellant must establish that he would suffer substantial loss. He must further be ready to provide security for the due performance of the decree.

This court is further required to take into account the fact that by refusing or granting stay, it may result in the appeal being rendered nugatory. As was held by Madan JA (as he was then) in **Butt vs Rent Restriction Tribunal [1982] KLR 417** at page 419:

*"It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It had been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, in **Wilson vs Church (No.2) 12 Ch D (1879)** 454 at page 459. In the same case, Cotton LJ said at page 458:*

*"I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory."*

This court is of course aware that in cases involving the welfare of children, such welfare should be treated as of paramount consideration (see **Section 4(3)** of the **Children Act**).

In the present application, it is evident that the appellant has been motivated to file the present application because of his basic plea that he is not able to provide maintenance for the children because he lacks the financial means to do so. The appellant did not place before the court any proposal in regard to how he intends to support his children pending the hearing and determination of the appeal. The appellant is aware that the children, the subject of these proceedings, must be housed, fed, clothed, taken to school, be medically attended to if they fall sick, and generally be taken care of irrespective of whether or not there is a pending appeal. It is the appellant's duty as the father of the children to provide for the upkeep of the children. He cannot plead poverty or lack of financial means to support the children because that is his responsibility. As stated earlier in this ruling, the appellant placed no proposal before this court in regard to how he intends to support the said children pending the hearing and determination of the appeal. It would be irresponsible for this court to stay the orders of the Children's Court pending the hearing and determination of the appeal without at least requiring the appellant to provide some support for the upkeep of the said children. Such requirement will be in keeping with the legal mandate of this court to always put into consideration the best interest of the children in its decision.

Having carefully evaluated the facts of this application, I will not at this stage grant the order of stay of execution sought by the appellant. However, I will give the appellant a chance to make appropriate proposal on how he intends to honour his responsibility to provide for the upkeep of the children pending the hearing and determination of the appeal. The appellant will be required to provide the proposal within seven (7) days of the delivery of this ruling, which proposal shall take into account the period of more than one year that the appellant has not provided for the maintenance of the children. If the plaintiff shall not provide a suitable and acceptable proposal, the present application for stay of execution shall stand dismissed with costs to the respondent.

**DATED AT NAIROBI THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2010**

**L. KIMARU**

**JUDGE**