IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KOOME & OKWENGU, JJ.A)

CIVIL APPLICATION NO. NAI 185 OF 2015 (UR 150/2015)

BETWEEN

P K M…….....APPLICANT

VERSES

R P M..... RESPONDENT

(Being an application for injunction pending the hearing and determination of an appeal from the Judgment of the High Court of Kenya at Nairobi (Kimaru, J.) dated 10th March, 2015 in

H.C. Divorce Cause No. 154 of 2008)

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RULING OF THE COURT

This is an application under **Rule 5(2)(b)** Court of Appeal Rules for an order that the execution of the judgment and decree of the High Court (**Kimaru, J**.) dated 10th

March, 2015 be stayed pending the hearing and determination of the appeal therefrom. At the hearing of the application, **Tom Ojienda SC**, the learned counsel for the applicant intimated that the applicant lodged ***Civil Appeal No. 166 of 2015*** on the same day he lodged the present application.

On or about 24th December 2008, **R P M** the respondent herein lodged a petition for divorce, custody of the two children of marriage and maintenance against the applicant in the High Court. By the Petition, she sought monthly maintenance in the sum of USD 6,000.00 or its equivalent in Kenya shillings.

On an application by the respondent for orders, *inter alia*, interim custody of the two children of marriage, monthly maintenance of the respondent in the sum of Kshs. 600,000, school fees and support for the children, the High Court (**Nambuye, J.** – *as she then was*) on 24th May 2010, granted joint custody of the two children of the marriage to the applicant and respondent and care and control to the respondent; monthly maintenance of Kshs. 250,000 for the respondent and children during pendency of placing the children in a local boarding facility and Kshs. 150,000 maintenance for the respondent after the children are placed in a local boarding facility. The order that the children study in local boarding facilities was subsequently varied by Nambuye J. on the application of the respondent, the court ordering

that the two children be relocated to educational facilities overseas with the applicant paying for their education and living expenses. That order was complied with by the applicant, for the court made a finding in the impugned judgment thus:

"The children are currently studying in high cost universities in the United Kingdom. One is studying in Oxford while the other is studying at the University of Aberdeen. The children live off campus in residences rented for them by the respondent (applicant herein)".

By the impugned judgment dated the 10th March 2015, High Court granted a decree nisi dissolving the marriage, monthly maintenance for the respondent in the sum of Kshs. 250,000/-, for a period of ten years to be paid in lump sum of shs. 30,000,000/-within ninety (90) days. In addition, the applicant was ordered to provide a house for the respondent in up market areas of Nairobi specified in the judgment or in any other up market area of Nairobi within ninety days (90) and in default, pay Kshs. 60,000,000/-to the respondent. Lastly, the applicant was ordered to pay the costs of the petition.

The application is supported by the affidavit of the applicant and several documents annexed to the affidavit. The respondent opposed the application and has filed a replying affidavit and annexed several documents. The applicant has also filed a supplementary affidavit and a further supplementary affidavit. The parties have also filed respective written submissions and bundles of authorities. At the hearing, the respective counsel for the parties also made oral submissions.

The discretion of the Court under Rule 5(2)(b) to grant or refuse a stay of execution, as a general rule, ought to be exercised in a way that would not render an appeal, if successful, nugatory. (**Butt v Rent Restriction Tribunal [1982] KLR 417**). The purpose of an application for a stay of execution is to preserve the subject matter in dispute so that the rights of an appellant, who is exercising his undoubted right of appeal are safeguarded and the appeal, if successful, is not rendered nugatory (**Scott & Another v Kago & 2 others [1987] KLR 503, J.K. Industries v Kenya Commercial Bank Limited & Another [1987] KLR 506)**.

The guiding principles on which Court exercises its unfettered discretion are first, that the applicant must show that he has an arguable appeal and, second, that the appeal if successful, would be rendered nugatory (**Githunguri v Jimba Credit Corporation Limited (No. 2 [1988] KLR 838)**. Although the discretion under Rule 5(2)(b) is at large substantial loss, is the cornerstone of the jurisdiction and has to be prevented by preserving status quo because such loss would render an appeal nugatory. **Mukuma v Abuogs *[1988] KLR 646).***

The applicant has in the application and in the draft memorandum of appeal enumerated several grounds of appeal which broadly challenge the factual and legal basis of the award of maintenance. The applicant states that those grounds of appeal are arguable. On the other hand, the respondent vehemently contends that the applicant has no arguable appeal for the reasons stated in the written submissions.

