IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, KIAGE & M'INOTI JJ.A.)

CIVIL APPLICATION NO. NAI 94 OF 2017 (UR 71 OF 2017)

BETWEEN

D P N……..……....……APPLICANT

AND

A D C.....…....……..RESPONDENT

(Application for stay of proceedings pending the hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Muchelule, J.) dated 16th March 2017

in HCDC No. 178 of 2014)

****

RULING OF THE COURT

In the motion on notice before us taken out under ***rule 5(2) (b)*** of the rules of this Court, ***the applicant, DPN***, prays for stay of proceedings in ***High Court Divorce Cause No 178 of 2014*** pending the hearing and determination of an intended appeal against the ruling and order of the High Court ***(Muchelule, J.)*** dated 16th March 2017. By that ruling, the learned judge dismissed with costs an application by the applicant to commit ***Mr. Allan Kosgey***, ***Advocate***, to prison for a period of 6 months for alleged contempt of court. Mr. Kosgey is the advocate on record for the respondent ***Alison Dawn Chater***, both in the High Court and in this Court.

The brief background to the motion is as follows. By a judgment dated 13th February 2015, Muchelule, J. dissolved the marriage between the applicant and the respondent and made an agreement entered into by the parties on 11th June 2014, a part of the judgment, and enforceable as such. That agreement provided for among others, the custody and maintenance of the two issues of the marriage until they attained the age of majority.

By an application dated 14th December 2015, the respondent applied to commit the applicant for contempt of court for failure to honour his parental responsibilities under the agreement of 11th June 2014. For his part, the applicant, on 20th January 2016 applied for review of the judgment and stay of execution of the orders on maintenance and upkeep of the children.

On 25th February 2016 the parties appeared before Muchelule, J. who made the following order:

"1. That the applicant's (respondent's) application dated 14th December 2015 has not been personally served and therefore can't proceed.

2. That service be effected and the respondent (applicant) given 21 days to respond to it.

3. That hearing be on 14th April 2016 for both applications

4. That the parties are at liberty to exchange further affidavits."

On or about 9th March 2016 the respondent applied for leave to serve the application dated 14th December 2015 upon the applicant through substituted service. That application was granted on 11th March 2016 by ***Muigai, J.*** and on 31st March 2016 the respondent placed an advisement in the *Daily Nation* worded as follows:

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO 178 OF 2014

ADC.....PETITIONER

VERSUS

DPN.....RESPONDENT

TO DPN, NAIROBI

SUBSTITUTED SERVICE BY WAY OF ADVERSTISEMENT

UNDER ORDER 5 RULE 17 OF THE CIVIL PROCEDURE RULES, 2010

TAKE NOTICE that an application dated 14th December 2015 has been filed in the High Court of Kenya at Nairobi, being Divorce Cause No. 178 of 2014, for which orders are that you, the respondent, be held in contempt of the order of the curt dated 9th April 2015 and that you be committed to civil jail for a period of six (6) months. Service of the application upon you has been ordered by way of advertisement. A copy of the application and order dated 14th December 2015 may be obtained from the High Court of Kenya at Nairobi at or the petitioner's advocates' office.

AND FURTHER take notice that unless you file a response within the next 7 days, this matter will proceed to hearing on 14th April 2016 and judgment made your absence notwithstanding.

DATED at Nairobi this 30th March 2016

KOSGEY & MASESE

ADVOCATES FOR THE PETITIONER

DRAWN & FILED BY

KOSGEY & MASESE ADVOCATES

HAZINA TOWERS, 19TH FLOOR

MONROVIA STREET/UTALII LN

P.O. BOX 30317-00100

NAIROBI

That advertisement is what in the opinion of the appellant constitutes contempt of court by the respondent's advocate. Before the High Court, the applicant contended in the application for committal of the respondent's advocate for contempt, that the court had ordered the respondent's advocate to serve him personally with the application; that the advocate had disobeyed that order; that the applicant's advocate had undertaken to produce the applicant for personal service; that no order authorizing substituted service had been issued; that the respondent's advocate had advertised a non-existent order with intent to harass and intimidate the applicant; that the advertisement was misleading in stating that the court had ordered committal of the applicant to civil jail for 6 months; that the respondent's advocate had also illegally disclosed in the advertisement the full names of the parties in the divorce cause; and that in all, the said advocate had eroded the authority of the court.

In the ruling that the applicant intends to impugn in his intended appeal, the learned judge held that the substituted service was authorized by the court; that read as a whole the advertisement did not mean that the applicant had already been committed to civil jail for 6 months as he claimed; and that there was no evidence that the respondent's advocate was in contempt of court.

Before us, ***Ms. Githinji***, learned counsel for the applicant rehashed the background we have set out above and urged us to order stay of proceedings pending the hearing and determination of the intended appeal. She submitted that the learned judge erred by ignoring the applicant's affidavit; by failing to consider all the issues raised in the application; and by ignoring the fact that the application raised serious issues of contempt and dishonourable behaviour by counsel. The applicant also contended that unless we stay further proceedings, the High Court will hear the dispute and if the appeal succeeds, it will be rendered nugatory.

Mr. Kosgey, learned counsel for the respondent opposed the application, submitting that the learned judge had not committed any error and that the intended appeal is not arguable. He added that the High Court properly found that there was no contempt of court because the advertisement was authorised by a court order. He also argued that the application was intended to thwart the proceedings in the High Court to enable the applicant avoid his obligations to maintain his children. It was further contended for the respondent that even if the intended appeal were to succeed, the same would not be rendered nugatory, as there are adequate remedies where contempt of court is proved. Lastly the respondent submitted that the litigation in the High Court involves the welfare of young children and as such we should not stay proceedings as urged by the applicant.

We have carefully considered the application and the submissions by learned counsel. To entitle the applicant to an order of stay of execution, he has to satisfy us that he has an arguable appeal and that unless we stay the proceedings in the High Court, his intended appeal will be rendered nugatory if it eventually succeeds. (See ***Jaribu Holdings Ltd v. Kenya Commercial Bank Ltd, CA. No. 314 of 2007).*** The applicant must satisfy us on both those requirements; it is not enough to satisfy only one of them. (See ***Republic v. Kenya Anti-Corruption Commission & 2 Others [2009] KLR 31).*** An arguable appeal is not one that must necessarily succeed upon the hearing of the intended appeal, but is one that raises even a single *bona fide* issue that deserves to be considered by this Court. (See ***Kenya Railways Corporation v. Edermann Properties Ltd, CA No. Nai. 176 of 2012).***

The applicant submits that he intends to demonstrate that the High Court erred by failing to consider all the issues that he placed before it, including affidavit evidence and that had it done so, it would have concluded that the respondent's counsel was in contempt of court. We are persuaded that the intended appeal is arguable in the sense we have explained above and will not say more, for it is for the bench that ultimately hears the appeal to determine whether indeed the appeal has merit or not. (See ***Central Bank of***

Kenya Deposit Protection Fund Board v. Uhuru Highway Development Ltd & Others, CA. No. 95 of

1999).

Will the appeal be rendered nugatory if it succeeds absent an order of stay of proceedings? We do not think so. If the proceedings before the High Court are concluded and this Court finds that the learned judge was in error, it will either remit the matter back to the High Court for proper hearing or find the respondent's advocate was indeed in contempt of court. In such an eventuality, the advocate will either have to be committed to jail or sentenced to a fine. It must be emphasized that the orders that the applicant has sought in the High Court are directed at the respondent's advocate personally and not the respondent.

What has, however, weighed heavily in our minds, is the fact that the proceedings in the High Court that the applicant seeks to stay involve the maintenance and welfare of two children. The respondent has deposed that the applicant has failed to provide for them in terms of the agreement between the parties, which was adopted as part of the judgment of the High Court. As a result she has applied to the High Court to enforce the maintenance orders. The applicant has not controverted those depositions nor has he disputed that he has not maintained the children as per the judgment of the High Court. Staying the proceedings before the High Court will therefore mean that the two children will continue without being provided for. ***Article 53(2***) of the ***Constitution*** declares in very express terms that a child's best interests are of paramount importance in every matter concerning the child. (See also ***section 4(2) Children's Act, Cap 141).***

This Court, where circumstances demand, will weight the respective hardships that each party will be exposed to before issuing orders under rule 5(2) (b). (See ***Oraro & Rachier Advocates v. Cooperative Bank of Kenya Ltd (1999) 1 EA 236*** and ***E. Muriu Kamau & another v National Bank of Kenya Ltd CA. 258 of 2009).*** In this case even such consideration weighs heavily in favour of refusing to stay the proceedings before the High Court. Taking all the forgoing into account, we do not find any merit in this application and the same is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 29th day of September, 2017

P. N. WAKI

……

JUDGE OF APPEAL

P. O. KIAGE

……..

JUDGE OF APPEAL

K. M'INOTI

…….

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR