



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIVASHA**  
**HIGH COURT CIVIL APPEAL NO. 55 OF 2015**

**S. M. O.....APPELLANT**

**-VERSUS-**

**H. O. (Suing through His Mother & Next Friend A. B. M.).....RESPONDENT**

**RULING**

1. Before me is a Notice of Motion filed on 3/7/15 expressed to be brought under **O 42 r 6 Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act**. It would appear that prayers 2 & 3 are erroneous as rather than seeking stay of execution of the orders of the lower court, both seek stay of “proceedings of the orders” of the said court. From my general reading of the application, affidavit and submissions, what the applicant intended to seek were orders to stay execution of the lower courts order of 17/6/15 pending appeal and stay of the lower court proceedings pending appeal

2. From the submissions the appellant was actually prosecuting the appeal, rather than the application for stay pending appeal.

Secondly, the order appealed from was an interim order of maintenance pending the hearing of the substantive matter.

The brief background to the Appellant’s application is that the Appellant fathered a child in the course of a relationship and/or cohabitation with the minor’s mother and next friend A. B. M. The minor is now aged about 4 years. It would seem that the relationship which commenced around 2008 began to falter in the year 2013 and the parties were subsequently estranged.

3. In September, 2014 the applicant filed a suit for maintenance of the subject minor child, and other relief. An application for interim maintenance resulted in the orders now being challenged. I have read the submissions of the respective parties. The Appellant emphasizes the principle of equal parental responsibility under Article 53 (1) (e) of the Constitution and has cited several authorities. He has also highlighted his other financial commitments. For their part the Respondents have urged the court in considering the application to bear in mind the best interest of the child in the interim.

4. The Respondents counter the appellant’s argument that the lower court order placed the entire burden and responsibility of the subject upon the appellant alone, by stating that, the court considered that the mother could contribute Ksh.5000/= per month towards the maintenance of the child, while the Appellant contributed Ksh.20,000/= per month.

5. In light of the fact that the appeal and the matter in the lower court has not been heard, I feel constrained from making any factual conclusions with regard to the alleged financial status of each of the parties of the minor subject or the subject’s needs.

However, it is apparent from the various documents placed before me, that the appellant may have a higher income than the subject's mother. He has argued that he has fully committed his income elsewhere, and cannot afford the sums ordered by the lower court as maintenance.

6. Certain principles are immutable, while considering a matter such as the one before this court. Firstly the over-arching principle is that the court must consider the best interest of the child (**See MA V ROO (2013) eKLR**). A corollary to the first principle is that both father and mother have equal responsibility towards the maintenance of their child (**See S.M.M. V.W. K. (2009) eKLR**).

7. Thirdly, although the courts will usually determine the financial contribution based on the affidavit of means by the father and mother of a child, no party can make financial commitments even though capable of demonstration, which override his or her responsibility to maintain his/her child (**See ZNN V MWN (2015) eKLR**). The affidavit of means is useful in this regard but it is not a magic bullet, as parties will ordinarily exaggerate their needs while understating their income.

In this case, the Appellant has gone to great lengths to demonstrate his financial commitments while the mother of the subject appears reticent about her real income and expenses even while claiming that she made contribution to the purchase of substantial "marital" property prior to the estrangement.

8. In my considered view, a stay of execution of the interim orders for the maintenance of the minor would militate against the best interest of the child. I doubt that substantial loss will be suffered by the appellant. Such stay as sought would serve no useful purpose. Secondly an order to stay proceedings in the lower court would have the same undesired effect. The needs of the minor subject cannot be suspended any more than the responsibility of the parents towards him.

9. I therefore reject the application filed on 3/7/15. The most efficacious order in this matter is a direction that the proceedings in the lower court be expedited. Costs will abide by the outcome of the appeal.

It is so Ordered.

Delivered and Signed this 7<sup>th</sup> day of **April** 2016 In the presence of Mr. Njuguna for the Respondent, M/S Lelei for Appellant absent.

**C. Meoli**

**JUDGE**