



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO.40 OF 2010

JAMES OTIENO OLUOCH.....APPELLANT
VERSUS
JOYCE BARAZA AMBUYA..
.....RESPONDENT

RULING

On 13th July 2010, the Children’s Court ordered the appellant to pay the respondent the sum of Kshs.10,000/- per month as interim maintenance for the child that was the subject of the proceedings before the said court pending the hearing and determination of the case that had been filed. The appellant was aggrieved by the said decision. On 12th August 2010, the appellant lodged an appeal against the said decision to this court. The appellant faulted the trial magistrate for, *inter alia*, reaching the said decision without taking into consideration the legal requirements of the **Children Act 2001**. Contemporaneous with filing the appeal, the appellant filed a notice of motion pursuant to the provisions of **Order XLI Rule 4** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act** seeking to stay execution of the order of the Children’s Court pending the hearing and determination of the appeal. The appellant further craved that this court stays further proceedings before the Children’s Court pending the hearing and determination of the appeal. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of James Otieno Oluoch, the appellant. He swore a further affidavit in support of the application. The application is opposed. The respondent filed a replying affidavit in opposition to the application.

At the hearing of the application, I heard rival submissions made by Mr. Ogotu for the appellant and by Mrs. Wambugu for the respondent. I have carefully considered the said arguments. The issue for determination by this court is whether the appellant put forward sufficient grounds to enable this court stay execution of the order of the subordinate court pending the hearing and determination of the appeal. **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.

What are the facts of this application? It is common ground that the appellant visited the rural home of the

respondent with a view to seeking the respondent's parents' permission to marry the respondent. This was on 15th August 2009. Dowry was negotiated and agreed under Luhya customary law. The appellant paid part of the dowry that was demanded by the respondent's parents. According to the appellant, after the completion of the dowry negotiations, he lived together with the respondents for a period of three weeks after which the respondent deserted from his house. During this period, the appellant alleged that the marriage was not consummated. The respondent denied this fact. It was her case that she had cohabited with the respondent, as husband and wife, in their matrimonial home at Komarock estate from 2007. The cohabitation was formalized by the customary marriage which was concluded on 15th August 2009. From the cohabitation, D.W, the child that is the subject of this application was born. He was born on 25th July 2008.

The appellant denied that he was the father of the child. This denial of paternity, prompted the Children's Court to order the appellant and the child to undergo DNA test. The DNA report established beyond doubt that the appellant was the father of the child. It is the appellant's case that the Children's Court misapprehended the provisions of **Section 24** and **25** of the **Children Act** essentially because he had not acknowledged parental responsibility of the child. In particular, the appellant denied that he had cohabited with the respondent for a period of more than twelve (12) months or that he had maintained the child prior to the suit being filed in the Children's Court. The respondent countered this argument by stating that the defendant had cohabited with her for a period of more than twelve (12) months before the appellant denied her access to the matrimonial home in September 2009. She averred that prior to that date, the appellant had maintained her and the child.

Having evaluated the facts of this application and the applicable law, it was clear to the court that the order sought by the appellant in this application cannot be granted. This is because the issue of paternity of the child has already been settled by the DNA test. The appellant is the biological father of the child. The issue regarding whether the appellant had acquired parental responsibility under **Section 24** and **25** of the **Children Act** shall be determined by the Children's Court. However, there is anecdotal evidence to suggest that the appellant had at some point after the birth of the child maintained the respondent and the child. As stated earlier in this ruling, this court is required to put into consideration the best interest of the child in its decisions. **Article 53(1)(e)** of the **Constitution** provides as follows: *"Every child has a right to parental care and protection, which includes equal responsibility of the mother and the father to provide for the child, whether they are married to each other or not; ... "*

It is evident from the above provision of the **Constitution** that where paternity is established, a father of a child cannot run away from responsibility of providing for the child merely because he can establish that he had not acquired parental responsibility pursuant to the provisions of **Section 24** and **25** of the **Children Act**. The **Constitution** has supremacy over the **Children Act**. Where a provision **Children Act** is inconsistent with the **Constitution**, such provision shall be inapplicable to the extent of its inconsistency. In the present application, it is clear that the appellant cannot shirk his parental responsibility by the mere fact that there are pending proceedings before the Children's Court. In the premises therefore, this court finds no merit with the appellant's application. The appellant has failed to establish what substantial loss he would suffer if he is required to maintain his biological child. The appellant shall pay the interim maintenance ordered by the Children's Court pending the hearing and determination of the case before the Children's Court. This court declines to grant stay of execution of the order of the Children's Court pending the hearing and determination of the appeal. This court further declines to grant the appellant's application seeking to stay proceedings before the said Children's Court pending the hearing and determination of the appeal. The appellant is ordered to pay the interim maintenance ordered by the subordinate court with effect from 13th July 2010 until the hearing and determination of the suit before the Children's Court. The appellant shall pay the costs of this application.

DATED AT NAIROBI THIS 8TH DAY OF NOVEMBER, 2010

L. KIMARU
JUDGE