



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CIVIL APPEAL NO. 21 OF 2013**

MNK.....APPELLANT/APPLICANT

VERSUS

EGK.....RESPONDENT

**From original conviction and sentence in Children Case No. 23 of 2007 at the Chief Magistrate's Court Embu by HON. BIWOTT on 3/4/2013**

**RULING**

1. The appellant/applicant filed this application dated 19<sup>th</sup> November 2013 seeking stay of execution of the Ruling of 17<sup>th</sup> June 2013 by Mr. Biwott – SPM.
2. The main grounds are;
  - i. The applicant has filed an appeal against the said Ruling.
  - ii. The respondent has demonstrated the intention to execute the said orders.
3. He supported his application with his affidavit sworn on 19<sup>th</sup> November 2013, through which he expounds on the grounds.
4. The respondent filed a replying affidavit opposing the application. She has given a history of this matter where Judgment was delivered on 13/8/2009. She said it has not been appealed against.
5. She states that the order sought to be appealed against was a mere refund of what she has spent on the minor.
6. She asked for dismissal of the application.
7. Both parties agreed to dispose of the application by way of written submissions which they filed.
8. In his submissions Mr. E. Njiru for the applicant states that the applicant had shown vide annexure “MKN11” that the respondent was bent on executing the orders of 17/6/2013.
9. And further that the appeal has chances of success.

10. The Respondent in her submissions has stated that the applicant's application is bent on punishing the minor who he is not catering for. She is basically complaining that the applicant has left to her the burden of bringing up their child the subject of this matter. She has cited the case of **ROBERT FRANCIS SHAW –VS- JUDITH DEBORAH SHOW COURT OF APPEAL CIVIL APPEAL APPLICATIO NO. NAI 288/11 (UR 189/11)** where the Court of Appeal dealt with a matter similar to this.

11. I have considered the affidavits, anextures and the submissions filed by both parties.

12. The position is that indeed the applicant has filed an appeal. Under Order 42 rule 6(2) Civil Procedure Rules there are conditions to be met before an order of stay of execution is made. These are;

- i. The court must be satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay.
- ii. Such security as the court orders for due performance of the decree or order.
- iii. Under (i) is also considered the element of the appeal of the appeal not being frivolous.

13. It is clear that what the applicant is appealing against is not the Judgment but a Ruling/Order of the Court after his (applicant's) failure to maintain the minor as directed by the Court.

14. The lower court found him in arrears amounting to shs.55,180/= which remained unpaid.

15. The lower court further stated that if the amount is not paid the applicant be sent to civil jail. It did not however indicate the period within which the money should be paid and/or for how long the defaulter would be in Prison.

16. There is no dispute that the Applicant and Respondent are the parents of the minor the subject of this application. It is also true that there is a Judgment in this matter outlining the parental responsibilities of these two parties.

17. What the respondent did in what culminated in the Ruling of 17/6/2013 was to seek reinforcement of the decree of the Court which the applicant was not fulfilling.

18. Referring the matter to Alternative Dispute Resolution (ADR) did not annul the Judgment of the said court.

19. If the Applicant was not satisfied with what he was ordered to pay as per the Judgment he should have appealed or sought a Review, which he has not done.

20. He therefore had an obligation vide this application to demonstrate to this court how the orders of 17/6/2013 would or have prejudiced him.

21. Secondly he had to demonstrate how failure to grant the order for stay would render the appeal nugatory. He should have demonstrated that what the lower court ordered him to pay had already been taken care of by himself.

22. He has failed to establish any of the above.

23. Matters of children are delicate issues which can be amicably resolved by willing parties. There would be absolutely no need of taking a child to an expensive school just because somebody else is paying the school fees, as this ends up burdening one party. This is however a matter for the trial court to consider if and when an application is made before it.

24. As indicated above the applicant has not established that he had already paid what he was ordered by the court to pay on 17/6/2013.

25. And in any event if he proves later that he had paid the required sum he will be given credit for it.

26. Before the Judgment/decreed which set down the payments is varied and/or set aside, the numerous applications will not solve anything. I do not find any reason to justify the stay of execution sought. The application is therefore dismissed, with no order as to costs.

**DATED SIGNED, AND DELIVERED IN OPEN COURT AT EMBU THIS 2<sup>ND</sup> DAY OF JULY 2014.**

**H.I. ONG'UDI**

**J U D G E**

**In the presence of:-**

Respondent

Njue – C/c