



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

**Civil Appeal 72 of 2005**

***(Being an appeal arising from Children's Case No. 217 of 2005 MSA between Khadija  
Mohamed Swaleh and Abdulrahman Mohamed Riday)***

**ABDULRAHMAN MOHAMED RIDAY .....APPELLANT**

**VERSUS**

**KHADIJA MOHAMED SWALEH .....RESPONDENT**

**RULING**

The children's Court at Mombasa issued the following orders inter-alia on 18.8.2004:

- (i) That the custody of the child to be vested to Khadija Mohamed Swaleh, the respondent herein, with an order that Abdulrahman Mohamed Riday, the appellant/Applicant having unlimited access.
- (ii) The appellant to remit a monthly sum of Kshs.4,000 to the Respondent as the child's maintenance.
- (iii) The appellant to meet the child's education and related expenses.
- (iv) The appellant was to provide a medical scheme for the child.

It would appear the appellant partially complied with these orders. This prompted the Respondent to file a motion before the children's court dated 14<sup>th</sup> March 2005 in which she sought inter-alia an order directing the appellant to deposit a lump sum of Kshs.200,000/- in court to meet the child's school tuition fees and medical needs. The Respondent swore an affidavit in support of that motion. It is conceded that despite the motion having been served upon the appellant it did not attract any response. The Motion was listed for interpartes hearing on 7<sup>th</sup> September 2005. On that date the record shows that Mr. Hassan advocate for the appellant sought for an adjournment on the basis that he has been unable to file a reply because the appellant was held up in Saudi Arabia. The application for adjournment was opposed by Mr. Gichana advocate for the Respondent. In a short ruling the learned Principal Magistrate rejected the application for adjournment and proceeded to allow the application as prayed. She also noted that the appellant had not fully complied with the orders of 18<sup>th</sup> august 2004. Being aggrieved the appellant filed an appeal against the decision. The grounds of appeal are set out in the Memorandum of Appeal dated 7<sup>th</sup> September 2005.

The subject of this ruling is the Motion dated 9<sup>th</sup> September 2005 taken out by the appellant pursuant to order XLI rules 3 and 4 of the Civil Procedure Rules. Basically the appellant is seeking for a stay of execution of the orders issued on 7<sup>th</sup> September 2005 pending the hearing and determination of the appeal. The motion is supported by the affidavit of Hassan Abdi sworn on the 9<sup>th</sup> day of September 2005. It is the argument of Mr. Hassan advocate for the appellant that a stay order should be given failure to which the appellant will be rendered a destitute. There is a terse argument to the effect that the appeal has high chances of success. The Respondent on her part objected to the motion by stating that the

appellant was not keen in complying with court orders. She specifically pointed out the orders on 18<sup>th</sup> august 2004.

I have keenly considered the arguments put forward by learned advocates appearing for the parties. I have also perused the grounds raised in the motion and the facts deponed on affidavits. The motion before this court is that premised under Order XLI rule 4 of the Civil Procedure Rules. In an application under Order XLI rule 4 an applicant must show that he will suffer substantial loss. In this regard there is no affidavit from the appellant. What is on record is an affidavit sworn by Mr. Hassan advocate who does not aver that he has been authorized to depone on such disputed factual matters. Learned counsels should be careful when taking upon themselves to state facts on oath which they will be hard to prove when required.

On that score I am not satisfied that the appellant will suffer any substantial loss. The application must be made without unreasonable delay. It is clear that the motion was filed timeously hence I have no qualms on this condition. An applicant must also offer security. None was offered. In all force the applicant has failed to meet the requirements set forth in order XLI rule 4 of the Civil Procedure Rules. For the above reasons I see no merit in the Motion, consequently it is ordered dismissed with costs to the Respondent.

**Dated and delivered at Mombasa this 29th day of September, 2006.**

**J.K. SERGON**

**J U D G E**