



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: NAMBUYE, GATEMBU & J. MOHAMMED, J.J.A.**

**CIVIL APPEAL (APPLICATION) NO. 226 OF 2012**

**BETWEEN**

**DEN.....APPELLANT/ APPLICANT**

**AND**

**PNN.....RESPONDENT**

**(An appeal from the judgment of the High Court at Nairobi (Karanja J) dated 19<sup>th</sup> July, 2012**

**in HCCC NO. 20 OF 2011)**

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**RULING OF THE COURT**

Before us is a Notice of Motion application under certificate of urgency dated 3<sup>rd</sup> October, 2014 brought pursuant to **Rules 5 (2) (b) & 47 of the Court of Appeal Rules (the Rules)**. The applicant seeks, *inter alia* the following orders against the respondent:

2. *Pending the hearing and determination of the applicant's appeal against the decision of the High court delivered on the 19<sup>th</sup> July, 2012 by the Hon. Lady Justice Karanja this Honourable court be pleased to grant a stay of execution of the Orders given on 30<sup>th</sup> April, 2014.*

The grounds upon which the application is premised are set out on the face of the motion as follows:

- a. *That the applicant being dissatisfied with the judgment delivered on 19<sup>th</sup> July, 2012 has lodged an appeal against the said judgment.*
- b. *That the applicant has a good appeal which will be rendered nugatory unless the orders sought are granted.*
- c. *That the applicant was not notified of the delivery of the ruling dated 30<sup>th</sup> April, 2014.*
- d. *The Respondent has not complied with the terms of the judgment appealed against.*
- e. *The applicant had applied for an Order of stay in the Superior (sic) Court but his application was*

dismissed on 9<sup>th</sup> May, 2013.

- f. *The Applicant resides in the premises subject matter of these proceedings with two minor children of the marriage having been granted custody of the said minors by the Nairobi Children's Court in Children's Case No. 549 of 2010.*
- g. *The court has directed that this appeal be heard during the first two weeks of the month of October, 2014.*
- h. *It is mete and just that the Orders sought be granted.*

The genesis of this application is a matrimonial property dispute over **House No. [Particulars withheld] Highview Estate Phase II L.R No. NAIROBI BLOCK [particulars withheld]** (the suit property). The applicant through an originating summons dated 27<sup>th</sup> April, 2011, brought under **Section 17 of the Married Womens' Property Act (1882)** sought for the distribution of three properties namely; House No. **[Particulars withheld] Highview Estate Phase II L.R No. NAIROBI BLOCK [particulars withheld]** (the suit property); L.R No. NYANDARUA/OLJORO OROK SALIENT/**[particulars withheld]** and Motor Vehicle Registration No. **[Particulars withheld]** make Nissan Saloon.

After hearing the parties, the learned Judge, W. Karanja, J *[as she then was]*, made the following orders **inter alia**:

*In the broader interests of justice and fairness, and bearing in mind the best interest of the children herein, I make the following orders:*

1. *That the matrimonial home i.e. house No. [particulars withheld] Highview Estate Phase II L.R. No. Nairobi Block [particulars withheld] remains with the respondent herein. The same should be transferred to her upon discharge after she completes paying the KShs.1,000,000/= she has charged it for.*
2. *In return, she will forfeit her rights in LR. No. Nyandarua/Olgoro orok Salient / [particulars withheld] which should be transferred to the petitioner.*
3. *The respondent refunds the petitioner KShs.1,000,000/= to compensate him for losing any claim on the matrimonial property and also taking into account the disparity in value between the two properties. The petitioner's name not to be removed from the title documents until the said money is paid.*

Aggrieved by this judgment, the applicant filed a notice of motion application in the High Court dated 3<sup>rd</sup> September, 2012 seeking a stay of execution of the order pending the filing of an appeal against the judgment dated 19<sup>th</sup> July, 2012. The said application was dismissed by Musyoka, J on 9<sup>th</sup> May, 2013.

Subsequently, the respondent filed an application dated 11<sup>th</sup> June, 2013 seeking to have the applicant vacate from the suit property. The High Court, Kimaru, J, vide a ruling dated 30<sup>th</sup> April, 2014 allowed the said application and a decree was issued on 24<sup>th</sup> September, 2014.

The applicant filed a notice of motion application dated 3<sup>rd</sup> October, 2014 seeking a stay of execution of the orders granted on 30<sup>th</sup> April, 2014. The respondent did not file a replying affidavit and was not present in court at the hearing of the application. Learned counsel, Mr C.N. Kihara appeared for the applicant. He submitted that a notice of appeal was filed on the 13<sup>th</sup> September, 2012; that the applicant has an arguable appeal as there is an order of eviction against him, which orders have not been stayed; that the applicant seeks that this court does permit the applicant to stay in the suit property until the intended appeal is heard and determined; that the applicant has been evicted by the respondent which is a violation of the orders of 3<sup>rd</sup> September, 2012 and that the applicant was ready to comply with any orders

that this court makes.

