IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.

CIVIL APPLICATION NO. 61 OF 2015 (UR 51/15)

BETWEEN

N B R……..…....……..APPLICANT

AND

J O……...……..……RESPONDENT

(An application for stay of execution, pending the hearing and determination of an intended appeal against the ruling and order of the High Court of Kenya at Mombasa, (Odero J.) dated 18th December 2015

in

HCDC No 25 of 2014)

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RULING OF THE COURT

The applicant, ***N B R***, having duly filed a notice of appeal against the order and ruling of the High Court ***(Odero, J.)***, dated 18th December 2015 which ordered him to pay with effect from November 2013, a monthly sum of Kshs 100,000.00 to the respondent, ***J O*** as maintenance *pendente lite*, is before us seeking stay of execution of that order pending the hearing and determination of his intended appeal. The respondent contests the application contending that the intended appeal is not arguable, but as an alternative she has deposed in her replying affidavit that she is not averse to receiving half of the amount awarded by the High Court and the balance being deposited in an interest earning account in the joint names of the advocates for the parties, pending the hearing and determination of the intended appeal.

By way of background, the applicant and the respondent were married at the Attorney General's Office, Mombasa on 7th June 2012. Their only issue, SAR, a daughter, was born on 29th December 2012. Barely one year later, the relationship hit matrimonial doldrums and the respondent moved out of the matrimonial home with SAR. On 26th February 2014, the applicant filed a suit in the Children's Court, Tononoka, seeking among others, custody and access to the child. On 17th April 2014 the parties recorded a consent order in which they agreed that the respondent would have physical custody of SAR, while the applicant would have unhindered access to her on specified days in a week. In addition the parties agreed that the applicant would pay to the respondent Kshs. 175,000/-per month for maintenance and upkeep, from which Kshs 65,000/- was to be expended in payment of rent. We understand that arrangement is still

subsisting.

On 3rd April 2014 the applicant filed a petition for divorce in the High Court, having obtained leave to apply for dissolution of the marriage before the expiry of the mandatory three years. On 13th May 2014, the respondent applied in the divorce cause for alimony *pendente lite* of Kshs 1 million per month. Upon hearing the parties, the learned judge awarded the respondent Kshs 100,000.00 per month over and above the Kshs 175,000 per month that the applicant has been paying to the respondent vide the consent order in the Children's Court. It is the execution of that order that the applicant seeks to stay in the application now before us brought under rule 5(2)(b) of the Court of Appeal Rules.

The grounds upon which the application is based, as set out in the applicant's supporting affidavit and supplementary affidavit sworn respectively on 26th October 2015 and 23rd November 2015 and elaborated by his learned Counsel, ***Ms. Wasuna*** are that the applicant is unable to pay the total amount of Kshs 275,000 awarded to the respondent by both the High Court and the Children's Court; that the High Court had failed to consider adequately or at all that pursuant to a prenuptial agreement the applicant had already paid to the applicant Kshs 6 million; that he had also deposited another Kshs 6 million in a fixed deposit account for the benefit of SAR; and that the applicant was in any event responsible for paying SAR's school fees, the respondent's and SAR's medical covers, the respondent's life insurance premiums, and the respondent's car insurance premiums, over and above payment of Kshs 175,000 per month.

Learned counsel submitted that in the circumstances, the intended appeal was arguable because High Court had failed to consider relevant factors and had awarded a manifestly high amount for alimony. It was further argued that the learned judge had failed to distinguish between the Kshs 6 million paid to the respondent and the separate Kshs 6 million placed in a fixed deposit account for SAR and erroneously treated the Kshs 12 million as 6 million only.

As to whether the intended appeal would be rendered nugatory absent an order for stay of execution, it was submitted that the applicant, who was unable to pay the amount awarded to the respondent was likely to be destroyed financially and if the order of stay was not granted and his appeal ultimately was successful, it would not help him in any way.

The respondent opposed the application through her replying affidavit sworn 16th November 2015. ***Ms. Okata***, her learned counsel, put forward some rather novel propositions in opposition to the application, among them that in the absence of an existing appeal already filed in this Court, the Court has no jurisdiction to entertain the application for stay of execution and that the application was fatally defective because the affidavit in support of the certificate of urgency was deposed by the applicant's advocate rather than the applicant himself and without any evidence of authority in that regard. Learned counsel further submitted that the parties had already initiated negotiations and therefore the application for stay of execution was unnecessary and uncalled for. Due to her financial constraints, counsel stated, the applicant had accepted payment of Kshs 200,000 per month because the applicant had defaulted in payment of the Kshs 100,000/- per month ordered by the court and had kept the respondent from benefitting from a company where both were directors.

