



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIV APP 56 OF 04**

**JOSEPH BORO NGERA ..... APPELLANT**

**VERSUS**

**ELIZABETH WANJIKU NGERA ..... RESPONDENT**

**RULING**

The Respondent in this Appeal, Elizabeth Wanjiku Ng'era has made an Application under the provisions of Order XLIV Rule 1 Civil Procedure Rules seeking for orders that this Court reviews, varies or set aside its orders dated the 3rd of June 2004. The Application is supported by the annexed affidavit of Elizabeth Wanjiku Ng'era. The grounds in support of the said Application are that this Court did deliver its ruling on the 3rd of June 2004 granting the Appellant's Application for stay pending the hearing of this Appeal. The Respondent states that at Page 9 of the Court's Ruling, the Court stayed the orders granted by the lower Court on the 6th of April 2004 pending the hearing and determination of the Appeal. The Respondent further states that apart from the order of maintenance, the lower Court had granted custody of the children of marriage to the Respondent. The Respondent further states that the lower Court also granted an order of separation pending the hearing of the Separation and Maintenance Cause. The Respondent further stated that at Page 8 of the said ruling the Court found that the Appellant had not raised the issue of custody of the children in his Application yet at page 9 of the said ruling the Court ordered stay of the orders of the lower Court including those of custody. From the above set of circumstances the Respondent stated that it was evident that there was an error apparent the face of the record which error ought to be rectified on review. The Application is opposed. The Appellant has filed Grounds in Opposition to the Application. Miss Mathenge and Mr. Okeke, Counsel for the Respondent and the Appellant respectively argued the Application before me.

I have considered the Application and the Grounds of Opposition filed by the parties in this Application. I have also considered the rival arguments made by the Counsel for the Respondent and Counsel for the Appellant. I have also had the occasion to re-read the Application for stay of execution made by the Appellant and the proceedings of the Court prior to the delivery of the ruling dated the 3rd of June 2004. It is clear that the thrust of the Appellant' Application for stay of execution pending Appeal was the order made by the lower Court that he pays the sum of Kshs.100,000/- per month as maintenance. In his arguments before Court, the Counsel for the Appellant urged this Court to allow the Application for stay based on the fact that the order made by the lower Court as regards the amount of Kshs.100,000/- was unconscionable and further that he was incapable of paying the same. After considering the said rival Submissions, this Court ordered that the Appellant pays the sum of Kshs.30,000/- per month as maintenance apart from the fact that the Appellant was required to pay the school fees for the children and also provide for their clothing. The issues of custody or separation was not canvassed before this Court in the said Application. The order of stay of execution of all the orders issued by the lower Court was therefore granted in error. There was an error apparent on the face of the record. I hereby review the said ruling and state that the order that the Appellant was granted only stayed the issue of maintenance and nothing else.

This Court was, and still is, concerned that the parties to this suit in pursuit of the resolution of their matrimonial dispute, appear to have lost sight of the fact that the welfare of their children is involved. In its ruling dated the 3rd of June 2004, this Court stated at page 9 as follows: - "I would advise the parties in this Appeal to seek a way of resolving their marital dispute so that it does not affect the well being of

the children. The faster they would resolve the same the better it would be for the children.”

It is with this position in mind that this Court ordered that the parties to this Appeal resolve their marital dispute either amicably or through the Court process in the lower Court. I do therefore order that the separation and maintenance cause do proceed for hearing before the lower Court on all the issues raised before it save for the issues of maintenance which has been stayed and varied by this Court. There shall be no orders as to costs.

**DATED at NAKURU this 11th day of August 2004.**

**L. KIMARU**

**AG. JUDGE**