



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, G.B.M. KARIUKI, MWILU J.J.A.)

CIVIL APPLICATION NO. NAI 364 OF 2014

BETWEEN

R K K..... APPELLANT/APPLICANT

AND

M W K 1ST RESPONDENT

C N 2ND RESPONDENT

S G 3RD RESPONDENT

(t/a Particulars withheld)

(Being an application for interim Orders and stay of execution of the decree pending the hearing and determination of an appeal against the Order by the High Court of Kenya, Nairobi (Ougo, J) delivered on 22nd day of September 2014

in

H.C.C.C. NO. 122 of 2013)

RULING OF THE COURT

APPLICATION

1. On 20th March 2015, R K K, the applicant, made an application to this court by way of a notice of motion dated 19th March 2015 supported by his own affidavit. The application sought the following orders against M W K, C N and *Particulars withheld* the 1st, 2nd and 3rd respondents respectively –

- a. ***(spent)***
- b. ***(spent)***

- c. *That pending the hearing and determination of the appeal herein, this Honourable Court be pleased to order stay of execution of the orders restraining the Applicant from entering or interfering the running of the two schools, Particulars withheld and their assets and from interfering with the Respondents peace.*
- d. *(spent)*
- e. *(spent)*
- f. *That pending the hearing and determination of the appeal herein this Honourable Court be pleased to issue an order directing all the school customers of particulars withheld to pay school fees and related expenses in the previous school account used by the school where the Applicant and the 1st respondent were both signatories or in the alternative a manager be appointed.*
- g. *That pending the hearing and determination of the appeal herein the respondents be ordered to pay the Applicant his salary of Ksh.300,000/= per term with effect from 2nd term, 2015.*
- h. *That this Honourable court be pleased to grant any such further directions and orders as it may deem necessary.*
- i. *That the costs of this application be in the cause.*

Background

2. The background to the application is as follows. The applicant and the 1st respondent lived together as a couple. The 2nd and 3rd respondents are daughters of the 1st respondent. The application shows that while the applicant and the 1st respondent were cohabiting, the 1st respondent invited the applicant to participate in her school business. But later, things turned awry. On 18th April 2013, the 1st, 2nd and 3rd respondents instituted in the High Court **suit No.122 of 2013** against the applicant alleging that the latter had fraudulently transferred to his name motor vehicles belonging to the schools and wrongfully interfered with the assets, workers and management of the *particulars withheld* which are the property of the respondents. The respondents sought against the applicant orders to nullify the transfers of the motor vehicles *Particulars withheld*, and *particulars withheld* to the applicant's name and orders to restrain the applicant from transferring other motor vehicles referred to in the plaint to his name. The respondents also sought orders to restrain the applicant from interfering with the workers and management and assets of the said schools or with the 1st respondent or threatening the latter or trespassing on her person.
3. Following the application made to the High Court in the said suit by the respondents against the applicant seeking interim orders analogous to the prayers in the plaint, the High Court in its ruling dated 22nd September 2015 gave interim orders against the applicant which are the subject of the applicant's appeal to this court whose record was filed on 18th December 2014.

Pending the hearing of the appeal, the applicant presented to this Court on 20th March 2015 the aforementioned notice of motion seeking the aforesaid orders.

APPLICATION

4. When the application came up for hearing, learned counsel **Ms Lilian Machio** appeared for the applicant and learned counsel **Mr. D. Anzala** appeared for the 1st respondent. Mr. Gatheru Gathemia appeared for the 3rd and 4th respondents. The applicant in addition to the affidavit in support of the motion filed a further affidavit on 19th May 2015 and a list of authorities while the

1st respondent filed a replying affidavit on 23rd April 2015 and a list of authorities on 19th May 2015. The 3rd and 4th respondents only filed a statement of grounds of opposition.

5. The said notice of motion (hereinafter referred to as “the application”) is premised on rule 5 (2)(b) of the Rules of this Court and is made in the appeal by the applicant.

6. Ms Machio urged us to grant the orders sought in the application on the grounds that the applicant has an arguable appeal and that unless the orders are granted, the appeal, if successful, shall become nugatory. It was Ms Machio’s submission that the learned Judge of the High Court (Ougo J) contradicted herself because, on the one hand, she held that conclusive findings can only be made after adduction of evidence during the trial while on the other hand she granted the interim injunctive orders in absence of such evidence. It was counsel’s view that the orders issued by the High Court did not protect the interest of the applicant in relation to the school, its income, and developments. In counsel’s view, the applicant was locked out. She contended that her client had discovered that school income was being diverted to a bank account unknown to the applicant and that the 1st respondent’s averment that the money was used to pay loans owed by the school was not supported by evidence. Counsel urged the court that the school business was a partnership and that the 1st respondent was the only one involved in managing the business and hence there was need to protect the interest of the applicant who was a signatory to the bank accounts, a fact, in counsel’s view, that renders untenable the 1st respondent’s allegation of fraud on the part of the applicant. It was the submission of the applicant’s counsel that the withdrawal by the applicant of Shs.6 million from the business bank account on 23rd April 2008 was with the knowledge of the 1st respondent. Counsel urged us to allow the application and to grant the orders sought. She placed reliance on the averments of the applicant contained in the latter’s affidavits.

7. In reply, learned counsel **Mr. Anzala** relied on the 1st respondent’s affidavit and the authorities in the 1st respondent’s list of authorities. It was counsel’s contention that the prayers sought in the application by the applicant cannot be granted under rule 5(2)(b). Prayer (c) of the application, he said, was for stay of a restraining order which lacked positivity and was not capable of being executed. Prayers (f) and (g) of the application sought a mandatory injunction as they seek to direct the doing of things in spite of the fact that there is no provision for grant of mandatory injunction under rule 5(2)(b) of this Court’s Rules. In counsel’s view, the appeal is not arguable. He pointed out that there is no allegation that there is waste of partnership properties or mismanagement of the business. He further submitted that the 1st respondent secured in the High Court the orders appealed against so as to preserve the partnership business and property. He hastened to point out that the applicant wrongfully took the logbooks of the school motor vehicles as he moved out and that there is apprehension that he might sell them. Already, said counsel, it has been admitted that the applicant has transferred one motor vehicle from the name of Mary Happy School. Counsel wondered why the orders given by the High Court should be stayed when they seek to benefit all the parties to the partnership business. In counsel’s view, the orders sought by the applicant are designed to pre-empt the litigation in the High Court. He urged us to dismiss the application. In retort, Mrs. Machio contended that the appeal is arguable and the orders sought are necessary to stop injustice.

8. We have perused the application and the affidavits filed by the parties.

We have also given due consideration to the rival submissions made by counsel for the parties. The application is predicated on rule 5(2)(b) of this court’s Rules. Under the rule, where an appeal has been filed or a notice of appeal has been duly given manifesting intention to appeal, this court has jurisdiction in civil proceedings to order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just. The court has developed principles to guide it in the exercise of its discretionary jurisdiction under rule 5(2)(b). These principles are designed to balance two parallel propositions, **first**, that a successful litigant should not be deprived of the fruits of a judgment in his favour without just cause and **secondly** that a litigant who is aggrieved by a decision should not be deprived of his right to challenge the impugned decision to the higher court.

In **Butt v. Rent Restriction Tribunal** this court held that the power to grant or refuse an application under rule 5(2)(b) (supra) is discretionary and in exercising it the Court should consider the special circumstances of the case and unique requirements; further, that the discretion should be exercised in such away as not to prevent an appeal; that if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the Judge's discretion; that a judge should not refuse to grant stay where there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.

9. These principles require that an applicant under rule 5(2)(b) does satisfy the Court first that he has an arguable appeal by showing that the appeal is not frivolous and that there are triable issues. It is now settled that an applicant need not demonstrate a litany of arguable points. It is sufficient even if there be a solitary arguable point. It has been held by this Court in many decisions that in determining whether the appeal is arguable, the Court will advisedly avoid delving into the merits of the appeal to eschew prejudicing the appeal or intended appeal. This Court has repeatedly held that an arguable appeal is not necessarily one that is bound to succeed. It is sufficient that the applicant has an appeal that is arguable even if it be on a single point of law.
10. Secondly, an applicant must satisfy the Court that if the order sought is not granted, the appeal, if successful, shall be rendered nugatory. In short that the success of the appeal would be rendered Pyrrhic victory if the order is not granted.

11 . In the instant application, the memorandum of appeal filed by the applicant shows that there are issues for consideration and determination by the Court which include the question whether the learned Judge applied the correct principles and whether she took into account the relevant considerations. As to whether the appeal, if successful, shall be rendered nugatory, the injunction against the applicant restrains the latter from transferring to a third party the title to the motor vehicles referred to in the order. If we were to stay that order as prayed by the applicant, the effect would be to defeat the substratum of the pending suit in the High Court as the applicant would be handed a carte blanche in relation to the vehicles whose ownership is the subject of the dispute in the suit pending in the High Court.

As regards the order restraining the applicant from interfering with the schools or the 1st respondent, the issue of ownership is a moot point and is subject to determination. While we would not wish to delve into issues that touch on the merits of the appeal at this stage, we observe that while the 1st respondent alleges that the introduction of the applicant's name into the business was gratuitous, the latter does not show that he contributed to the school business or ever managed the schools as one would expect of a partner who has put in some investment. We also observe that the relationship obtaining between the applicant and the 1st respondent at the material time appears to be that of a couple in cohabitation. It is clear to us that the suit was brought by the 1st respondent and that the applicant did not raise a counter-claim. His grievance is that the interim orders granted to the respondent which he has appealed against have inhibited him from disposing of the schools' motor vehicles and from accessing the school and the workers. If the applicant succeeds in the appeal, the vehicles shall still be there as their transfer has been inhibited by a court order. As regards the schools, the appellant has not made any allegations alleging their mismanagement. If the appellant establishes his claim, the business shall still be available to the parties. At any rate, if during the pendency of the appeal any impropriety in management of the business is ascertained, a party is always at liberty to apply.

12. In the result, although the appeal is arguable, it will not, if successful, be rendered nugatory if stay is not granted as prayed. We are satisfied that on the peculiar facts of this case, the interest of justice will be better served by maintaining the orders appealed from, pending the determination of the appeal which will not be rendered nugatory if stay is not granted.

13. Accordingly, we decline to allow the application which we hereby dismiss with costs to the respondents.

Dated and delivered this 22nd day of April 2016.

J. W. MWERA

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JUDGE OF APPEAL

G.B.M. KARIUKI SC

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR