IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, WARSAME & KIAGE, JJ.A)

CIVIL APPLICATION NO. 254 OF 2017

BETWEEN

J G M.....APPLICANT

AND

G W G.....RESPONDENT

(An application for stay of execution of the decision/ruling of the High Court of Kenya

at Nairobi (Musyoka, J.) dated 3rd February 2017

in

HCCC No. 35 of 2008)

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RULING OF THE COURT

The applicant, **J G M** (J) and the respondent **G W G** (G), are estranged husband and wife. J married G as his second wife in 1981 and they have five grown children. On 5th August 2008, G filed an originating summons at the High Court praying for the sale of various properties as matrimonial property, and the partition of the proceeds thereof between them.

The record shows that various adjournments and missteps bedeviled the hearing of that suit but it finally commenced with G testifying on 24th April 2012 before Njagi, J in the presence of the parties and their advocates. It was, however, adjourned before she completed her testimony and fixed for further hearing on 21st June 2012.

On that date however, it was listed before G.B.M. Kariuki, J (as he then was) and Mrs. Wambugu was present for G as was Mr. Orwa for J. They informed the court that the case was part heard before Njagi, J and it was ordered to be listed before him on 5th July 2012. Further appearances before G.B.M. Kariuki, J and Njagi, J. occurred before it was fixed at the registry on 28th March 2013 for hearing on 23rd May 2013. There was no appearance for J's advocates at the fixing of the date, however, and on the date fixed it was listed before Musyoka, J who proceeded with G's adjourned testimony. Neither J nor his lawyer was present in court. At the end of that testimony, judgment was fixed for 26th September 2013 which was attended by counsel for both parties.

The judgment granted the originating summons provoking an application filed a few day later seeking to set aside the *ex parte* hearing and judgment for having proceeded without J's participation, yet it was not his intention to absent himself. It was supported by an affidavit by J sworn on 30th September 2014 in which he swore to not having been informed or otherwise had knowledge of the hearing on 23rd May 2013, and another by his advocate, Franklin Omino sworn on the same date in which he explained that the hearing date had been taken ex-parte without invitation to his firm and that even though he learnt later that a hearing notice was served on his firm, it must have been received by the secretary under protest and it was not brought to his attention or recorded in the office diary.

The learned Judge heard the setting aside motion and by the impugned ruling dated 3rd February 2017, dismissed it. J was aggrieved by that dismissal and filed a notice of appeal. In the meantime G lodged her party and party bill of costs dated 12th July 2017 seeking to be paid some neat figure of **Kshs. 23,440,937**. That bill of costs, together with the 40 point decree, led to J's application for stay of execution and for injunction pending appeal.

The motion on its face contains grounds which are a summary of the background of the application and contains averments, critical to any

application under **rule 5(2)(b)** of our Rules, that J has an arguable appeal, and that unless the prayers sought are granted, the appeal shall be rendered nugatory. J's supporting affidavit sworn on 2nd November 2017 expanded on those grounds and in particular emphasized that the proceedings leading to the Judgment were ex-parte without knowledge or chance to be heard, his former lawyers not having notified him of the date; the learned Judge *„casually dismissed?* his application to set aside the judgment; G did not contribute to the purchase of the suit properties; the matrimonial home Ruiru/Kiu Block […] is also listed for sale yet that is where the children of the marriage stay to date; some of the listed properties did not exist having been sold before G filed suit; the draft memorandum of appeal raises weighty issues to be canvassed; the learned Judge did not exercise his discretion judiciously; and that G *"has embarked on demising the suit properties"* to his utter detriment and ought to be restrained so as not to render the appeal merely academic.

In opposition to the motion G swore a replying affidavit on 15th May 2018 in which she admitted to the suit having proceeded for hearing with judgment being rendered on 26th September 2014. J filed an application to set it aside and she opposed it by a replying affidavit sworn on 28th October 2014 which she annexed. She asserted that J had "*variously failed to attend court*" as she swore in her said affidavit, "*and is also born (sic!) by the record*." She then swore that her advocates had advised her that J was trying "to stay a negative order not capable of being stayed." J has no arguable appeal as the learned Judge exercised his discretion judiciously and the application is frivolous, deserving of dismissal.

Appearing before us, **Mr. Midenda** and **Mrs. Wambugu** learned counsel for the parties reiterated the positions taken by their clients and cited authorities. Mr. Midenda denied that the judge gave a negative order and so there was nothing to stay, arguing, instead, that the dismissal of the setting aside application rendered the judgment enforceable hence the need for stay and injunction. On her part **Mrs. Wambugu** was adamant that the application was seeking to stay a dismissal order and should not be allowed. She concluded that the suit proceeded without J's participation and added that he "*had failed to attend on several occasions*" which was proof that he "*had deliberately obstructed the hearing."* She conceded, however, that his not being given a chance to appear before the judge *"is perhaps an arguable point"* to be urged on appeal. She insisted that the appeal would not be rendered nugatory as J is recourse in law was a suit against his former advocates for negligence.

We have given the application, the rival affidavits, the contending submissions and the authorities cited, due consideration. On an application for stay or execution or for an injunction pending appeal brought under **rule 5(2)(b)** of the Rules of Court, an applicant in order to succeed must show that he has an arguable appeal by which is meant an appeal that raises at least one legitimate point of grievance to be urged on appeal and which calls for a response from the respondent and a decision from the Court. It is enough that the said point is not frivolous. Next, and the applicant must convince the court on both, he needs to show that unless the application is granted, then his appeal would be rendered nugatory or will be merely academic and of no consequence the feared harm having occurred in the interim. There is a long line of authorities that address these twin principles which are now commonplace. They were aptly treated by this Court in ***STANLEY KANGETHE KINYANJUI vs. TONY KETTER & 5 OTHERS [2013]eKLR*** and we need not launch into any detailed analysis of them.

Is the intended appeal herein arguable? Most inelectutably. It is conceded that whether the learned Judge exercised his discretion correctly in dismissing J's setting aside application in the circumstances of this case is a point on which he can legitimately expect an answer from G and a decision from this Court. We note that in his brief, 5-paragraph ruling subject of the intended appeal, the learned Judge made a finding that *"the advocate chose not to inform the defendant [J] that a date had been fixed for the hearing of the matter....,"* but went on to say that a listed case as should not be taken out *"because some party has chosen to stay away."* We have no doubt that the whole question of whether a party who has not been informed of the hearing date by his advocate should be condemned unheard is one worthy of consideration by the bench that will hear the appeal. The right to be heard on a cause or defence is fundamental issue of monumental standard which cannot be wished away. The question that would ultimately be determined is whether the appellant was given an opportunity to be heard. We think such a fundamental issue raised by the appellant cannot be termed as frivolous. It is also arguable whether on the consideration of the record as a whole J was such a litigant of an unserious or obstructive character as to be undeserving of that court's setting aside discretion. Enough said.

As to the second limb, it is not disputed that the properties involved in the suit are of no mean value and represent the entirety of the parties' known properties and, arguably, more. To have them sold, as J alleges without controvert, would definitely be a big blow should it turn out they should not have been sold. Implicated is also the matrimonial home on which the parties' children are alleged by J to reside and G has not denied it. Clearly, the complaints that costs of Kshs. 23 million demanded in a matrimonial matter are exorbitant are not idle claims either.

We think that it conduces to the doing of justice that drastic, irrecoverable and irreversible consequence for litigation should best be allowed to crystallize when parties have exhausted the undoubted rights of appeal to avoid negating and rendering the success of those appeals a mockery of the judicial process.

Ultimately, we are persuaded that this is a deserving case for us to grant the interim relief sought and we allow the application. The intended appeal shall be filed within forty ***five (45)*** days of the date hereof and shall be fast-tracked for hearing. Each party is at liberty to apply.

Costs shall be in the intended appeal.

Dated and delivered at Nairobi this 27th day July, 2018.

P. N. WAKI

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JUDGE OF APPEAL

M. WARSAME

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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.

DEPUTY REGISTRAR