



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 3 of 2009

LAWRENCE NJIRU APPELLANT/APPLICANT

VERSUS

ESTHER MWITURIA RESPONDENT

RULING

This application arises from the decision of Senior Resident Magistrate Mr. T. L. Tanchu in a matter involving the maintenance of the applicant's minor child who is currently under the custody of her mother ('the respondent').

The applicant seeks orders the following terms:

- *That pending the hearing and determination of the filed appeal, this court does grant an order of stay of the ruling (sic) granted on 6/1/2009.*
- *That this court does grant any such further directions and orders for the best interest of the child.*

He also prays for costs.

It was Miss Machio's submissions that her client, who has an arguable appeal, and who had attached his affidavit of means to the pleadings in the subordinate court, has satisfied the conditions for the grant of an order of stay pending appeal.

She urged the court to note that having increased the amount payable by the sum of Shs. 6,000/- since December last year the applicant has promptly paid the monthly sum of Shs. 30,000/- to date.

In urging the court to dismiss the application because the applicant had not established what loss he stands to suffer, Mr. Saende, the respondent's learned counsel was of the view that the court ought to consider what is best for the child. It was his submission that though the respondent had requested for a monthly sum of Shs. 75,000/- the court had awarded her only Shs. 45,000/-.

I have considered the pleadings herein as well as the submissions of both counsel and I do bear in mind the fact that the applicant has to establish that he has complied with the requirements as laid down in Order XLIV of the Civil Procedure Rules, wherein it is required that he who applies for stay of execution, must demonstrate that he has already filed an appeal, that he stands to suffer substantial loss

and that he has moved the court without unreasonable delay. The record reveals that the applicant filed his Memorandum of Appeal 16/1/2009, which was within ten days of the contentious ruling, and in the circumstances, he has fulfilled the first condition.

The contentious decision was delivered on 6/1/2009. This application was filed on 26/1/2009, twenty days is in my view reasonable time.

The issue at stake between these two is the sum payable for the maintenance of their child. Miss Machio was of the view that unless the order of stay is granted, her client's appeal would be rendered nugatory as the respondent has no known means, with which she can reimburse him with, should he succeed in his appeal. This would however appear to contradict the applicant's deposition to the effect that the respondent '*works at the Commercial Bank of Africa as a Project Officer earning at least Kshs 100,000/- per month*'. His assertions can not therefore hold any water.

This matter involves a minor, her interest is paramount. Needless to say the contentious sum is not to be paid as a one off payment. It is payable on a monthly basis. I am unable to see what loss the applicant stands to suffer by providing for his child. Should he win his appeal he will have a right to set off whatever sums will be refundable to him, against whatever will be payable to the respondent in the future.

This application lacks in merit. I dismiss it with costs.

Dated and delivered at Nairobi this 13th day of May 2009.

JEANNE GACHECHE

Judge

Delivered in the presence of:

For the applicant: Miss Machio

For the respondent: Mr. Kinyanjui