

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL CASE NO. 113 OF 2018

MI.....PETITIONER

VERSUS

MB.....RESPONDENT

RULING

1. In **Civil Appeal No. 131 of 2019**, the parties were the same as the ones in the instant appeal and application. The subject matter was their son whose custody and maintenance were in issue. The applicant therein sought stay of execution of the orders that the Children Court had granted. The application had been brought under **Order 42 rule 6 Civil Procedure Rules**. The application was refused because the court found that it had no jurisdiction to grant stay as no appeal had been filed. What the applicant had annexed was only a Draft Memorandum of Appeal.

2. In the instant application, the applicant has a pending appeal filed on 26th October 2018. She is seeking the stay of the orders given on 5th November 2019 by the Children Court which sought to execute the judgment of 27th September 2018 by the same court. The orders were sought pending the hearing and determination of the appeal. Once again the application is under **Order 42 rule 6** of the **Civil Procedure Rules**.

3. It is evident that now the court has the jurisdiction to hear and determine the application for stay.

4. The plea that the present application is *re-judicata*, given the decision in **Civil Appeal No. 131 of 2019** is not sustainable. This is because *res judicata* under **section 7** of the **Civil Procedure Act** proceeds on the basis that there was a former suit in a competent court between the same parties litigating over the same subject matter and that in the former suit the court heard and determined the issues in question and the same issues have been raised in the subsequent case. (**Abok James Odera –v- John Patrick Machira, Civil Application No. 49 of 2001 at Nairobi**). For *res judicata* to issue the issue must have been heard and decided on merits. In **Civil Appeal No. 131 of 2018**, the court did not deal with the merits as it had no jurisdiction, there being no appeal.

5. In conclusion, the preliminary objection raised by the respondent is not sustainable and is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 13TH MAY 2021.

A.O. MUCHELULE

JUDGE