



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT KITALE**

**CIVIL APPEAL .5 OF 2007**

**ANDREW SAMBULA SHIUNDU =====APPELLANT**

**V E R S U S**

**ESTHER NANDUTU WALIUBA =====RESPONDENT**

**R U L I N G**

On 12/2/2007, the **Hon. Mrs. H.M. WANDERE**, R.M Kitale, delivered her ruling in an application in SPM Children's Case No.31 of 2006. By that ruling, the learned magistrate ordered the defendant, **ANDREW SAMBULA SHIUNDU**, to pay KShs.6, 000/= monthly, being maintenance for his 2 children.

Being dissatisfied with that ruling, the defendant, (who shall hereinafter be cited as ("**the appellant**") lodged an appeal to the High Court. He also filed an application for stay of execution, and for stay of proceedings in Kitale SPM Children's Case No. 31 of 2006.

It is the appellant's case that if he were compelled to pay Kshs.6, 000/= monthly, as maintenance for his two children, he would suffer as he would then be left with insufficient funds to meet his other financial needs.

In any event, the appellant says that he was living with one of the two children, and also that he was responsible for paying school fees for the children.

The appellant pointed out that the respondent was engaged in gainful employment. Therefore, as the responsibility of looking after children was placed on both parents, the appellant feels that it was wrong of the magistrate's court to order him to be paying Kshs.6, 000/= monthly.

His reason for so saying is that the court had not determined the issue of custody. Therefore, the appellant feels that as he was staying with one child, whilst the other child was ordinarily resident at Kitale Academy, which is a boarding school, the court ought to have made it clear, who was supposed to be maintained by the funds in question.

In answer to the application the respondent submitted that if this court stayed the execution of the orders made by the magistrate's court, the children would suffer, as there would then be no order compelling the appellant to maintain the children.

As far as the respondent was concerned, the learned magistrate was right to have ordered the appellant to provide maintenance for the 2 children, as there was proof that prior to that order, it had been difficult to get the appellant to pay school fees for the children. Indeed, the respondent had to seek the assistance of the Justice and Peace Commission, she said.

In any event, the respondent believes that the sum of Kshs.6, 000/= monthly was very reasonable as there were two children to be maintained. She also said that the appellant was a man of means, who should be in a position to pay that amount comfortably.

The respondent exhibited a note from Kitale Academy dated 18/10/2006, showing that in respect of Linah Khakasa, there was then an outstanding fee of KShs.2, 000/=. However, the appellant asked the court not to accept that document in evidence, as the respondent had added onto it, the following words, in her own handwriting;

***“ On 30/10/06 she was also sent away from school due to school fees.”***

Of course, if the said letter has been forged, there may well be a penalty to be paid, in accordance with the law. However, until and unless the original note is adduced in evidence, before the learned trial magistrate, who will then entertain issues as to the admissibility thereof, if any such issues are raised, it would be premature for this court to express any more views on the contents of the note.

For now, it is evident that when the magistrate's court gave the order in issue, the court was influenced by the following finding;

***“ ... I find that it has not been disputed that the Respondent does not live together with the Applicant who lives with their children the subject matter of this suit. Secondly there is no form of provision for the maintenance of these children.”***

As at the date of the application before this court, it was common ground that the appellant was living with one child whilst the respondent was living with the other child. It therefore follows that if any maintenance was to be paid by the appellant, it ought to be for only one child.

However, I must make it crystal clear that the maintenance being referred to herein is over and above the school fees and other items and articles required for use in school. I say so because the appellant has stated, on oath, that he pays the school fees in any event. There is absolutely no doubt in my mind, that it is in the best interest of the children to have uninterrupted education. The appellant is ordered to ensure that the school fees is paid timeously, at all times pending the hearing and determination of the appeal herein.

However, as regards the payment of maintenance for the child staying with the respondent, I believe that there should be a stay, as the appellant is also staying with one child. This decision is influenced by the fact that the respondent has readily admitted earning Kshs.15,000/= monthly. In effect, on a prima facie basis, it appears that the respondent should be capable of maintaining one child, especially after the appellant pays school fees for the two children.

In a nutshell, apart from the requirement that he pays school fees timeously, there shall be a stay of execution of the order for payment of maintenance.

But there shall be no stay of further proceedings in Kitale SPM Children's Case No. 31 of 2006. If anything, I believe that the interests of the children will be best served if the said proceedings are heard and determined expeditiously. Accordingly, I direct that the said case be accorded priority.

Does the appellant leave the child who lives with him alone in the house until late hours? Does the respondent travel a lot, in the course of her business ventures, leaving the child exposed to a harmful environment? Who, between the children's mother and father is best suited to provide for the children in such manner as will ensure that the children's interests are best provided for?

All those questions need to be addressed comprehensively, and as soon as possible. And, should the trial court determine them before the appeal herein is determined, the orders made herein shall give way to the decision of the trial court.

Finally, the costs of this application shall abide the determination of the appeal.

Dated and Delivered at Kitale, this 23<sup>rd</sup> day of January, 2008.

**FRED A. OCHIENG**

**JUDGE**