



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 13 OF 2018**

**M M K.....APPELLANT /APPLICANT**

**VS**

**E W.....RESPONDENT**

**RULING**

Before me is an application brought by way of Notice of Motion dated 19<sup>th</sup> April 2018 filed by the applicant herein under certificate of urgency. The application was filed under sections 1A, 1B, 3 & 3A of the Civil Procedure Act (Cap 21) and Order 51 of the Civil Procedure Rules, as well as Article 53(2) of the Constitution of Kenya and section 80 of the Children's Act No 8 Of 2001, and seeks the following orders-

1. The application be certified as urgent and service be dispensed with and it be heard ex parte in the first instance due to its urgency.
2. Pending hearing and determination of the application this honourable court do stay the execution of the judgement delivered by Hon J J Masiga (Senior Resident Magistrate) delivered on 5<sup>th</sup> April 2018 in the Children Court Garissa Children Case No. 2 of 2018.
3. Pending the hearing and determination of this application this honourable court be pleased to order that the respondent do cater for the maintenance of the minors as the appellant is a man of straw.
4. Pending the hearing and determination of this application this honourable court be pleased to order that the applicant continues to cater for the educational and medical needs of the minors as he has been doing.
5. Any other relief that the court may deem fit.
6. Costs of the application be borne by the respondent.

The application has grounds on the face of the Notice of Motion whose main thrust is that the judgment was not based on the financial capabilities of the applicant, and that the magistrate failed to consider the evidence of the applicant. The application was filed with a supporting affidavit sworn on 19<sup>th</sup> April 2018 by the applicant.

The application was opposed through a replying affidavit sworn by the respondent on 8<sup>th</sup> May 2018 whose main thrust was that the applicant has a number of businesses and means but has neglected his children after marrying a second wife.

At the hearing of the application both the applicant and the respondent made oral submissions in court.

This application will not succeed. The main reason why the application will not succeed is that all the substantive prayers for relief sought are for the period 'pending the determination of the application'. It follows therefore that this court has not been asked to make any orders which will operate beyond this ruling. It is not for this court to manufacture prayers for parties and I will not do so. The application thus stands spent after this ruling.

I observe also that no appeal appears to have been filed and paid for as yet. I only see a stamped Notice of Appeal without any payment receipt in the file and a Memorandum of Appeal which was to be lodged before the Deputy Registrar but which appears not to have been so lodged. This default needs to be rectified if progress has to be made in the intended appeal.

Even if I am wrong on the above finding, I am still of the view that the applicant has not satisfied the requirements for grant of stay of execution of decree or judgment contained in Order 42 Rule 6(2) of the Civil Procedure Rules. In particular the applicant has not demonstrated that he will suffer substantial loss in this Children matter unless the stay orders sought are granted. In my view the best option

available to the applicant is to expedite the hearing of the appeal, and ask this court for indulgence for a hearing date on priority basis.

As for the application herein, it has no merits and I dismiss the same. I reserve costs to be determined following the decision in the main appeal.

**Dated and delivered at Garissa this 5<sup>th</sup> day of June 2018.**

**George Dulu**

**JUDGE**