

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.8 OF 2012

P A K.....APPELLANT

VERSUS

S A K.....RESPONDENT

RULING

The application before court is the one dated 15th March 2012. In it, the Appellant seeks orders from this court of temporary stay of execution of the judgment and decree of the Subordinate Court delivered on 27th February 2012 pending the hearing and determination of the appeal. The grounds in support of the application are stated in the face of the application. The application is supported by the annexed affidavit of P A K, the Applicant. He swore two (2) supplementary affidavits in further support of the application. The application is opposed. The Respondent, S A K swore a replying affidavit in opposition to the application.

At the hearing of the application, this court heard oral rival submission made by Mr. Omondi for the Appellant and by Mrs. Wambugu for the Respondent. Mr. Omondi submitted that the Appellant had an arguable appeal. He referred to the memorandum of appeal which in his view raised various grounds of appeal which are arguable. He submitted that if stay is not granted, the Appellant would be committed to civil jail in execution of the order of the court. He stated that if the Respondent is allowed to execute the order of the court, the Appellant would suffer and his business too would be affected. He explained that if he was committed to civil jail, his children would suffer. He was willing to pay between Kshs.5,000 – Kshs.10,000/- per month for the maintenance of the children pending the hearing and determination of the appeal.

Mrs. Wambugu for the Respondent was opposed to the application. She submitted that the Respondent had custody of the children. She urged the court not to allow the application because the Appellant had not complied with the orders issued by the Subordinate Court that he provides maintenance for the children. She wondered why, if indeed the Appellant was sincere, he did not pay the sum of Kshs.5,000/- that he was offering to pay during the hearing of the application. She submitted that the appeal filed raised no arguable grounds. No security for costs has been offered. She urged the court to dismiss the application for stay of execution with costs.

This court has carefully evaluated the facts of this application. The Subordinate Court did on 27th February 2012 order the Appellant to pay the sum of Kshs.40,000/- per month for the maintenance of the Respondent and their children. The Appellant was aggrieved this decision. He has filed an appeal to this court challenging the decision. Pending the hearing and determination of the appeal, he has filed the present application seeking stay of execution of the order of the court. The application is opposed. The Respondent submitted that the Appellant had made no effort even to pay part of the monthly sum that was ordered to be paid as maintenance. Under **Order 42 Rule 6(2)** of the **Civil Procedure Rules**, the Appellant must establish that he would suffer substantial loss if stay is not granted. He must also be ready to provide security for the due performance of the decree or order. The application for stay must be presented to court without undue delay.

In the present application, apart from the above considerations, the subject matter of the dispute being the

welfare of children, this court is required to keep in mind the requirement of **Section 4(3)** of the **Children Act**. The Section mandates this court to treat the best interest of the child as of first and paramount consideration in the exercise of its judicial functions. The Appellant was aggrieved by the decision of the subordinate court which ordered him to pay maintenance for the upkeep of the children. He was required to pay Kshs.40,000/- per month. From the submission of the Respondent, it was evident that the Appellant has made no effort at all even to pay part of the sum that was ordered during the pendency of the hearing of this application. The Appellant, as a parent, is aware that it is his duty and responsibility to provide and take care for his children. He was required to act in good faith by at least paying part of the amount that was decreed before the hearing and determination of this application. It was apparent to this court that the Appellant used the court process to avoid his duty and responsibility of providing for the upkeep of his children. The offer that Appellant made to pay upto the sum of Kshs.10,000/- per month during the hearing of the application was an afterthought. This court is of the view that the Appellant has not acted in good faith in this application. It can never be said that the Appellant will suffer substantial loss when he is performing his parental responsibility of providing for the upkeep of his children.

In the premises therefore, this court finds no merit with the application filed by the Appellant. The application lacks merit and is hereby dismissed with costs.

DATED AT NAIROBI THIS 2ND DAY OF JULY, 2014.

L. KIMARU

JUDGE