



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CIVIL APPEAL NO. 94 OF 2018**

**AMM.....APPLICANT**

**VERSUS**

**EMM.....RESPONDENT**

**R U L I N G**

1. **EMM**, the Respondent, sued **AMM**, Applicant, on behalf of their two (2) minor children seeking monthly maintenance. The trial Court considered the matter and ordered the Applicant to maintain the children by paying **Kshs. 8,000/=** on every 5<sup>th</sup> day of the month with effect from **5<sup>th</sup> November, 2018**. Custody of the children was granted to the Respondent since the Applicant neither sought access nor custody.
2. Following orders of the Court the Applicant has approached the Court seeking stay of execution of the Judgment pending hearing and determination of the Appeal.
3. The Application is premised on grounds that: substantial loss will be occasioned as the Respondent will move to execute; the Appeal will be rendered nugatory, the Applicant is willing to abide by the terms and conditions set by the Court; the Application has been made without undue delay and it is in the interest of justice to have orders sought granted.
4. The Applicant swore an affidavit in support of the Application where he averred *inter alia* that the Appeal has overwhelming chances of succeeding. The Application has been brought without undue delay; and that with his current salary he is able to pay the Respondent **Kshs. 3,000/=** every month towards maintenance of the children.
5. The Respondent swore a Replying Affidavit in response where she deponed that following the order of the Court, the Applicant has declined to pay the sum ordered and was therefore in arrears. That she is overburdened and the children are suffering; the Applicant has not furnished the Court with reasonable security and/or pay required amount for the children's upkeep; the sum proposed of **Kshs. 3,000/=** cannot sustain the children as she spends **Kshs. 22,000/=** per month on them.
6. To exercise the discretion in granting the order sought or not I must do it judiciously. The principles of granting stay of execution are enunciated in **Order 42 Rule 6(1)(2)** of the **Civil Procedure Rules** which provides thus:

***“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***

***(2) No order for stay of execution shall be made under subrule (1) unless—***

***(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***

***(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”***

7. In the case of **Butt vs. Ren Restriction Tribunal (1982) KLR 417** it was stated thus:

***“... (a) the power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion***

*should be exercised in such a way as not to prevent an appeal;*

*(b) the general principle in granting or refusing a stay is if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the Judge's discretion;*

*(c) a Judge should not refuse a stay if there are grounds for granting it merely because in his opinion a better remedy may be available to the applicant at the end of the proceedings;*

*(d) the court in exercising its discretion whether to grant and refuse an application for stay of execution will consider the special circumstances of the case and unique requirements. The special circumstances in this were that there was a large amount of rent in dispute and the applicant had an undoubted right of appeal.*

*(e) the court in exercising its powers under Order XLI rule 4(2)(b) (now Order 42(6)(b) of the Civil Procedure Rules, can only order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."*

8. In his submissions, **Mr. Ngala Mulonzya**, learned Counsel for the Applicant submitted that the Applicant was ordered to pay a stipend of **Kshs. 8,000/=** per month to the Respondent but his net salary is **Kshs. 12,800/=**, that he is willing to pay **Kshs. 3,000/=** as the children are not big enough to spend a lot of money. The argument of the Respondent is that the **Kshs. 8,000/=** is not even sufficient. The Applicant alluded to his salary but failed to attach any document to establish his allegations.

9. In cases of children, what is paramount is the welfare of the children. The sum ordered is for upkeep of the Applicant's children therefore failure to order stay of execution sought shall not make him suffer any loss since he shall be fulfilling parental responsibility.

10. Judgment in the matter was delivered on the **18<sup>th</sup>** day of **October, 2018** and the Application was lodged on **22<sup>nd</sup> November, 2018**. It was therefore done timeously.

11. There has been no suggestion of any security that may be offered for due performance of the Decree.

12. Accordingly, I am not persuaded that an order of stay should issue in this case. Consequently, the Application is dismissed with costs to the Respondent.

13. It is so ordered.

**Dated, Signed and Delivered at Kitui this 12<sup>th</sup> day of June, 2019.**

**L. N. MUTENDE**

**JUDGE**