



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO.52 OF 2010**

**ANDREW NG'ANG'A KIARIE.....**  
**.....APPELLANT**

**VERSUS**

**SUSAN WAMBUI.....RESPONDENT**

**RULING**

The appellant was dissatisfied with the decision that was rendered by the Children's Court on 28<sup>th</sup> September 2010. In the said decision, the Children's Court directed the appellant to settle the arrears of school fees that were owing in respect of the education of the child that is the subject of the proceedings before the said Children's Court. The appellant filed an appeal to this court. Contemporaneous with filing the appeal, the appellant filed an application pursuant to the provisions of **Order XLI Rule 4** of the **Civil Procedure Rules** seeking the stay of execution of the said order of the Children's Court pending the hearing and determination of this appeal. The grounds in support of the application are stated on the face of the application.

The application is opposed. Upon being served with the application, the respondent filed another application seeking to enforce the order of the Children's Court. In the affidavit in support of the application, the respondent gave reasons why the court should not allow the appellant's application. The appellant filed a replying affidavit to the respondent's application.

At the hearing of the application, I heard oral rival arguments made by Mr. Korongo for the appellant and by Susan Wambui, the respondent, who is acting in person. 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 the grant of the order sought staying execution of the order issued by the subordinate court. The principles to be considered by this court in determining to grant the application are well settled. **Order XLI Rule 4(2)** of the **Civil Procedure Rules** provides that no order of stay of execution shall be granted unless the court is satisfied the substantial loss may result to the applicant. The application for stay must be made without unreasonable delay. The applicant must be prepared to give security for the due performance of such decree or order that may ultimately be binding on him. In **Buttt vs Rent Restriction Tribunal [1982] KLR 417**, at page 419, Madan JA (*as he was then*) held as follows:

*"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 has 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, LJ 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 being a children's case, this court is required under **Article 53(2)** of the **Constitution** to put the best interest of the child into consideration when determining the application. This requirement is further

echoed by the provision of **Section 4(3)** of the **Children Act** that required the court, in the exercise of any powers conferred by the **Act** to treat the interest of the child as of first and paramount consideration. This is with a view to safeguarding and promoting the rights and the welfare of the child.

Certain facts are not in dispute in the present application. The appellant does not dispute that he has the duty to maintain the child that is the subject of the proceedings before the Children's Court. Indeed, since 2009, the appellant has been paying the sum of Kshs.5,000/- per month for the maintenance of the child. The issue that prompted the appellant to file the present appeal was the order by the Children's Court that the appellant pays school fee arrears to the tune of Kshs.38,100/-. The appellant pleads that the Children's Court did not take into account the fact that the sum of Kshs.5,000/- that he pays as monthly maintenance covered the education of the child. On her part, the respondent argued that the appellant should provide for the cost of the education of the child separate from the monthly sum that he pays for the maintenance of the child. It was apparent to the court that the appellant and the respondent did not agree on the school that the child was to receive education. Whereas the appellant is of the view that the school the respondent admitted the child is beyond his financial capacity, the respondent is of the view that the school where the child is admitted is the best school in the circumstances. The respondent insists that if the appellant was keen on the education of the child, he would have supported her education in the school that the child is admitted.

Having evaluated the conflicting facts of this application, it was clear to the court that the respondent did not consult the appellant before she admitted the child to the school that she recently completed her primary education. The respondent made a unilateral decision to admit the child in the school. The appellant is a primary school teacher. Apart from maintaining the child, he also takes care of his other family. Now that the child will join secondary school, the appellant and the respondent are advised to agree in advance the school that the child shall attend to avoid the situation that the appellant and the respondent find themselves in. To resolve the impasse between the petitioner and the respondent in this application, I will direct that the appellant and the respondent share the responsibility of settling the arrears of school fees due in respect of the education of the child.

In the premises therefore, the appellant will pay to Elirama school the sum of Kshs.18,000/-. This amount shall be paid on or before 20<sup>th</sup> December 2010. The respondent shall settle the remaining balance. The order issued by the Children's Court on 28<sup>th</sup> September 2010 is in the circumstances stayed pending the hearing and determination of this appeal. Costs shall be in the cause.

**DATED AT NAIROBI THIS 26<sup>TH</sup> DAY OF NOVEMBER, 2010**

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