IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPLICATION NO. 31 OF 2015 (UR 29 OF 2015)

BETWEEN

A B……..…….…....1ST APPLICANT

H B……...…2ND APPLICANT

AND

R B……...…RESPONDENT

(Being an application for stay of execution and stay of further proceedings pending the filing, hearing and determination of an intended appeal against the Ruling of the High Court of Kenya at Mombasa (Muriithi, J.) dated 15th June, 2015

in

H.C.C. No. 8 of 2014 (O.S))

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RULING OF THE COURT

If there is a lesson to be learned from these proceedings so far, it is the need for courts to be sensitive to the realities of a case, and to issue orders which are efficacious, practicable, unambiguous and enforceable. Courts should not issue ambiguous orders under the guise of taking a middle ground so as to please all the parties to the dispute, more so, when the dispute is acrimonious as this one.

That said, there is a common thread running through this application with regards to the parties. They are all connected to **S P B** (*deceased*). From 1983 to 2006 or thereabouts, the 1st applicant had been married to the deceased. Thereafter they separated and it was not until the month of Ramadhan of 2014 that according to the 1st applicant they reconciled and she moved back and resumed cohabitation with the deceased in a property known as **Mombasa [Particulars withheld] Road Mombasa** "*the suit premises*". However, from the documents on record, it is not possible to tell when exactly the 1st applicant moved back onto the suit premises or when the alleged reconciliation took place. Prior to the separation, their marriage had been blessed with an issue, the 2nd applicant. During the period of separation, the deceased got to know the respondent whom she courted and eventually married on 13th June, 2009 in accordance with Muslim rites. Prior to this, however, he had intermittently married and

divorced other women in quick succession. This time around, his marriage to the respondent did not suffer the same ignominy. It lasted until he passed on and was blessed with two issues, **TSB** and **ASB** aged 5 and 3 years respectively.

All was peaceful until about 11th July, 2014 when the deceased was shot and killed in Changamwe area of Mombasa while driving to his offices along Lumumba Road from Moi International Airport Mombasa, where he had picked the 2nd applicant. By then the respondent and the two issues of the marriage were holidaying in Germany. Barely two months after the unfortunate demise, and burial of the deceased, things came to a head and it became apparently impossible for the parties to reside in the suit premises as had been the case in the past. According to the respondent, soon after the death of the deceased, the 2nd applicant brought onto the suit premises the 1st applicant from where she had been accommodated by the deceased following a consent order recorded between them in the several suits lodged by the 1st applicant against the deceased regarding the suit premises, their marriage, as well as the companies in which they were directors. The respondent alleges that the 2nd applicant took the action under the guise that the 1st applicant had just been diagnosed with terminal illness and therefore needed to take close care of her from the suit premises. According to her, no sooner had she arrived than the applicants together with 2nd applicant's wife demanded that the respondent vacates the suit premises permanently under all manner of threats. The respondent reported the threats to Nyali Police Station severally without success. Eventually, on 6th September, 2014, the respondent contends that as she returned from the police station after filing yet another report in the company of her minor children, the security guard refused to open the gate for her to get into the suit premises. This was followed by the applicants dumping her personal effects at her mother's house in Nyali where she, together with her minors retreated, and where they have since been residing.

But according to the applicants, the respondent on her own volition opted to move out of the suit premises barely two months after demise of the deceased claiming it was impossible for them to stay together as a family. Prior to this she had engaged in callous acts which demonstrated her desire not to live with them and there was nothing therefore they could do. They were of the view that given the foregoing, staying together would only present hardship to each of them and it was only fair and just that she continues to live wherever she found peace and personal satisfaction.

This state of affairs then compelled the respondent to take out an originating summons ("**O.S")** on 8th September, 2014, in the High Court of Kenya at Mombasa in which she sought answers to three questions:-

i. Whether the suit premises was the matrimonial home of the deceased and respondent for purposes of the Matrimonial Property Act, 2013;
ii. Whether the suit premises, household goods and effects therein were matrimonial property for purposes of the same Act; and,
iii. Whether the respondent can be lawfully evicted from the suit premises by the applicants as they had done in the absence of a court order or decree.

Anticipating that the questions would be finally answered in her favour, she sought several declarations in that regard and also an order of injunction to restrain the applicants from removing from the suit premises her household goods and effects and or herself and her children, or in any manner interfering with or undermining her quiet and peaceful enjoyment of the suit premises.

Contemporaneous with the O.S., the respondent took out a chamber summons in which she mainly sought two prayers:-

i. An injunction to restrain the applicants from dealing in, entering, occupying, remaining upon, removing household goods and personal effects of the respondent and her children from the suit premises, pending the hearing and determination of the O.S. and,
ii. In the event that the applicants had evicted her, an order for the applicants to deliver to her the suit premises with vacant possession.

In support of and in opposition to the application, parties simply reiterated what we have already stated above. Suffice to add that both parties claimed that they knew of no other home than the suit premises and therefore each was entitled to reside therein as a matter of right. That their relationship nonetheless was so poisoned that it was well-nigh impossible for them to reside under the same roof.

These were the scenarios that were presented before **Muriithi, J.** In a ruling delivered on 15th June, 2015, he disposed of the application thus:-

> *"(29). Accordingly, for the reasons set out above, the plaintiff's notice of motion (sic) is granted upon terms as follows:-*
>
> *a) An order of mandatory injunction to restore the plaintiff to the matrimonial home on the suit property which she occupied with the deceased Shahid Butt before his death in 2014 and,*
>
> *b) An order of prohibitory injunction restraining the defendants by themselves,their servants, employees, agents, assigns or otherwise however from in any way interfering with or undermining the plaintiff's possession and occupation of the matrimonial home in all that property known as House No. 1 situate on Mombasa [Particulars withheld], Mkomani Road, Mombasa pending hearing and determination of the suit.*
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> *c) For avoidance of doubt, this court does not authorize the eviction of the 2nd Defendant from the suit property and she may continue to stay with the 1st Defendant, and the portion of the house previously occupied by him during the life of his deceased's father, S B. In the alternative, the estate will in accordance with the consent order of November, 2009 in HCCC No. 93 of 2006 aforesaid pay for accommodation and maintenance of the 2nd defendant as provided therein.*
>
> *d) Liberty to apply.*

(30). In accordance with the duty of parties and counsel pursuant to the overriding objective principle under section 1A (3) of the Civil Procedure Act to assist the court in compliance with the court orders, I direct that counsel for the parties and the parties do within seven (7) days hereof to arrange for the smooth restoration of the Plaintiff and her children to the matrimonial home on the suit property and for the retention of the defendants of the portion of the suit property that the 1st defendant lived on prior to the death of the Deceased S B.

(31). Costs in the case."

The applicants were aggrieved by the decision and are determined to challenge it in this Court. They have evinced that intention by filing a Notice of Appeal. Indeed, that notice was filed on the date following the ruling. Pursuant to the notice, the applicant on 19th June, 2015 lodged with our registry a motion on notice praying for stay of execution of the aforesaid orders pending the hearing and determination of the intended appeal and secondly, for stay of further proceedings in the O.S pending the hearing and determination of the intended appeal.

The application is anchored on **Rule 5(2) (b)** of this Court's Rules. The main grounds in support of the application are that the applicants have an arguable appeal which will be rendered nugatory and a mere academic exercise unless this Court intervenes and grants the orders sought. To buttress these contentions, the applicants have in a draft memorandum of appeal annexed to the application cited not less than 25 possible grounds ranging from the bias exhibited by the Judge against the applicants; practicability of the parties, being sworn enemies staying together; the harm that may be caused to the children of the respondent with the aforesaid forced arrangements; failure by the Judge to appreciate and protect the best interests of the children as required under **Article 53** of the Constitution; misapprehension by the Judge of the evidence tendered by the parties; determining prematurely that the

suit premises were the respondent's matrimonial home; relying on a consent order made in 2007 even before the marriage of the respondent to the deceased which consent had in any event been overtaken by events following reconciliation of the 1st applicant with the deceased; misapplication of **Section 12** of the Matrimonial Property Act and totally ignoring **Section 8** of the same Act.

On the nugatory aspect of the appeal, the applicants merely reiterated that their appeal was meritorious with high chances of success which will be rendered nugatory if, we failed to intervene and allowed the order of the High Court to be executed. They did not say how and in which manner the intended appeal will be rendered nugatory, though.

In response, the respondent deposed that the appeal did not raise any arguable grounds, was a non-starter, lacked merit and could not therefore be rendered nugatory; that the applicants were seeking aid of the court to sanction the illegality of unlawfully evicting the respondent and her young children from the matrimonial home; that contrary to the barefaced falsehoods the applicants keep peddling, the 1st applicant did not live with the respondent in the suit premises throughout the time she was married to the deceased until he passed on; that the respondent had married the deceased long after he had separated from the 1st applicant; that following protracted court actions by the 1st applicant against the deceased which culminated in a consent order recorded by Court in **Civil Application Number 285 of 2006**, the deceased was ordered to provide the 1st applicant with an alternative residence and specified maintenance which the deceased complied with, that the deceased too had purchased a house in Nairobi for the 2nd applicant to relocate to with his wife but he had since reneged from the arrangement; and that the grounds set out on the face of the application and draft memorandum of appeal and depositions in the supporting affidavit of the 2nd respondent suggesting harm to her young children were insensitive, self – serving and hurting blackmail of a party by others before court. Finally, she deposed that since it was not possible for the applicants and 2nd applicant's wife to live in the portion of the suit premises occupied by the 1st applicant, the best option was to enforce the directions by the High Court that the estate do provide accommodation to the 1st applicant.

Arguing the application before us on 6th July, 2015, **Prof. Mumma**, learned counsel for the applicants reiterated and elaborated on the grounds in support of the application as well as the depositions in the affidavit in support thereof. He wound up his submissions by relying on the following authorities:-

i. *Miriam Muthoni Mahihu & 5 others v African Safari Club Limited [2013] eKLR.*
ii. *Atwal v Amrit East Africa Law Reports [2011] 2EA 20.*
iii. *East African Fine Spinners Limited & 3 others v Bedi Investments Limited [1994] eKLR*
iv. *JvC [1996]2 WLR 540*

Similarly, in his response, **Mr. Kaluma**, learned counsel for the respondent focused at length on the depositions in the replying affidavit to the application.

We have carefully considered the application, the submissions by learned counsel, the authorities cited and the law. How this Court's jurisdiction is invoked and the principles that guide it in determining the applications brought under **Rule 5(2) (b)** of our Rules is certainly well settled. This Court succinctly set out those principles in the case of **Stanley Kangethe Kinyanjui v Tony Ketter & 5 others [2013] eKLR** and it bears repeating:-

> *"……..we note that such an application is everyday fare in this Court and the principle on which the Court acts if invited to exercise that jurisdiction is old hat. This Court, in accordance with precedent, has to decide first, whether the applicant has presented an arguable appeal, and second, whether the intended appeal would be rendered nugatory if these interim orders were denied. From the long line of decided cases (although none was cited by counsel, perhaps due to their notoriety) on **Rule 5(2) (b)** aforesaid, the common vein running through them and the jurisprudence underlying these decisions can today be summarized as follows:-*

i. *In dealing with **Rules 5(2)(b),** the court exercises original and discretionary jurisdiction and that*

exercise does not constitute an appeal from the trial Judge's discretion to this Court. See ***Ruben & 9 others v Nderitu & Another [1989] KLR 459.***

ii. *The discretion of this Court under* ***Rule 5(2) (b)*** *to grant a stay or injunction is wide and unfettered provided it is just to do so.*

iii. *The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.* ***Halai & Another v Thorton & Turpin [1963] Ltd [1990] KLR 365.***

iv. *In considering whether an appeal will be rendered nugatory, the court must bear in mind that each case must depend on its own facts and peculiar circumstance.* ***David Morton Silverstein v Atsango Chesoni, Civil application No. NAI 189 of 2001.***

v. *An applicant must satisfy the court on both principles.*

vi. *On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised.* ***Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. NAI 345 of 2004****.*

vii. *An arguable appeal is not one which must succeed, but one which ought to be argued fully before the Court; one which is not frivolous.* ***Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd & 2 others, Civil Application No. 124 of 2008.***

viii. *In considering an application brought under Rule 5(2) (b), the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.* ***Damji Pragji*** *(Supra)*

ix. *The term 'nugatory' has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.* ***Reliance Bank Ltd vs Norlake Investments Ltd [2002] 1 EA 227*** *at page 232.*

x. *Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.*

xi. *Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim.* ***International Laboratory for Research on Animal Diseases v Kinyua [1990] KLR 40****3."*

The case of **Miriam Muthoni Mahihu** (supra) cited by the appellant also defers to these pronouncements. In addition to the above, the Court too is obligated by statute to be guided by the overriding objective of litigation which is to facilitate the just, expeditious, proportionate and affordable resolution of disputes. See **sections 3A** and **B** of the Appellate Jurisdiction Act.

We shall bear the above injunctions in mind as we deliberate and determine this application. All the above considerations save the arguability and the nugatory aspect of the intended appeal, present no challenge at all to us in this application. What we have therefore to grapple with is whether *prima facie*, the applicants have made out a case regarding the arguability of the appeal. Having perused the draft memorandum of appeal annexed to the application, we entertain no doubt at all that the intended appeal raises arguable points of law which are not frivolous. The issues in contestation are ownership of the suit premises, whether the suit premises were matrimonial property and if so, whether it was the 1st applicant's or the respondent's; whether the Judge's orders were efficacious considering the acrimony between the parties; whether the trial court properly appreciated that the dominant consideration of the court in this case was the welfare of the children notwithstanding the interest of the parents no matter how strong, and whether in granting the mandatory injunction, the trial court effectively gave judgment in finality at an interlocutory stage. Given all the foregoing and although we are only required to be satisfied by only one issue that the appeal is arguable and not frivolous, we are nonetheless satisfied that looking at the above grounds, they are all certainly arguable. The requirement of arguability is therefore satisfied.

Will the intended appeal however be rendered nugatory should we refuse the application and the applicants eventually succeed? As already stated, the applicants did not provide any material upon which we would have been satisfied on this aspect. All that the applicants asserted in the bold statement in the grounds in support of the application was:-

"……The applicants have an arguable appeal which will be rendered nugatory and a

mere academic exercise unless the Honourable court intervenes and grants the orders sought…."

That very same statement was repeated verbatim in paragraph 37 of the applicants' affidavit in support of the application. How about in their submissions? Prof. Mumma merely submitted that there is a real danger posed to the well-being of the minors herein in living under the same roof with a sworn enemy of their mother. That if the application was therefore not allowed, the subject matter in controversy in the intended appeal will already be in the hands of the respondents with the result that the appeal will, if successful, be rendered nugatory.

We must say at once that we have difficulties in appreciating this line of argument. How would the presence of the respondent and her children in the suit premises render the appeal nugatory? Perhaps if the argument was that if the orders were implemented, then the suit premises will be sold or something will be undertaken thereon as to put it beyond the reach of the applicants or that by virtue of the respondent's occupation with her children thereof, the 1st applicant's share therein if at all will be diluted, dissipated or even diminished, we would understand. No such argument has been made. But again even if the applicants had made out such a case, we doubt whether it could hold. After all, the applicants are in the interim the administrators of the estate of the deceased. Accordingly, nothing can be done to the suit premises without their knowledge and consent. In any event, there is evidence that the 1st applicant had not continuously lived in the premises. There was a hiatus during the time that she was separated from the deceased. During this time nothing happened to her alleged 50% shareholding in the suit premises. So the argument that she must reside in the suit premises because of her 50% shareholding or to secure it cannot be sustained. She can stay elsewhere as she had previously and her 50% shareholding will be intact. Her absence in the suit premises would therefore not render the appeal nugatory. In our view, it is her presence in the suit premises that was the genesis of the disputes that have led to this appeal. Prior to this, the respondent, her children, the 2nd applicant and his wife had lived peacefully under the same roof.

Similarly, a lot of argument was made regarding the 1st applicant's ill health. Again, this alone does not render the appeal nugatory if stay is denied. Evidence abound and it is not disputed that her ill health was discovered long before the deceased passed on. In fact she was diagnosed with the ailment sometimes in 2005 and has been on medication since, catered for by the deceased, even when they were living in separation. Does she require to be in the suit premises to continue with the medication? We think that the 2nd applicant and his wife can still take care of her elsewhere.

There is also unchallenged evidence that the 1st applicant filed several suits against the deceased. Those suits were subsequently compromised by a consent order recorded as aforesaid in which the 1st applicant withdrew all the suits on condition that the deceased provides her with alternative residence, a vehicle and maintenance which included medicine. The deceased until his death was honouring the terms of the consent order. It has not been demonstrated, that if the 1st applicant was to revert to her earlier position, those benefits will be withheld by the estate of the deceased where in any event she is a co-administrator.

Finally, it is not disputed that just before the deceased passed on he was staying in the suit premises with the respondent, their two children, 2nd applicant and his wife. There is nothing on record to suggest that their stay was acrimonious. Why should such arrangement not continue, the death of the patriarch notwithstanding? The evidence on record as we have already stated is not clear as to when the 1st applicant rejoined the household. But again and we have stated, it appears that it is the presence of the 1st applicant in the suit premises that sparked the misunderstanding.

We have said all these despite having held that there is no evidence of the appeal being rendered nugatory to demonstrate that there was a basis laid for the High Court to have ordered in the interim that the respondent could either return to her previous house where she was staying during their separation with the deceased or the estate seeks her accommodation elsewhere and away from the suit premises. To our mind, this is the order that should have accompanied the orders of mandatory junction and prohibitory injunction but not in the alternative.

Accordingly, the applicant having failed to satisfy us on the last limbs the application fails and is dismissed. However, invoking the oxygen principles, we would direct that the 1st applicant moves out of the suit premises to her earlier residence forthwith or the estate of the deceased gets her some residence elsewhere and takes care of her as the deceased had done in his lifetime. Between the welfare of the children and the ill health of the 1st applicant, we think the welfare of the children takes priority or precedence. Accordingly, the 1st applicant should give way pending the hearing and determination of the intended appeal. Once the respondent and the two minors are re-instated in the suit premises, they will continue to reside therein with the 2nd applicant and his wife as had been the case when the deceased was alive. This being a family dispute, the costs of the application shall abide the outcome of the appeal.

With regard to stay of further proceedings in the O.S pending the hearing and determination of the intended appeal, we note that none of the parties addressed us on this prayer in the application. We can only take it that it was abandoned. Accordingly, we make no determination in that regard.

Dated and delivered at Malindi this 31st day of July 2015.

ASIKE-MAKHANDIA

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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