



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO.187 OF 2010**

**BENJAMIN TUMO.....APPLICANT/APELLANT**

**VERSUS**

**ANN WANJIKU.....RESPONDENT**

**RULING**

The Children Court at Maralal in the Senior Resident Magistrate Children Case No.5 of 2010 ordered the applicant to pay Kshs.5,000/= per month for the maintenance of the applicant's child with the respondent.

The matter proceeded *ex parte* and the applicant was aggrieved. He has filed this appeal but in the meantime, he is seeking that the above orders be stayed pending the hearing and determination of the appeal herein. His main ground for seeking a stay of execution is that he is a man of straw who will not be able to honour the terms of the order; that the trial court did not hear him; that before, this application was argued *ex parte* when the respondent failed to respond to it or attend to oppose it.

In the plaint in the lower court, it was averred by the respondent that the applicant is working for gain in Maralal, which was admitted in the applicant's defence. As a matter of fact, the applicant deposed that he had been remitting to the respondent Kshs.4,500/= per month for the maintenance of the child. That he continued to do so until February, 2010 when he stopped due to loss of business.

In making a maintenance order, the court is guided by the considerations listed in **Section 94(1)(a) to (l)** of the **Children Act**, which includes, income, earning capacity, financial needs and obligations. The applicant who admitted having been making a monthly maintenance contribution of Kshs.4,500/= now claims that he has no capacity due to loss of business.

A stay of execution in civil cases will be granted where the court is satisfied that the applicant will suffer substantial loss if the order of stay is not granted. The applicant has not disclosed what business he was engaged in, the income from that business and how or when he lost the business. Without that evidence and bearing in mind that a stay of execution will not be in the best interest of the child, I decline to grant the orders sought. Instead the appellant is urged to expedite the appeal process with the help of the registry so that it may be heard and determined on merit expeditiously.

I make no orders as to costs.

**Dated, Delivered and Signed at Nakuru this 1<sup>st</sup> day of March, 2011.**

**W. OUKO  
JUDGE**