



**IN THE COURT OF APPEAL
AT NAIROBI
CORAM: TUNOI, SHAH & KEIWUA
CIVIL APPLICATION NO. NAI. 177 OF 2001 (UR.96/2001)**

P.K.M.....APPLICANT

AND

F.M.M.....RESPONDENT

RULING OF THE COURT:

This is an application by P.K.M (hereinafter referred to as "the applicant") brought under rule 5(2)(b) of the Rules of this Court whereby he seeks an order for stay of execution of the ruling delivered by the superior court (Rawal, J). The learned Judge ordered that custody of the child of the marriage between the applicant and F.M.M (the respondent) be granted to the respondent.

The background to the suit in the superior court is that the parties were married under the Marriage Act on 27th July, 1999. The child M.K was born on 7th April, 1999. The cohabitation between the parties ended on or about 12th January, 2001 when the applicant refused to allow the respondent to return to the matrimonial home allegedly as she had spent the preceding week with a man called Oscar Shibasma. There are allegations and counter-allegations made by the parties each accusing the other of infidelity and loose morals. At this stage we are not fully concerned with what may come in the intended appeal. What we have to decide is whether or not to grant a stay of the orders made by the superior court pending the hearing and determination of the intended appeal. Is the intended appeal arguable and if so would the success in the intended appeal be rendered nugatory if the stay sought is not granted? The learned Judge in her ruling said:

"I must confess that this was not an easy case to decide. Both the parents have some weaknesses like drinking, and being flirtatious to say the least. Although there are preponderance of evidence that F could be adulterous also. Her simple denial of those allegations without anything further do not portray well in favour of her character. I also note that F did not jump to get access when the orders were granted by consent of counsel of the parties. She purports to justify her failure to do so by stating albeit, through her counsel, that the advocates cannot control human relations."

The learned Judge goes on to say further:

"I am not told, how F shall be able to look after the child without the maintenance. F's means of earnings are not at all disclosed. As against that Madsen has disclosed his income and states that the child is well settled in the environment given by him. F does not allege that the child is suffering or is not properly looked after. She capitalizes only on her motherhood."

The learned Judge was, in reality, not convinced that she could grant custody of the child of the marriage to the respondent unhesitatingly. She did so order with "great hesitation".

It is arguable, at least, as to whether the respondent, in all circumstances narrated before the superior court, by affidavit evidence, would be better able to look after the child. She appears to have no place she could call home and her earnings are not known. It is also arguable that the change in residence would or could adversely affect the child. What is paramount is the welfare of the child.

Having stated that the intended appeal is arguable we come to the second issue already adverted to above. If it succeeds the custody of the child would revert to the applicant with whom at present the child is well settled. Non-granting of stay would create a hiatus in the child's young life. We think it would be prudent to let the child grow up without such a hiatus.

It is for these reasons that on 5th December, 2001 we ordered that the care, custody and control of the infant child be with the applicant. We confirm the orders made on that day including the order for access. The costs of this application will be in the intended appeal.

Dated and delivered at Nairobi this 14th of January, 2001.

P.K. TUNOI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

M. Ole KEIWUA

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JUDGE OF APPEAL