The jurisdiction of the Court in a 5(2)(b), application should be clearly understood. As stated by this Court on many occasions, an arguable appeal does not mean an appeal which would ultimately succeed. The authorities show that an applicant is only required to show that the grounds raise a serious question of fact or law which can go either way for consideration by the Court on appeal. It is not the function of the Court when considering a 5(2)(b) application, to evaluate the evidence and make findings on the contested issues of fact or law. That is the exclusive function of the bench that would ultimately hear the appeal.

A major complaint disclosed by the grounds of appeal is in essence that, the trial court failed to consider the applicant's financial capacity and without any iota of evidence determined his financial means on pure speculation. As a result the applicant complains that condemning him to pay a whooping Kshs. 90,000,000/- while continuing to meet the educational and living expenses of the two children abroad is vindictive.

The impugned judgment shows that no concrete evidence of the applicant's wealth was laid before the

trial court. The court made a finding that the applicant had made every effort to conceal all his properties through limited liability companies which he incorporated for purposes of transferring some of his properties to his nominees and close relatives. Further, the court clearly indicated that the final order of maintenance would be made on the basis that the applicant owns substantial properties and income which he deliberately failed to disclose. Thus the factual basis of the award – as to the financial capacity of the applicant is a serious question for consideration by the Court on appeal which renders the appeal arguable.

The grounds of appeal also fault the trial court for applying archaic common law doctrines on award of maintenance that are no longer good law and in failing to apply the modern law as enshrined in **Article 45(3), 53(1)(e)** of the **Kenya Constitution, 2010** and in the **Marriage Act No. 4 of 2014**. In particular, the applicant faults the trial court for not ordering the respondent to maintain herself pursuant to **Article 45(3)** which according to him gives equal rights to spouses. The issue was raised at the trial and the trial court framed the question thus:

"whether an order that the respondent pays maintenance to the petitioner as well as the expenses of the issues of the marriage would offend the principles of equality and freedom from discrimination and that of equal responsibility of and contribution by parties to a marriage."

The trial court construed Article 45(3) to mean that while parties to a marriage are equal bearer of rights, it is often the case that their economic and other circumstances are markedly dissimilar and it would be misapprehension of the law to insist upon identical treatment of parties to a marriage.

The respondent contends in this application that he did not offend the provisions of Article 45(3) and that equality refers to both spouses being equal before the law and not their financial capacity. Local case law was cited in the trial court to the effect that under Article 45(3) of the Constitution, a wife has a duty to support and maintain herself no less than the husband has a duty to maintain himself.

There is thus a difference of opinion on the construction and application of Article 45(3) to spouses in relation to maintenance orders, which renders the appeal arguable and which should properly be determined in the appeal.

The memorandum of appeal also raises other issues including the propriety of award of maintenance for 10 years without considering the probability that the respondent would remarry and also the propriety of a lump sum award.

The respondent has vehemently contended that the appeal against the award of a lump sum of shs. 30,000,000/- and the award of shs. 60,000,000 in lieu of providing a house is not arguable in light of the evidence which was before the trial court which,

M/s Judy Thongori, the respondent's learned counsel, has referred to. Some of the factual evidence referred to is contested by the applicant. As already pointed out, the function to evaluate the evidence and resolve contested issues of fact rests with the court which will ultimately hear the appeal.

On the whole, we are satisfied that the appeal is arguable and is not frivolous.

If the application is not allowed and the decree is satisfied, the appeal if successful, and which is already filed, would be rendered futile thereby occasioning the applicant substantial loss as there is no real likelihood that the money would be recoverable or the house, if bought for the respondent, will not have changed hands.

The applicant has agreed to continue paying shs. 150,000 monthly maintenance as ordered by Nambuye, J. on 24th May 2010 pending the determination of the appeal. In the circumstances, of this case, that would ameliorate the hardship that the respondent may be undergoing.

For the foregoing reasons, the application is allowed. The execution of the decree of the High Court is

stayed in terms of prayer 2 of Notice of Motion dated 1st July 2015 on condition that the applicant pays to the respondent Shs. 150,000/- per month as maintenance on the 4th of each subsequent month with effect from 4th August 2015 as ordered by this Court on 30th July 2015 until the determination of the appeal.

The costs of the application shall be costs in the appeal

Dated and delivered at Nairobi this 22nd day of February, 2016.

E. M. GITHINJI

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

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