The respondent concluded by submitting that should the application for stay of execution be granted, it ought to be on terms that she is paid half of the amount ordered by the High Court and the balance deposited in an interest earning account in the joint names of the parties' advocates.

We have duly considered this application and the submissions by learned counsel. It need not be belaboured that in an application for stay of execution under rule 5(2)(b) of the Court of Appeal Rules, the applicant needs to demonstrate to the court that he or she has an arguable appeal and that if execution is not stayed, the intended appeal, if successful will be rendered nugatory. (See ***EXCLUSIVE ESTATES LTD. V. KENYA POSTS & TELECOMMUNICATIONS CORPORATION & ANOTHER*** **(2005) 1 EA 53).**

Before we address those two principle considerations, it is apt to first dispose of the objections raised by

Ms. Okata. There is no basis for the submission that before this Court can entertain an application under rule 5(2)(b), the applicant must have an existing appeal before this Court. Under the Rules of this Court, an appeal includes an intended appeal, which is mounted by lodging a notice of appeal. All that an applicant is obliged to show is that he has lodged a notice of appeal. (See ***SAFARICOM LTD V. OCEAN VIEW BEACH HOTEL LTD & 2 OTHERS, CA. NO. 327 OF 2009, per Omolo, JA).***

Secondly, as this Court stated in ***PATTNI V. ALI & 2 OTHERS, CA NO 354 OF 2004 (UR 183/04)***, ordinarily an advocate should refrain from swearing affidavits on contentious matters, particularly where he may have to be subjected to cross examination. However, there is no bar to an advocate swearing an affidavit on formal and non-contentious matters. (See ***Rule 9*** of the ***Advocates (Practice) Rules***). Indeed ***Rule 47(1)*** of the Court of Appeal Rules requires, as regards urgent applications, a certificate of urgency signed by the applicant or his advocate supported by an affidavit setting forth the basis of urgency. In this case the affidavit by the advocate was in respect to the issue of urgency only while the substantive motion was supported by an affidavit sworn by the applicant. Clearly the objections have no merit.

On the merits of the application, we have no hesitation in holding that the intended appeal is arguable. An arguable appeal, it has been stated time and again, is not one, which must necessarily succeed, but one, which raises a bona fide point, that deserves to be heard by this Court. (See ***KENYA TEA GROWERS ASSOCIATION & ANOTHER V. KENYA PLANTERS & AGRICULTURAL WORKERS UNION, CA. NO. NAI. 72 OF 2001***. There is a valid issue whether the learned judge misapprehended the evidence by concluding that the applicant had only deposited Kshs 6 million for SAR. There is an additional issue whether had the learned judge taken that into account, she would have made the award of alimony that she did.

On whether the intended appeal will be rendered nugatory should it succeed in the absence of an order of stay of execution, we take note of the applicants assertions, which are not seriously controverted that he is unable to pay Kshs 275,000 per month in addition to all the other payments that he is making in support of the respondent and SAR. The respondent does not dispute that in addition to paying her Kshs 175,000 per month the applicant also pays SAR's school fees, medical cover, and her insurance premium. A successful appeal will not restore the applicant to his present position if pending the appeal he is ruined financially.

We also take note of the fact that, as an alternative, the respondent is willing to accept payment of half of the amount awarded by the High Court pending the hearing and determination of the intended appeal, but subject to deposit of the balance in an interest earning account. What is involved in this application however is alimony *pendente lite*, which is neither intended to enrich one of the parties nor to impoverish the other. Its purpose is to afford the respondent, on interim basis, reasonable and decent support, commensurate with her standard of living, pending the hearing and determination of the divorce cause.

Having carefully considered this matter, we are persuaded that a conditional order for stay of execution pending the hearing and determination of the intended appeal is merited. We accordingly direct that in lieu of Kshs 100,000 per month, the applicant shall pay to the respondent Kshs 50,000 per month. The applicant shall continue to pay to the respondent Kshs 175,000/- pursuant to the order recorded in the Children's Court. It is so ordered.

Dated and delivered at Mombasa this 26th day of February, 2016

ASIKE MAKHANDIA

…….

JUDGE OF APPEAL

W. OUKO

…….

JUDGE OF APPEAL

K. M'INOTI

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR