



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 41 of 2005**

**DICKSON MANYASI WEKESA ..... APPELLANT**

**VERSUS**

**SYDNEY SIMON MUNYAGA (*suing through* MIRIAM WAYUA MUNGAGA) ...RESPONDENT**

**RULING**

The application by way of Notice of Motion seeks orders for stay of execution of the order of the subordinate dated 21<sup>st</sup> December, 2005 made in Children case No.319 of 2003, pending determination of the application as well as pending hearing and determination of the appeal filed which is Civil Appeal No.41 of 2005.

The application is premised under Order XLI Rules 4 and 5 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya.

**The same is based on the grounds appearing on its face and on supporting affidavit of the Applicant sworn on 7<sup>th</sup> October, 2005 as well as further affidavits sworn on 15<sup>th</sup> December, 2005 and 1<sup>st</sup> March, 2006.**

**The basis of the application is that the order of monthly maintenance of Shs.20,000 against the Applicant was made without any evidence on record.**

**The Applicant had denied paternity of the child. He stressed that the whole suit was a nullity as the counsel for the Respondent did not have a valid practicing certificate. However, he conceded that it was not brought to the notice, of the Trial Magistrate.**

**It is contended that due to his denial of paternity, he would suffer irreparable damage as his appeal has great chance of success.**

**The application was opposed and the Respondent has relied on her affidavit in reply sworn on 16<sup>th</sup> February, 2006. According to her the application is not competent as the same is not supported by an affidavit. I do not understand this point in opposition as I do note that the application dated 12<sup>th</sup> January, 2006 is supported by an affidavit sworn on 12<sup>th</sup> January, 2006 as I have earlier observed.**

**It is further contended that the order of DNA test was made despite opposition from the Applicant and the Applicant did not appear before the Government Chemist on the scheduled time as ordered. The issue of non-practicing certificate is taken now in appeal but has not been supported by any documentary proof such as a letter from Law Society of Kenya confirming the alleged averments.**

**I have to bring out that after the submissions were made, both counsel agreed that their clients shall undergo a DNA test. However, after several mentions to that effect, on 21<sup>st</sup> July, 2006 both counsel informed the court to make the ruling and that no DNA test been carried out.**

**Without going much into the details of the facts before the subordinate court, which shall be looked at, during hearing of the appeal, I have considered the Ruling of the court which is sought to be appealed against. I should restrain myself into commenting much on its contents.**

**Suffice it shall be, at present to find, which I hereby do, that the ruling cannot be said to have been made without any evidence.**

**I also do not have sufficient evidence before me to rule on the issue of invalidity of the suit. I could have relied on the said fact, even though it was not contended before the subordinate court simply on the trite principle of law of nullity that nothing stands on nothing as the valid order has no existence.**

**In short, I do not have any ground to stay the execution of the order of the subordinate court dated 21<sup>st</sup> December, 2005.**

**I also note in passing that the appeal is filed on 3<sup>rd</sup> June, 2005 almost more than five months after the order of the court.**

**The application is thus dismissed with costs in appeal.**

**Dated and signed in Nairobi, on this 27<sup>th</sup> day of September, 2006.**

**K.H. RAWAL**

**JUDGE**

**27.9.06**