



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

Civil Appeal 3 of 2008

**ALBERT KARIUKI KANAKE.....
.....APPELLANT**

VERSUS

R K K (MINOR Suing through Winnie Karimi).....RESPONDENT

RULING

The applicant has filed an appeal against the decision of the lower court in Children Case No. 15 of 2007 against a ruling delivered on 5/12/2007. He now applies under Order XL 1 rule 4 for a stay of Execution of the ruling pending hearing of the said appeal. The application is supported by affidavit with annexures. Annexure AKK3 is a Notice to show cause in execution of the court order demanding the payment of Shs.263,250 and in default Applicant be committed to civil jail.

The grounds upon which application is made is that the applicant has filed this appeal which has good chance of success and there is fear that if stay is not granted the applicant shall suffer irreparable loss by being committed to civil jail thus losing his liberty. A perusal of Order 41 rule 4 it is clear under what circumstances a stay may be granted.

Firstly, an appeal is not a ground for granting a stay.

Secondly, the applicant must show sufficient cause to warrant a stay of Execution of a court order therefore preventing the decree holder from enjoying fruits of his Judgment. Provision of subrule 2 thereof the orders cannot be granted unless the court is satisfied that substantial loss will be suffered if orders are not granted. And that the applicant is able to give security for any orders that may be ultimately be binding on him. In this application the conditions are not fulfilled. The affidavit in support the applicant confirms the court order. He confirmed that he is obeying the additional order to pay school fees and he has paid for the current term. He expresses willingness to abide with any conditions the court may order.

It is to be noted that this suit is not ordinary civil suit. It is concerning the maintenance of children. The rights of children are now provided under Children Act. And the main consideration is the interest of the child. In this case the rights to maintenance and education are already decided by court on interlocutory basis. It is for the interest of the child that there should be lump sum available to the child in case of emergency or other needs that may arise. I do not fault the Trial Magistrate in making order for payment in a lump sum. The applicant has not shown his financial status.

I have perused the authority submitted by counsel for Respondent the well written and reasoned decision. A.F Vs H.A AND H 1 and I entirely agree with the opinion of Hon. Judge Sitati. The court

has a responsibility in children cases to decide cases taking the interest of child as paramount. Not dealing with the provision of Order 41 rule 4 as in ordinary civil cases between businessmen and others.

I do not see any reason to grant orders of stay in this case. Apart from paying school fees the child has to live eat and be clothed and enjoy all the rights children enjoy and the order ought not to be stayed.

I therefore find no reason to grant orders sought the application is dismissed with costs to Respondents.

Dated this 15th February, 2008.

J. N. KHAMINWA

JUDGE

15/2/2008

Khaminwa – Judge

Njue – Clerk

Mr. Okwaro HB for Applicant

Mr. Njagi for Respondent

Read in open court.

J .N. KHAMINWA

JUDGE