



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU & SICHALE, J.J.A)

CIVIL APPLICATION NO. 118 OF 2019

BETWEEN

JKM.....APPLICANT

AND

PNK.....RESPONDENT

(Being an application for stay of execution from the Ruling of the High Court of Kenya at Nairobi (Ali-Aroni, J.), dated 7th March, 2019

in

Civil Suit No. 41 of 2013 (O.S)

RULING OF THE COURT

[1] What is before us is a notice of motion brought under Rules 5(2)(b), 42, and 47 of the Court of Appeal Rules, Section 3A of the Appellate Jurisdiction Act, and Articles 39, 48, 50(1) and 159 of the Constitution of Kenya. The applicant JKM seeks an order of stay suspending the execution of orders made on 7th March, 2019, by the High Court (Ali-Aroni J).

[2] The orders subject of the motion arise from committal proceedings that were initiated by the respondent PNK, the applicant’s former wife, following dissolution of her marriage to the applicant, and successful proceedings that she had filed under Section 17 of the Married Women Property Act 1882, for a declaration that properties that had been acquired and registered in the name of the applicant during the subsistence of the marriage are jointly owned by her and the applicant and held in trust by the applicant for the benefit of both parties in equal shares. Following the declarations made by the court, the respondent discovered that the applicant had transferred 3 of the properties to third parties during the pendency of the proceedings, even though there was an order of the court restraining the applicant from alienating or transferring the properties. The respondent therefore filed proceedings for the applicant to be committed for contempt of court order. The committal proceedings were heard by the High Court (Ali Aroni J) and a ruling delivered on 4th October, 2018 in which the applicant was found to be in contempt of the court order and committed to civil jail for a period of 3 months.

[3] In an attempt to avoid the committal, the applicant negotiated with the respondent and a consent order was recorded, pursuant to which the warrant of arrest was lifted, but the applicant did not comply with the consent order. On 7th March, 2019 the parties appeared before the learned judge of the High Court to confirm compliance of the judgment and the consent order agreed upon by the parties.

[4] The learned Judge in a ruling delivered on the same day noted that the applicant had not complied with the elaborate consent entered into by the parties, and that the warrant for the applicant’s arrest for contempt of the court order was merely lifted, but the order for his arrest in accordance with the ruling made by the court on 4th October, 2018 remained intact. The learned judge concluded thus:

“Further, the court from the history of this case sees a deliberate defiance on the part of the respondent to comply with orders issued. In order to bring this long outstanding matter to a closure, uphold the rule of law and the dignity of the institution and (sic) hereby reinstate the committal warrants, further, I direct the applicant to move the court to have the Deputy Registrar transfer the properties. The respondent will have no audience before the court until the contempt is purged.”

[5] The applicant was aggrieved by that ruling and filed a Notice of Appeal dated 11th March, 2019. Subsequently, the applicant lodged the notice of motion now before us for stay of execution of the orders.

[6] The notice of motion was supported by the grounds stated in the motion and an affidavit sworn by the applicant. In a nutshell the applicant explains that he transferred the three properties to his son and a third party; that this is what led the respondent to file the contempt proceedings; that the court found the applicant guilty of contempt and ordered him committed to civil jail for three months; that the applicant filed an application for review of the committal order; that the parties negotiated and recorded a consent settling the matter; that due to various reasons the applicant was unable to comply with the consent orders that were agreed upon; that in making the orders subject of the appeal the learned Judge denied the applicant an opportunity to explain his circumstances and the reasons for non-compliance with the court order; and that the court also ignored the fact that the consent order compromised the committal proceedings.

[7] In arguing the motion, the applicant's counsel insisted that the applicant had an arguable appeal as the orders for his committal were issued in error, the committal proceedings having been compromised through the consent order; that the learned Judge denied the applicant an opportunity to be heard contrary to Article 52 of the Constitution; and that unless the order of stay is granted, the warrant of arrest will be effected and the applicant's intended appeal will be rendered nugatory. The applicant explains that he suffers from high blood pressure and is apprehensive that if he is sent to prison, his health will suffer irreversible consequences.

[8] The application was opposed through a replying affidavit sworn by the respondent in which she explained the background to the motion and maintained that the applicant has not met the requirements provided under Rule 5(2)(b) of this Court's Rules for issuing orders of stay of execution; that the applicant's intended appeal is not arguable; that the applicant has been in blatant defiance of court orders and an order for stay of execution will merely impede the course of justice.

[9] Ms Mbugua learned counsel for the respondent submitted that the applicant had demonstrated a persistent pattern of defiance of the court orders; that he has not complied with the judgment of the High Court, but has instead transferred his properties contrary to the court orders and had not made any attempt to purge his contempt; that the judgment of the High Court declaring the Contempt of Court Act, No. 46 of 2016 unconstitutional does not affect the contempt proceedings against the applicant as the ruling of the court committing the applicant was made before that judgment, and under **section 23 of the General Provisions Act**, the repeal does not affect orders made before the repeal; that in any case the court has inherent powers to punish for contempt.

[10] This Court has stated many times that for an application seeking orders under Rule 5(2)(b) of this Court's Rules to be successful, the applicant must demonstrate that first the appeal or intended appeal upon which the application is anchored, is arguable, and secondly that should the Court fail to grant the orders sought, the appeal will be rendered nugatory. For instance, in **Ishmael Kagunyi Thande v HFCK Civil Application No Nai 157 of 2006 (Unreported)**, this Court stated that:

The jurisdiction of the Court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed he must not only show that his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory.' (See Githunguri vs Jimba Credit Corporation Ltd. No.2 [1988] KLR 838 & J. K. Industries Ltd vs Kenya Commercial Bank Ltd [1982-88].

[11] The applicant in his draft memorandum of appeal claims that the learned Judge condemned him unheard contrary to the principals of natural justice, and that the learned Judge wrongly applied her discretion by committing the applicant to civil jail without giving him an opportunity to be heard. It is of importance that the following facts remain undisputed: The appeal is against the orders of Ali Aroni J made on 7th March 2019. There is no appeal against the ruling made by Ali-Aroni J on 4th October 2018 in which she made a finding that the applicant was in contempt of the judgment of the Court and should be committed to civil jail.

[12] The subject judgment which was made on 20th January, 2017 declared that all the properties acquired during the subsistence of the marriage between the applicant and the respondent, though registered in the name of the applicant, belong to both parties and should be shared equally. It is common ground that before that judgment, there was an order of injunction restraining the applicant from transferring or dealing with the properties. The applicant has not appealed against the said judgment of 20th January, 2017 nor the order made of 4th October 2018. He admits having transferred three of the properties during the pendency of the proceedings. Under these circumstances we do not find any arguable issue in his intended appeal as it is apparent to us that the issues that the applicant is raising of having been denied natural justice is nothing other than a red herring.

[13] We are alive to the fact that what is before us is not the appeal but an application for stay of the order of committal against the applicant pending the hearing of the intended appeal. We cannot however ignore the fact that the order of committal is anchored on the adverse finding made against the applicant by the High Court on 4th October, 2018. As long as there is no appeal against that finding and order, the applicant cannot be heard to complain against its enforcement. Moreover, the applicant has admitted that subsequent to the order made on 4th October, 2018 he entered into a consent with the respondent in a bid to avert his committal for contempt of the court order. Although the consent was adopted by the court, he failed to comply with the consent agreed upon, and has not demonstrated any attempts to purge his apparent contempt. In the circumstances it is evident that the intended appeal is frivolous and does not raise any genuine triable issues.

[14] On the point that the appeal shall be rendered nugatory, the applicant submitted that his health shall deteriorate should he go to jail as he suffers from high blood pressure. No evidence of this was shown. We find that the applicant has not satisfied this Court that his intended appeal will be rendered nugatory should this Court fail to grant the orders sought. While the applicant has a right of appeal, the Court must balance this right against the right of the respondent to enjoy the fruits of the judgment made in her favour, and the importance of protecting the dignity of the courts, in so far as obedience of court orders is concerned.

[15] The applicant having failed to satisfy the two requirements of Rule 5(2)(b) of the Court Rules, he has failed to meet the threshold for granting the orders of stay of execution pending appeal. We therefore come to the conclusion that this application is for dismissal. Accordingly, the applicant's motion is dismissed with costs.

Dated and delivered at Nairobi this 27th day of September, 2019.

M. K. KOOME

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR