



GAOO v JRO (Civil Application 212 of 2015) [2022] KECA 686 (KLR) (28 April 2022) (Ruling)

Neutral citation: [2022] KECA 686 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 212 OF 2015
RN NAMBUYE, F SICHALE & S OLE KANTAI, JJA
APRIL 28, 2022

BETWEEN

GAOO APPLICANT

AND

JRO RESPONDENT

(Being an application for stay of proceedings pending the hearing and determination of an intended appeal from the Ruling/Orders of the High Court of Kenya at Nairobi (W. Musyoka, J.) dated 3rd July, 2015 in Nairobi HCCC No. 61 of 2011)

RULING

1. Before us is a Notice of Motion dated August 3, 2015. It is brought under sections 3A of the *Appellate Jurisdiction Act*, Rules 5(2)(b), 41, and 47 of the *Court of Appeal Rules*, 2010, and all other enabling provisions of the law.
2. The application seeks an order staying all further proceedings in Nairobi High Court Civil Suit No. 61 of 2011(O.S) pending the hearing and final determination of an intended appeal in this Court.
3. It is supported by grounds on its body, a supporting affidavit sworn by GAOO together with annexures thereto, written submissions dated June 17, 2021 and legal authorities. It has been opposed by a replying affidavit sworn by JRO together with annexures thereto, written submissions and legal authorities both dated February 17, 2022.
4. Cumulatively, the applicant submits that the High Court Judge, Musyoka, J, erred in his ruling dated July 3, 2015 in allowing the respondent's application dated 16th July, 2014 to amend the originating summons and to substitute the matrimonial property described as No.96 on Ndorobo Road - Langata to L.R No. xxxxxx after dissolution of the marriage. The applicant argues that this was meant to defeat the Applicant's defence of disclaimer of ownership in the property that had been cited in the original primary pleadings.



5. The applicant was aggrieved by that ruling and filed a notice of appeal dated July 10, 2015 intending to appeal against the whole of the said ruling. He has filed a memorandum of appeal dated August 3, 2015 raising (8) grounds of appeal. It is intended to fault the trial Judge for breaching and disregarding; the express provisions of the law, namely, Order 8 Rule 3 of the *Civil Procedure Rules*; proceeding on a misapprehension of the law in holding that the respondent was at liberty to amend her pleadings at any stage of the proceedings notwithstanding its effect on the defence to the claim that was already filed on record; misdirecting himself in law and in fact by holding that the applicant would not be prejudiced with the said amendments knowing very well that the parties to the suit were no longer husband and wife at the material time of the filing of the application, its prosecution and delivery of the ruling; erring in law and in fact in holding that the proposed amendments do not introduce a new cause of action nor a new asset and that it still refers to property along Ndorobo Road, Langata area in Nairobi when in fact the amendment sought to introduce a property situated in Langata area in Karen being L.R No. 128 xxxxx Nairobi; erring in law by holding that the particulars sought in the application by the respondent would not introduce a new cause of action nor a new asset when the substitution of the description of the property clearly changed its identity; misdirecting himself in law and in fact in allowing the respondent's application on flimsy grounds to the effect that the proposed amendment would not prejudice the applicant although he recognized the fact that the parties were no longer husband and wife and failed to appreciate the legal nature of the amendments sought.
6. It is on the basis of the above grounds that the applicant asserts that the intended appeal is not only arguable but also has high chances of success and secondly, that the intended appeal will be rendered nugatory if the stay order sought is not granted as the High Court will proceed with the hearing and determination of the proceedings pending before it thereby rendering the appeal herein nugatory.
7. On case law, the applicant relies on the cases of *Misnak International (UK) Ltd vs. 4MB Mining Limited C/o Ministry of Mining, Juba Republic of South Sudan* and *Nchiru Catholic & Parish (Through the Catholic Church of Meru Registered Trustees) Domiciano Ratanya* Civil App. No. 99 of 2020 all on the prerequisites for granting relief of the nature sought in the application under consideration. The applicant, therefore, urges this court to grant the application as prayed.
8. Opposing the application, the respondent submits cumulatively that the applicant's application has no merit. In support of the above position, the respondent has cited the case of *Transjuba International Limited vs. ZEP-RE (PTA Reinsurance Company) & 2 Others* [2015] eKLR.
9. On the first limb of arguability the respondent submits that the applicant has never filed the alleged intended appeal almost 7 years after the ruling was delivered. The notice of appeal on which the application is anchored is rendered incompetent by virtue of Rule 83 of this Court's Rules. The application before court therefore collapses. The above position notwithstanding, the respondent relies on the case of *Central Kenya Ltd vs. Trust Bank Ltd & 5 Others* [2000] eKLR and submits that the impugned ruling of the trial Judge was well founded both on the law and the facts and is therefore unassailable. The intended appeal is therefore an exercise in futility.
10. On whether the appeal will be rendered nugatory the respondent submits that the applicant has not demonstrated how the final outcome of the High Court proceedings would be irreversible or how the applicant cannot be compensated by way of costs especially when it is not disputed that the High Court case is still pending as parties have not had a chance to ventilate their issues.
11. Our invitation to intervene on behalf of the applicant herein has been invoked under the provisions of law cited in its heading. Sections 3A enshrines the overriding objective principle of the Court. See *City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli vs. Orient Commercial Bank Limited* Civil Appeal No. Nai 302 of 2008 (UR No. 199 of