We have considered the application, the grounds in support thereof, submissions by counsel for the applicant and the law.

For an application under **Rule 5 (2) (b) of the Rules** to succeed, the applicant has to satisfy the Court that he has an arguable appeal and that if stay is denied, his appeal, if successful, will be rendered nugatory. A perusal of the record in this application indicates that the applicant **did not** file a notice of appeal in respect of the ruling of Kimaru, J dated 30<sup>th</sup> April, 2014, in regard to which he seeks a stay of execution.

In view of the fact that there is no notice of appeal in respect of the ruling which the applicant seeks a stay of execution, it is imperative that we consider whether we have jurisdiction to grant stay of execution. **Rule 5 (2) (b)** provides:

***“5 (2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or stay execution but the Court may***

a. ...

b. ***in any civil proceedings where notice of appeal has been lodged in accordance with Rule 75, order stay of execution, an injunction or stay of any further proceedings on such terms as the Court may think just.”***

In **NGURUMAN LIMITED V SHOMPOLE GROUP RANCH & ANOTHER, CIVIL APPLICATION NO. NAI 90 OF 2013**, Musinga J.A. recently held in the leading ruling:

***“The power of this Court under rule 5 (2) (b) to order a stay of execution, an injunction or a stay of further proceedings is only exercisable where a notice of appeal has been lodged in accordance with rule 75 of this Court’s Rules.”***

The learned Judge further stated:

***“No matter the nature of injustice that an applicant believes will be occasioned if the Court of Appeal declines to grant a relief under rule 5 (2)(b), as long as there is no appeal on record (which includes a notice of appeal) the Court’s hands are tied and it cannot, in the guise of administering substantive justice, purport to grant any order under the aforesaid rule. If it were to do so, that would amount to violation of both Article 164 (3) of the Constitution as well as Section 3 (1) of the Appellate Jurisdiction Act. ... Once the Court realizes that there is no notice of appeal it must simply strike out the rule 5 (2) (b) application, unless it is withdrawn. That is because the Court lacks jurisdiction to hear the application.”***

We are guided by the case of **SAFARICOM LIMITED V OCEAN VIEW BEACH HOTEL LIMITED & 2 OTHERS, CIVIL APPLICATION NO. 327 OF 2009**, Omolo J.A held:

***“At the stage of determining an application under Rule 5(2)(b) there may be no actual appeal. Where there is no actual appeal already lodged there nevertheless must be an intention to appeal which is manifested by lodging of a notice of appeal. If there is no notice of appeal lodged, one cannot get an order under Rule 5(2)(b) because as I have already pointed out the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or no intention to appeal as manifested by lodgment of the notice of appeal the Court of Appeal would have no business to meddle in the decision of the High Court.”***

We are further fortified by this Court’s ruling in the case of **EQUITY BANK LIMITED V WEST LINK MBO LIMITED, 2013 eKLR** where Githinji, JA stated:

***“That the true nature of an application under Rule 5(2)(b) is an interlocutory application in an appeal***

*pending before this Court; and that Rule 5 (2) (b) is a procedural innovation designed to empower this Court to entertain interlocutory applications for preservation of the subject matter of the pending appeal in order to ensure the just and effective determination of appeal. That as soon as a notice of appeal is lawfully filed, an appeal is deemed to be in existence and a litigant can move this Court for grant of an order of stay under rule 5 (2) (b) of this Court's Rules."*

From the foregoing it is clear that this Court's jurisdiction under **Rule 5(2)(b)** can only be invoked once a notice of appeal is lodged in this Court. See

**THE INTERIM INDEPENDENT ELECTORAL COMMISSION & ANOTHER V PAUL WAWERU MWANGI, (2011) eKLR.** A notice of appeal grants this Court jurisdiction under **Rule 5 (2) (b)**. In **THE OWNERS OF THE MOTOR VESSEL "LILLIAN S" V CALTEX OIL (KENYA) LTD, (1989) KLR 1** Nyarangi, JA held:

*"Jurisdiction is everything. Without it a court has no powers to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

Accordingly, the applicant herein having failed to file a notice of appeal in respect of the ruling in respect of which he seeks a stay of execution, we find that we have no jurisdiction to grant the orders sought.

The upshot of the foregoing is that we find the notice of motion application dated 3<sup>rd</sup> October, 2014, incompetent and it is hereby dismissed with costs to the respondent.

**Dated and delivered at Nairobi this 21<sup>st</sup> day of November, 2014.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**