



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: KARANJA, OKWENGU & KOOME, J.J.A.)**

**CIVIL APPLICATION NO. 6 OF 2020 (UR 3/2020)**

**BETWEEN**

**CMM.....APPLICANT**

**AND**

**GDM.....RESPONDENT**

(An Application for stay of execution of the Ruling and Orders of the High Court of Kenya

at Meru (A. Ong'injo, J.) dated 19th September, 2019 in Divorce Cause No. 1 of 2019)

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**RULING OF THE COURT**

1. By an application dated 29th January, 2020, pronounced to be brought under **Sections 3, 3A and 3B** of the Appellate Jurisdiction Act and **Rule 5(2)b** of the Court of Appeal Rules, CMM entreats the Court to, *inter alia*, stay the execution of the Ruling and orders of the High Court at Meru in Divorce Cause No. 1 of 2019 made on 19th September, 2020. He also has a general prayer that the Court be pleased to issue orders as it may deem fit to serve the ends of justice in the circumstances of this case.
2. The application is predicated on the grounds on its face and on the supporting affidavit sworn by the applicant on 28th January, 2020. As can be deciphered from the names of the parties herein, they share a last name, which name they have shared for the last 35 years they have spent together as husband and wife. In these years, they have been blessed with four issues of the marriage and have acquired property which the respondent estimates to be valued at Ksh. 200,000,000/= (Ksh two hundred million).
3. For reasons that do not concern us much for purposes of this ruling, the marriage between the parties came to an end with the respondent moving to the High Court sitting at Embu in Divorce Cause No. 1 of 2019 seeking divorce. In the interim, the respondent filed an application seeking several orders of injunction and inhibition to stop the applicant from disposing of the properties they had acquired during coverture; and also for an order to be provided with maintenance; a rental mansion in a good neighbourhood or rent at Ksh 100,000/- per month; furniture and other household “necessaries” worth Ksh. 1,000,000/= or thereabouts; living expenses to the tune of Ksh. 300,000/= per month and one of their motor vehicles, a Toyota Hilux Reg No. [Particulars Withheld] for her personal use.
4. The application was opposed through an affidavit sworn by the applicant herein on 14th June, 2019 in which the applicant denied having chased the respondent out of the matrimonial home; he denied that the respondent had contributed in any way in acquiring the listed properties; that the said properties were also charged to financial institutions and as he was servicing the loans, he had no money to pay the respondent any maintenance or alimony pending the determination of the divorce cause.
5. Having heard the parties by way of written submissions, the High Court (A. Ong'injo, J) delivered on 19th September, 2019 the Ruling now impugned. In her ruling, the learned Judge allowed most of the prayers that were meant to protect the matrimonial property and awarded the respondent only a small fraction of the money she had sought for her maintenance. An amount of Ksh. 150,000/= per month from the date of the suit until the divorce petition was determined was deemed to be adequate for the respondent. The respondent was also granted an order to remove “the furniture of her choice from the matrimonial home” under the protection of the OCS Nkubu Police Station.
6. The applicant preferred an appeal against the said Ruling and in the meantime moved this Court vide this application, seeking the orders mentioned earlier. In his grounds and depositions in his supporting affidavit, the applicant conceded that he has not paid a single coin of the money he was ordered by the court to pay as maintenance. He says that he has outstanding bank loans which he is struggling to service and that his failure to comply with the court orders could cost him his freedom in the likely event that he is sent to civil jail. He says that he has

an arguable appeal and, in the event, his intended appeal succeeds the same will be rendered nugatory if the stay orders are not granted.

7. The application is opposed by the respondent vide her lengthy affidavit sworn on 20th March, 2020. According to the respondent, the applicant has refused to pay any money to her as ordered by the court. Subsequent to delivery of the impugned Ruling, the parties entered into a consent where the applicant consented to be paying a monthly instalment of Ksh.130,000/= for the respondent's maintenance but after making only one payment, he stopped paying and even refused to honour court summons to appear in court for mention to confirm whether he had paid the money as directed by the court. The respondent deposes that the applicant is just forum shopping for the court that will give him favourable orders as he disobeys valid order of the High Court.

8. Both parties filed written submissions in support of their rival positions. According to the applicant, he has an arguable appeal. The applicant's thrust as is evident in his submissions is that the learned Judge failed to consider the provisions of **Article 45(3)** of the Constitution on equality of rights by the parties in a marriage. He does not however say whether he expected the learned Judge to also order the respondent to pay him an equal amount of alimony. From the contents of the said submissions, the applicant is irked by the order to support the respondent. He is just adamant that the respondent left the matrimonial home on her own volition, and seems to suggest that she should not therefore be paid any maintenance.

9. Those are nonetheless issues that he will be at liberty to canvass during the hearing of the petition before the High Court or before this Court at the hearing of the substantive appeal. On the nugatory aspect, the applicant lays emphasis on the fact that he cannot afford to pay the money as ordered, and therefore if stay orders are not granted, he will be sent to civil jail and that will render the appeal nugatory, if it succeeds.

10. The respondent maintains that the appeal is not arguable and that the applicant is just being obstinate and has refused to make the payments, not because he has no money, but because he does not want to. She urges the Court to dismiss the application.

11. It is now settled that for an application under **Rule 5(2)b** of the Court of Appeal Rules to succeed, the applicant must demonstrate first, that the appeal is arguable and second, that the appeal will be rendered nugatory if the orders sought are not granted and the appeal succeeds. Has the applicant demonstrated these two principles? We have considered all the material placed before us for and against the application. We are unable to see a single arguable point proffered by the applicant. The petition has not even been heard and the issues he is raising are issues that have not even been determined by the High Court. Using his alleged impecuniosity as a weapon does not fare well for him.

12. Even assuming that there is a single arguable point which we could have failed to pick out, he has not demonstrated how the appeal will be rendered nugatory if his appeal succeeds. Even after consenting to be paying Ksh. 130,000/= per month as maintenance, he failed to honour his own undertaking causing the court to issue warrants for his arrest. What he cites as the nugatory aspect are circumstances of his own creation. He refuses to pay the money, and he does not want to be sent to civil jail for failure to pay. He cannot have his cake and eat it. Overall, we find this application totally devoid of merit. We dismiss it with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**