- 2008); and *Kariuki Network Limited & Another vs. Daly & Figgis Advocates* Civil Application No. Nai 293 of 2009, in all of which the principles enunciated therein were summarized as donating power to the Court to dispense justice with greater latitude.
12. Rules 41 and 47 are merely procedural and therefore require no further interrogation. The substantive provision for accessing the relief sought is Rule 5(2)(b) of this *Court's Rules*. It is now trite that the Court's exercise of its mandate under this rule is original, independent and discretionary. See *Githunguri vs. Jimba Credit Corporation Ltd* No. (2) [1988] KLR 88. It is a procedural innovation designed to empower this Court to entertain interlocutory applications for the preservation of the subject matter of the appeal where one has been filed or is intended. See *Equity Bank Ltd vs. West Link NBO* Civil Application No.78 of 2011 (UR). The jurisdiction under Rule 5(2)(b) only arises where the applicant has lodged a notice of appeal. See *Safaricom Ltd vs. Ocean View Beach Hotel Ltd & 2 others*, Civil Application No. 327 of 2009 (UR).
 13. The conditions to be met before a party can obtain relief under Rule 5(2)(b) have been numerous restated by the Court. We take it from the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR, in which this Court summarized the guiding principles for the exercise of its mandate in the determination of applications of this nature, and which we fully adopt.
 14. We have applied the above principles to the rival arguments made before this Court. We are satisfied that our jurisdiction has been properly invoked under the applicable rule as there is a notice of appeal in place filed in accordance with Rule 75 of this *Court's Rules* dated July 6, 2015 and lodged on July 10, 2015 on which the application under consideration is anchored. See *Githunguri vs. Jimba Credit Corporation Ltd* case [*supra*].
 15. Turning to the merits of the application, the legal position is that in order to succeed in an application of this nature, a party has to demonstrate existence of an arguable appeal. An arguable appeal is not one that must necessarily succeed but one that warrants not only the Court's interrogation but also the Court's invitation to the opposite party to make a response thereto. The usual mode of demonstrating existence of an arguable appeal is usually through annexing of a draft or a memorandum of appeal. Alternatively, the intended grievances may also be set out either in the body of the application or in the supporting affidavit as the case may be.
 16. In the instant application, there is already a memorandum of appeal on the record. The appeal is not filed though. We have revisited the grounds of appeal intended to be proffered by the applicant herein as already highlighted above albeit in a summary form. We find them arguable, notwithstanding their ultimate success or otherwise. We are therefore satisfied that the applicant has satisfied the first prerequisite under the Rule 5(2)(b) of the Court of Appeal Rules.
 17. On the second prerequisite of the intended appeal being rendered nugatory, the respondent has submitted that there is nothing to stay with regard to the High Court proceedings as the matter is yet to proceed and that at the hearing each party will have an equal opportunity to ventilate their respective grievances. All that the respondent sought from the court was to amend her pleadings with corresponding leave to the applicant to amend his defence. Any inconvenience caused by the proposed amendment was capable of being compensated for by an award of costs in the first instance and an opportunity to the applicant to amend his pleadings accordingly and also to call evidence to rebut issues introduced by the amendment of the respondent's claim. There is no assertion by the applicant that the respondent was and still is incapable of making good such compensation by way of costs, nor that if the intended amendment is effected, he will not have an opportunity to correspondingly amend his defence or adduce evidence in rebuttal of issues introduced by the proposed amendment to the



respondent's pleading. In the circumstances, the applicant has therefore, failed to satisfy both limbs as required by Rule 5(2)(b) of this Court's Rules.

18. In light of the totality of the above assessment and reasoning, the application is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022.

R. N. NAMBUYE

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

