REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Application 288 of 2011

R.F.S.....APPLICANT

AND

J.D.S.....RESPONDENT

(Application for stay of execution in an intended appeal from the entire Ruling and Order of the

High Court of Kenya at Nairobi (Waweru, J) dated 2nd December, 2011

in

HCCC NO. 76 OF 2003)

****

RULING OF THE COURT

Before us is an application by Notice of Motion by **R.F.S** (the applicant) dated 16th December, 2011. In it the applicant moves this Court for orders;

"3. THAT this Honourable Court be pleased to issue a stay of execution of the entire Ruling and Order of Honourable Mr. Justice Hatari Waweru made on 2nd December, 2011 in Nairobi High Court Civil Case No. [...](O.S) and to stay all consequential orders thereon, pending the hearing and determination of the Applicant's intended appeal."

The motion is based on unusually expansive grounds appearing on its face under the following heads;

1) The grave injustice visited upon the Applicant

2) Irreparable harm will be visited upon the Applicant.

3) Justice and equity demand an expeditious determination of the application.

4) The order sought to be appealed against perpetuates injustice and a breach of natural justice rights.

5) Lack of jurisdiction.

6) Abuse of judicial process.

7) Imminent irreparable loss to the applicant.

In support of the application is the affidavit of the applicant expressed as sworn on 16th December, 2011 which has several documentary evidence annexed thereto.

The replying affidavit filed in opposition to the application before us was sworn by **Anthony Frederick Gross**,learned counsel for the respondent,on 18th January, 2012 and also has attached to it a number of annextures.

In order to gain a proper perspective of this matter and the decision we have reached on it, a brief background is necessary. The applicant and the respondent, **J.D.S**, were man and wife until their matrimonial bond was judicially severed through a decree of divorce issued in **Nairobi H.C. Divorce Cause [.....].**

The respondent subsequently filed a suit at the High Court namely **H.C. Civil Suit No. [...] (O.S),** for the division of matrimonial property. That suit was heard and determined by Hon. H. P. G. Waweru J, who delivered judgment therein on 4th June, 2004. The learned Judge found, ***inter alia***, as follows;

> *(a) That the Applicant's shareholding in a Private Limited Company going by the name **[PARTICULARS WITHHELD]** the registered proprietor of land on which stood the matrimonial home was matrimonial property.*
>
> *(b) That the said matrimonial home constitutes 24% of the value of the assets of the Company and that the Respondent was therefore entitled to 12% of the value of the company.*

The learned Judge proceeded to order a valuation of the assets of the said company the monetary equivalent of 12% of which the applicant was to pay the Respondent.

Both parties being dissatisfied with that judgment, they appealed and cross-appealed, respectively, but this Court (Omolo, Bosire & Githinji, JJ.A) by a judgment delivered on 19th March, 2010 in Civil Appeal No. 157 of 2004 dismissed both. This effectively upheld and affirmed Waweru J's determinations as summarized above.

Following this Court's judgment aforesaid, the applicant filed a Notice of Motion dated 21st June, 2010 at the High Court pursuant to **Sections 1A, 3, 3B** and **34** of the **Civil Procedure Act** in which he sought one substantive prayer, namely;

> *"THAT the Applicant herein be granted leave to deposit the sum due to the Plaintiff under the Judgment of this Court made on 4th June, 2004 in the aggregate sum of Kshs 3,450,000 in full and final settlement of the claim."*

In response to that application, the respondent filed Grounds of Opposition on 10th November, 2010 in which she contended, ***inter alia***;

"1) *THAT the value of Kshs 3,450,000 the Defendant/Applicant is seeking leave to deposit with this Honourable Court as full and final settlement of the Plaintiff/Respondent's pecuniary interest in the matrimonial home is erroneous and not commensurate with the Judgment of Justice Waweru delivered on 4th June 2004.*

…

3) THAT the valuation of [PARTICULARS WITHHELD] assets must be conducted before tender by the Defendant/Applicant or execution by the Plaintiff/Respondent.

…

*6) THAT the Applicant is not an expert valuer to adjudicate the value of the company assets and has purported to pluck the sum of Kshs 3,450,000 from the air and unilaterally seeks an order from this Honourable Court to ratify his gross under-estimation of the Plaintiff/Respondent's 12% pecuniary interest under the decree and Judgment of the Honourable Justice Waweru.***…**

8) THAT the attempt by the Respondent to seek leave from this Honourabvle Court to deposit Kshs 3,450,000 as full and final settlement of the Applicant's (sic!) is not only injudicious but unlawful and an attempt to circumvent justice."

The respondent had also in response to the said application, in fact previously filed on 10th November 2010, an application of her own by Notice of Motion by which she besought the High Court a revaluation of the company whether by Knight Frank or by any other registered valuer of the High Court's appointment. It is worth noting that she said Knight Frank had by a report dated 27th January, 2005 valued the properties of the company at Kshs 47,400,000. The respondent had then requested the applicant to settle the former's interest in the matrimonial home in the sum of Kshs 5,753,249.40 being 12% of the total valuation of the company. That request was not honoured or acceded to by the applicant.

So it was that these rival positions were canvased before Mwera, J. (as he then was) and he, by a Ruling read on 5th May, 2011 delivered himself (in relevant part) as follows;

> *"From all the foregoing, two positions emerge: should 12% of the value of the company's assets be pegged on a valuation of the company's assets to be done now as the plaintiff prays OR that that percentage be computed according to the balance sheet of the company as at 31st December, 1991 or a fair share thereof according to the Respondent proposed at Ksh 3.45M?"*

The learned Judge did not resolve the issue one way or the other. Rather, he took this view of the matter;

> *"The position this Court takes is that it began handling this matter when Waweru J. was on a posting at Machakos High Court. His Lordship is now back in Nairobi and it is only prudent that he interprets his Judgment of 4th June, 2004 to the parties and directs the mode of its execution."*

Mwera J. then directed that the matter be mentioned before Waweru J. in seven days. As he did so, however, the learned Judge also gave a specific direction that has since been the subject of heated contestation between the parties, namely;

> *"But for this Court and as at this stage it observes that for some seven years the Plaintiff can be said not to have benefitted in any way from that Judgment herein. It will thus be fair and just for this Court to order and it orders that the Respondent do make payment to her in advance of Kshs 2,000,000 (two million) for her use, in the next fourteen (14) days. When the basis of calculating her full entitlement up to 12% of the company has been determined, the balance may be ordered to be paid accordingly."*

This order did not go well with the applicant and he duly lodged in the High Court a Notice of Appeal dated 16th May in signification of his intention to challenge it before this Court. He also crafted and filed in the High Court, on the same date, a Motion seeking a stay of execution of Mwera J's orders pending the determination of the said intended appeal.

An adjourned hearing of the applicant's application for stay of execution was in time fixed for 25th July, 2011 but was scuttled by yet another application by a seemingly indefatigable applicant by Notice of Motion dated 4th July, 2011. In this latest supplication before the High Court, the applicant sought an

order that Mr. Justice Waweru *"do recuse himself from hearing, further hearing or deciding any aspect of these proceedings."*

The grounds upon which Waweru J's recusal was pleaded included;

> *"1 ….Since Waweru J's Judgment that was appealed against is what is sought to be relitigated, and he has already decided in favour of the Respondent herein, the Applicant is apprehensive that he will find no justice.*
>
> *2 The Applicant perceives that having already heard the parties and made up his mind to find in favour of the Respondent as he did in his Judgment, Waweru J cannot reasonably be objective.*
>
> **…**
>
> *4 The applicable law dictates that whenever a party expressed concern that they may not get a fair trial before a court, the Court is obligated to recuse itself."*

The respondent filed a replying affidavit on 3rd October, 2011 in which she took dim views of the application seeking Waweru J's recusal. She termed the applicant's apprehensions "unfounded", "misconceived", "misleading", "frivolous" and "tantamount to forum shopping" but not necessarily in that order. She took issue with what she saw as an attempt to bar Waweru, J from interpreting the judgment of his own authorship and dismissed the grounds proffered by the applicant as purely premised on surmise, conjecture and/or suspicions. In her indignant disdain she swore that;

> *"The Applicant has a penchant of (sic!) disobeying the court orders with impunity and has devised ways of circumventing justice by filing frivolous Applications and Appeals aimed at delaying and subverting justice and hoping to confound issues and mislead the Honourable Court quite apart from the delay created by filing interim applications."*

The application for his recusal was argued before Waweru, J and by a Ruling dated 2nd December, 2011, which it is that provoked the intended appeal pending which we are prayed to order a stay of execution, he dismissed it with costs.

In order to succeed before us on an application under **Rule 5 (2) (b)** of the **Court of Appeal Rules**, the applicant must show, as has been established by a long line of authorities, two things namely that;

> *(a) The intended appeal is arguable and not frivolous and;*
>
> *(b) Unless the court grants an order of stay the intended appeal, if successful, will be rendered nugatory.*

Now an appeal is said to be arguable when it contains grounds, points or issues that can genuinely be asserted, on which there can be divergent legal or factual positions of some merit worthy of juridical investigation and determination. To succeed, it is enough that even a single, solitary ground of such description exists and the same need not be one that must necessarily succeed an appeal **(**See **SILVERSTEIN VS CHESONI [2002] 1KLR 867**; **JOSEPH GITAHI GACHAU & ANOTHER VS. PIONEER HOLDINGS (A) LTD & TWO OTHERS**, **Civil Application No. 124 OF 2008**; **DAMJI PRAGJI MANDAVIA VS. SARA LEE HOUSEHOLD & BODY CARE (K) LTD (Civil Application No. Nai 345 of 2005))**

Does the applicant herein have an arguable appeal? In answering this question we are cognizant of the advisability of circumspection and a retiring taciturnity that eschews the making of strong definitive findings at this stage that have the potential of embarrassing the Court that will hear the main appeal. (See **DAMJI PRAGJI MANDAVIA**). Having so cautioned ourselves, we nonetheless find without hesitation that the intended appeal herein raises no *bona fide* arguable points.

From what we have taken the trouble to recount herein, it is clear that the intended appeal is against Waweru's J's refusal to recuse himself. The grounds upon which his recusal was sought were, with respect, probably doomed to fail. The learned Judge properly appreciated and applied the principles for the recusal of a Judicial Officer as succinctly rendered in the now notorious South African case of **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA VS. SOUTH AFRICA RUGBY FOOTBALL UNION 1999 (4) SA 147.** He was in the circumstances of the application before him quite correct, and it is doubtful that it can with any seriousness be argued otherwise, when he stated that to suggest that *"[he] could not be impartial in interpreting [his] own Judgment merely because [he] found for one of the parties [was] preposterous."*

We on our part find no merit in the applicant's complaint before this Court that the learned Judge's refusal to recuse himself engendered "*a perception of injustice that is deep."* We also are unconvinced that there is substance in the appellant's assertion under oath;

> "*I have been further advised by [my] advocate, and Mr. Harrison Kinyanjui specifically, that the applicable law dictates that whether a party expresses concern that they may not get a fair trial before a court, as I have done in this case, the said Superior Court Judge is obliged to recuse itself (sic)." (Emphasis ours)*

It is not and never has been the law that at the slightest expression of apprehension or doubt by a party as to whether he or she will get a fair trial judges must perforce cower, recoil and recuse themselves. Such a proposition could well surrender the ability of judicial officers to adjudicate cases to the fickle whims of litigants. The law is and must necessarily be that the recusal of Judges must be subject to clearly established principles and he who asserts a fear must place it beyond mere feeling and locate it on facts or factors that render his apprehensions reasonable. It is a function or sound decision and not mere whim or caprice.

Once it is found, as we have, that an appeal is not arguable, there really is no necessity to delve into the second limb of consideration for to obtain a stay one must establish both and a failure of one is a failure of the application in entirely. That notwithstanding, we also have no hesitation in finding that the nugatory ground has not been established.

The Applicant has attempted to persuade this Court by swearing that;

> *"Clearly the threat to my right to a fair trial as enshrined in the constitution is in grave jeopardy, and I will be compelled to remit unfair sums which are the subject of my appeal before this Court unless this Court intervenes as sought."*

We understand the applicant to be seeking umbrage under the Constitution in challenging and bemoaning Waweru J's concluding directions that were as follows;

> *"In dismissing the Notice of Motion dated 4th July 2011, which I hereby do, I also direct that the Defendant to (sic!) forthwith pay to the Plaintiff Ksh two (2) Million as ordered by Mwera, J on 5th May 2011. In default the Plaintiff may execute for the same. I also direct that the Defendant shall not be heard any further in this matter until he complies with that order of Mwera, J, by paying the Plaintiff Kshs two (2) Million."*

In the full circumstances of this case it does seem most strange that the applicant castigates the sum of Ksh two (2) million as being unfair when he, himself, had applied to make payment of the larger sum of Ksh 3.45 million to the respondent. It is equally odd that he complains of violation of his right to be heard yet it is clear from all the material placed before us that he has had access to the courts before which he has made a multiplicity of applications even after the initial Judgment had been rendered on the merits.

We find no grave or any injustice in the Superior Court Judge's order that the applicant pay Ksh two (2) million to the respondent and that he be denied further audience in that matter until he complies by making the payment which, by any analysis, is definitely and properly payable. Courts must not be seen

to be acting in vain and an order made to try and effect compliance and to negate the spectre of impunity cannot be viewed to be so burdensue as to merit stay. Indeed, an order of stay would be a perpetuation of an ancient and untenable injustice perpetrated by the Applicant by resort to a seemingly endless stream of legal manouvres.

The upshot is that the Notice of Motion dated 16th December, 2011 fails in its entirety and is accordingly dismissed with costs to the respondent.

Orders accordingly.

Dated and delivered at Nairobi this 1st day of March, 2013.

W. KARANJA

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR