



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), OKWENGU & SICHALE, JJ.A)

CIVIL APPLICATION NO. 174 OF 2019

BETWEEN

DENNIS PATRICK NEYLAND.....APPLICANT

AND

ALISON DAWN CHARTER.....RESPONDENT

(Being an application for Stay of Execution of the Ruling of the High Court

at Nairobi (A. Muchelule, J) dated 27th March, 2019

in

Divorce Cause No. 178 of 2014)

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RULING OF THE COURT

In an application brought pursuant to **Rule 5(2)(b)** of this Court’s Rules, the applicant has prayed that there be an order staying the execution of the order made by the High Court (Muchelule, J) on 27th March, 2019; and further that there be a stay of proceedings in **Divorce Cause No. 178 of 2014** pending the hearing and determination of the intended appeal.

We review here briefly the background to this dispute as follows. The appellant and respondent were married in 2003. Their union was blessed with 2 issues, N.L.N and R.L.N. On 13th February, 2015 their marriage was dissolved following a petition for divorce filed by the respondent on the grounds that their marriage had irretrievably broken down. Prior to the divorce proceedings being finalized, parties had entered into an agreement regarding, *inter alia*, the custody and maintenance of the children. Specifically, they agreed to have joint custody of the children with the respondent retaining care and control of the children until they attained the age of majority; neither party was to take the children out of the local jurisdiction of the courts of Kenya except with the written consent of the other party or by an order of the High Court; that parties were to make a joint decision in relation to the children’s education, bearing in mind their best interest. The applicant was to pay school fees and 50% of the auxiliary expenses for the children until they completed tertiary education. He was also to pay to the respondent Kshs. 200,000 for the maintenance and upkeep of the children with effect from 1st June, 2014 and going forward on or before the 15th of each month. This agreement was adopted as part of the judgment.

Slightly under one year after this agreement, on 18th December, 2015 the respondent filed a motion seeking to have the applicant held in contempt of the order of 13th February, 2015 in respect of the aforesaid agreement. In the application the respondents stated that the applicant had refused, failed or neglected to pay the agreed sum of Kshs. 200,000 per month towards the maintenance of the children, which failure, refusal or neglect had resulted in financial hardship to the respondent.

In reply the applicant did not only oppose this application but for himself, took out a similar application to cite the respondent for contempt accusing her of relocating their child, R.L.N to the United Kingdom without his consent.

The two applications were canvassed together before Muchelule, J who in determining the respondent's application found that the applicant did not dispute the fact that he had failed to pay the sum of Kshs. 200,000 per month as agreed; and that having failed in his obligation, he was in contempt of the court order issued on 13th February, 2015.

On the applicant's application, the learned Judge observed that the respondent was not employed and that since the applicant had failed to support her with the education and upkeep of the children leading to their child, R.L.N being kicked out of Mombasa Academy for failure to meet school fees obligations, the respondent had no alternative but to relocate back to the United Kingdom to look for a job to take care of the children. The applicant, according to the Judge was estopped from demanding a written consent for the relocation of R.L.N. For those reasons the applicant's application was dismissed. He was ordered to personally appear before court on 6th May, 2019 to show cause why he should not be punished for his disobedience of the court's order.

This has naturally aggrieved the applicant who has lodged this application pointing out that by the aforesaid order he stood to serve a 6 months' jail term or pay the sum of Kshs. 9,228,000; that if this decision is not stayed, its implementation will expose him to torture, cruel and inhuman treatment contrary to **Article 25(a)** as read with **Article 28** of the Constitution; and that the appeal will be rendered nugatory if the orders sought were not granted as the consequences are irreversible.

As is customary the applicant in his endeavor to persuade us that he will have an arguable appeal, pointed out that the Contempt of Court Act upon which the respondent based her application was declared null and void; that **section 5** of the Judicature Act did not apply to the circumstances of the case as it only applies to contempt on the face of the court; that the applicant was directed to appear to be punished which ought not to have been the case in civil debts and is in violation of **Articles 11, 24, 25 and 28** of the Constitution and the International Convention on Civil and Political Rights (ICCPR).

Counsel further contended that the Judge ignored the applicant's financial constraints and change in circumstances that have hindered him from complying with the orders in question. On the nugatory aspect, it was submitted that the applicant stands, without an order of stay, to serve 6 months' imprisonment.

For the respondent it was submitted that the orders sought to be stayed were incapable of being stayed as they were negative orders. On the aspect of arguability of the appeal, it was contended that none of the grounds proffered in the application is arguable considering that the basis of the dispute are children whose interest are paramount and supersedes those of the parties; that the applicant was undeserving of the orders applied for since he has refused and or neglected to pay child maintenance to the detriment of the children. It was further submitted that the applicant is a serial litigant who is notorious for his multiplicity of applications; that so far there are over 8 applications to his credit before the court below, most of which remain unprosecuted; and that this is yet another frivolous and vexatious application and an abuse of the court process.

On the nugatory limb, it was argued that the applicant has not been condemned to civil jail and at the same time he has not demonstrated the substantial loss he stands to suffer if the orders sought are not granted; that he has been given sufficient time to remedy the wrong and a fair opportunity to be heard on the date fixed for notice to show cause.

By the application and practice under **Rule 5(2)(b)** of the Court of Appeal Rules, the burden was on the applicant to demonstrate the traditional two facets: that his appeal is arguable and; that the appeal would be rendered nugatory if the interim orders were to be denied. In considering whether an appeal is arguable, it is sufficient if a single *bonafide* arguable ground of appeal is raised. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. Both limbs must be satisfied by an applicant in order to succeed. In its consideration of these principles, the Court exercises unfettered original and discretionary jurisdiction. But the Court must not make definitive or final findings of either fact or law. See: **Stanley Kangethe Kinyanjui V Tony Ketter & 5 others**, Civil Application 31 of 2012 for these proportions.

The learned Judge ordered the dismissal of the applicant's application while allowing that of the respondent. Secondly, the applicant was ordered to appear personally before the court to show cause why he should not be punished for contempt. There is no doubt that the grounds enumerated by the applicant as being arguable are indeed not frivolous, hence our conclusion that the first limb has been satisfied.

On the negatory aspect, it should be clear from what we have said so far that although the applicant's application was dismissed the order that has aggrieved him is that directing him to appear before the Judge to show cause, a positive order.

We do not, on the other hand see how compliance with the order requiring the applicant's appearance before court to explain to the court the reasons as to why he should not be committed to civil jail can render his appeal negatory. He has a chance to explain his circumstances.

The applicant has failed to demonstrate that the intended appeal will be rendered nugatory, thereby failing to satisfy both limbs. Accordingly, this application lacks merit and is dismissed with costs.

Dated and delivered at Nairobi this 22nd day of November, 2019.

W. OUKO, (P)

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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