IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MUSINGA & KIAGE, JJ.A)

CIVIL APPLICATION NO. 101 OF 2020

BETWEEN

LAC .....1ST APPLICANT

PFC ..... 2ND APPLICANT

AND

MJC.....RESPONDENT

(Being an application for stay of Execution pending the filing, hearing and determination of an intended Appeal against the judgment and/or decree of the High Court of Kenya at Nairobi (Achode, J.) dated 8th *April, 2020 in* **Civil Appeal No. 108 of 2018**)

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RULING OF THE COURT

The applicants, **LAC** and **PFC,** are the mother and step-father, respectively, of **KNC,** who succumbed to duodenal cancer on 4th October 2017. Before she expired, KNC had by her *"Kenyan Will"* dated 8th June 2017 appointed the applicants as the guardians of **AFC**, her minor daughter who is the subject of a long drawn-out custody tussle between them and the respondent **MJC**, who is the child's biological father and former husband of **KNC. AFC** was born in Kenya on 11th September, 2011 and is (9) years old at present.

The record reveals that following **KNC**'s demise, the respondent indicated his intention to assume the care and custody of **AFC,** which prompted the applicants to file proceedings at the Children's Court seeking to restrain the respondent from removing the child from jurisdiction and into England, where he resides. He in turn filed a counterclaim seeking the legal custody, care and control of the child as her surviving parent. Those proceedings ended in the applicants' favour with the learned magistrate holding that **AFC** remain in their custody until she attained the age of 10 years.

The respondent was aggrieved and filed an appeal to the High Court's Family Division. The applicants also cross-appealed. By a judgment delivered on 8th April, 2020, Achode, J. allowed the respondent's appeal and dismissed the applicants' cross-appeal holding, ultimately, that as the respondent was the surviving parent, and without a showing of exceptional circumstances, he was entitled to full custody of his child. Against that decision the applicants filed a notice of appeal and have now filed the motion under consideration seeking a stay of its execution pending the hearing and determination of an intended appeal. In their grounds as well as their joint affidavit in support, they assert that they have been the child's primary caregivers since her mother's demise in 2017; she is still undergoing bereavement counseling; she has settled well in Kenya where she attends [particulars withheld] School and it would not be in her best interests to disrupt her life by permanently relocating her out of Kenya. Such a move would render nugatory their appeal, which they laud as arguable as can be gleaned from the attached memorandum of appeal.

The respondent opposes the motion and has filed an affidavit sworn on 1st May, 2020 in which he asserts the importance of the parent-child bond between himself and **AFC**. She is a British citizen who is close to his parents, sister and niece, and has expressed the desire to move to the United Kingdom and live with him. He is engaged to be married to one **A,** with whom the child has a great bond. He accuses the applicants of trying to alienate the child from him. He swears that his parental rights and the child's best interest coincide to favour his having he child, and this would not render the appeal nugatory as she can be returned should the appeal succeed. Mirror orders can be made to that effect. He also states that the **KNC**'s will has not been proved in probate, and he objects to the appointment of the applicants as **AFC**'s guardians. He denies the claim that he has not provided for the child but admits that **KNC** did file proceedings to enforce financial arrangements. He prays that the application be dismissed.

Counsel for the parties filed written submissions and digests of authorities, which we have fully considered together with the rival contentions for and against the application.

In order to succeed on an application under **Rule 5(2)(b)** and obtain an injunction or, as in this case, a stay of execution pending appeal, an interim equitable relief, an applicant must satisfy the Court first, that he has an arguable appeal. By that is meant an appeal that is not flimsy, frivolous or chimeric. It is one that raises at least one point that demands an answer from the respondent and is worthy of judicial consideration or interrogation on appeal. An arguable appeal need not be one that must necessarily succeed.

The applicant must, beyond showing arguability, demonstrate to the court's satisfaction that unless that court intervenes as prayed, the substratum of the appeal should not be destroyed or defeated in the intervening period, thereby rendering the appeal nugatory or of no effect, and the success thereof pyrrhic, the apprehended harm having occurred. The applicant must satisfy both limbs or principles. See **STANLEY KANGETHE KINYANJUI vs. TONY KETTER & 5 OTHERS** ***[2013] eKLR*** which succinctly elaborates on these principles and this Court's jurisprudence on this well-trodden path.

It cannot seriously be doubted that the applicants' appeal is arguable. The rival contentions and the apparent clash between parental rights and responsibility on the one hand as asserted by the respondent, and the best interest of the child as seen from the perspective of her maternal grandmother and step-grandfather the applicants herein, call for this Court's full engagement on appeal. Added to that the will by **KNC** appointing the applicants as the child's guardians and the fact that the child has since the year 2015 settled in Kenya with the applicants, there clearly will be a firm basis for the Court to interrogate on appeal the content and contours of the best interest of the child, which is the paramount consideration. We have seen the rival English decisions cited by the parties but it is not our remit at this stage to make any pronouncement one way or the other on the same. Suffice to say the appeal is arguable.

On the nugatory aspect, it is of crucial importance that the child, who has only recently gone through the excruciating pain of losing her mother to the cruel hand of death, and she of but tender years, must not be tossed about on account of court orders that could potentially be reversed. Far better that the *status quo* currently obtaining, as has been over the last few years, be maintained until this Court renders an authoritative pronouncement on the looming appeal. It would not be in the best interest of the child for a potentially disruptive scenario to unfold. The harm of it would far outweigh the inconvenience the respondent might suffer in waiting for the appeal to be determined on merit. This aspect also squares with the public interest test that the Supreme Court has laid down in a consideration of this type of application. See ***GATIRAU PETER MUNYA vs DICKSON MWENDA KITHINJI & 2 OTHERS*****, Sup. Ct.**

Application No. 5 of 2014.

The upshot is that we find the conditions for grant of stay of execution satisfied and we grant the motion as prayed. Costs will abide the outcome of the intended appeal.

Dated and delivered at Nairobi this 9th day of October, 2020.

W. KARANJA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRA