



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: P. KIHARA KARIUKI, PCA, MUSINGA & OUKO, J.J.A)**

**CIVIL APPLICATION NO. NAI. 114 OF 2012 (UR 89/2012)**

**R F S ..... APPLICANT**

**VERSUS**

**J D S ..... RESPONDENT**

***(Being an application for stay of execution of the ruling and order of the High Court of Kenya at Nairobi (Maraga, J.) dated 24<sup>th</sup> October, 2011***

**in**

**Divorce Cause No. 18 of 2000)**

**\*\*\*\*\***

**RULING OF THE COURT**

On 24<sup>th</sup> May, 2011, Maraga J. (as he then was), delivered a ruling where he held that the parties herein had mutually agreed to enroll their children in [particulars withheld] and each of them were to pay 50% of the children’s education. The learned judge concluded the ruling as follows:

***“The parties should ascertain the arrears, if any, due from each or either of them for the children’s school fees and educational expenses in the [particulars withheld] Schools and the Respondent should pay his share within 30 days of ascertaining the figure failing which he shall be committed to civil jail for a period of six months. The Respondent shall pay the costs of the application.”***

The applicant was aggrieved by that decision and filed a notice of appeal against the same. He also filed before the High Court an application for stay of execution pending appeal. Vide a ruling dated 24<sup>th</sup> October, 2011, the application was allowed on condition that the applicant pays forthwith the arrears of his share of the tuition fees based on the rates of [particulars withheld] where the children were attending before they were moved to the [particulars withheld] School. The court further ordered that the applicant deposits within 90 days from the date of the ruling the arrears of the difference between the [particulars withheld] Schools in an interest bearing account in the joint names of the advocates for the parties pending hearing determination of the appeal.

The court added:

**“Needless to say in default of either or both of the said payments this application shall stand dismissed with costs.”**

The applicant was not happy with the aforesaid orders and moved to this Court and filed an application dated 25<sup>th</sup> April, 2012 under **Section 3A (1) and 2** of the **Appellate Jurisdiction Act** and **rules 5 (2) (b), 41 & 47** of this **Court’s Rules** and sought the following orders:

**“1. ....**

**2. That this Honorable Court be pleased to issue a stay of execution of that part of the Ruling and Order of the Honourable Mr. Justice Maraga, made on 3<sup>rd</sup> November 2011 but dated 24<sup>th</sup> October 2011 in Nairobi High Court Divorce Cause No. 18 of 2000, requiring the appellant to deposit in an interest bearing account in the joint names of the parties’ advocates the difference of the sum due under [particulars withheld] schools and to stay all consequential orders thereon, pending the hearing and determination of the Applicants’ application.**

**3. That this Honorable Court be pleased to issue a stay of execution of that part of the Ruling and Order of the Honourable Mr. Justice Maraga, made on 3<sup>rd</sup> November 2011 but dated 24<sup>th</sup> October 2011 in Nairobi High Court Divorce Cause No. 18 of 2000, requiring the appellant to deposit in an interest bearing account in the joint names of the parties’ advocates the difference of the sum due under [particulars withheld] schools and to stay all consequential orders thereon, pending the hearing and determination of the Applicants’ intended appeal.**

**4. That the costs of this Motion be borne by the Respondent in any event.”**

The application was supported by an affidavit sworn by the applicant. One of the main arguments that he advances therein is that the learned judge misinterpreted the consent that had been recorded in court on 23<sup>rd</sup> June, 2006. The salient parts of that consent were as follows:

**“1. That the respondent shall pay the school fees for both children as per the consent recorded in the judgment at the rate of 50 percent of the [particulars withheld] School and [particulars withheld] School or an equivalent amount at a school to be mutually agreed between the parties until the children complete their secondary education.**

**2. That the respondent shall meet 50 percent of the school fees for the children as it may be mutually agreed between the parties from time to time.”**

The applicant does not contest the learned judge’s order that he pays forthwith the arrears of his share of the tuition fees but is aggrieved by the order that he deposits the arrears of the difference between the [particulars withheld] and [particulars withheld] fees in an interest bearing account in the joint names of the advocates for both parties until his intended appeal is heard and determined. That order compels the applicant to pay into the escrow account **£20,750** which translates to about **Kshs.2,718,250/=** which he contends is financially oppressive. The applicant risks committal to civil jail if he does not deposit the aforesaid sum. Indeed on 22<sup>nd</sup> March, 2012 a warrant of arrest was issued against the applicant but execution of the same was subsequently stayed.

The respondent opposed this application by way of a replying affidavit sworn by her learned counsel, **Anthony Fredrick Gross**. Mr. Gross stated, *inter alia*, that the application is incompetent, misconceived and a backdoor appeal against the High Court order of stay. He further stated that the application herein was filed on 25<sup>th</sup> April, 2012 whereas the High Court’s order of conditional stay of execution had lapsed on 3<sup>rd</sup> March, 2012 for non-compliance, resulting in issuance of the warrants of arrest. The application had therefore been overtaken by events, he contended.

Counsel added that the only recourse which the applicant had if he was aggrieved with the High Court order of conditional stay was to apply for variation and/or review of the set conditions prior to the expiry of the 90 days' period, which was not done. Besides, the notice of appeal having been filed on 16<sup>th</sup> November, 2011 and the appeal having not been filed, the time for lodging the intended appeal has lapsed. For those reasons, Mr. Gross stated, the applicant has no arguable appeal.

As to whether the appeal, if at all, will be rendered nugatory, the respondent's counsel argued that by depositing the arrears of £20,750 in a joint interest earning account in the names of parties' advocates pending hearing of the intended appeal cannot render the appeal nugatory.

The twin conjunctive principles that must be satisfied in an application under **rule 5 (2) (b)** of the **Court of Appeal Rules** are well known. They are:

- (i) The intended appeal has to be arguable, in other words, it must be demonstrated that the intended appeal is not frivolous; and**
- (ii) The orders sought, if not granted and the appeal eventually succeeds, it would be rendered nugatory.**

The two limbs must be satisfied, see **RELIANCE BANK (IN LIQUIDATION) vs. NORLAKE INVESTMENTS LTD, Civil Application No. NAI. 98 of 2003 (unreported)**.

**Mr. Saende**, learned counsel for the applicant, submitted that the interpretation of the consent order aforesaid is an arguable issue. The applicant's understanding of the consent order was quite different from the manner the learned judge interpreted it, he stated.

Counsel further submitted that if stay of execution is not granted, the warrant of arrest will be executed and the appeal would be rendered nugatory.

**Mr. Njuguna**, learned counsel for the respondent, reiterated the arguments contained in the affidavit of Mr. Gross to the effect that the appeal is not arguable and that the application had been overtaken by events. Secondly, Mr. Njuguna submitted that in this matter the Court has no jurisdiction to grant an order of stay because the applicant is not seeking to stay the order of 24<sup>th</sup> May, 2012 upon which his committal to civil jail is premised but rather a lapsed order of conditional stay. Besides, the conditional stay now sought to be stayed is not capable of execution without the respondent falling back to the order of 24<sup>th</sup> May, 2012, counsel added.

We have taken into account all the submissions made by counsel. Whether the High Court rightly interpreted the consent order recorded by the parties may be an arguable ground but we are not entirely convinced that we have jurisdiction to grant the orders sought by the applicant. The conditional stay that was granted to the applicant required him, *inter alia*, to deposit within 90 days from 3<sup>rd</sup> November, 2011 (when the ruling dated 24<sup>th</sup> October, 2011 was delivered) the arrears of the fees difference in an interest bearing account in the joint names of the parties, failing which the application for stay would stand dismissed. The applicant failed to meet that condition and the application for stay therefore stood dismissed upon expiry of the given period of time. It is trite law that a negative order is not capable of execution. We can do no better than cite this Court's decision in **MOMBASA SEAPORT DUTY FREE LIMITED v. KENYA PORTS AUTHORITY, Civil Application No. NAI. 242 of 2006**. In that application, the Court dismissed an application for stay of execution which was made pursuant to an order made by the High Court dismissing a suit. The court held:

***“In this case, the Superior Court merely upheld the preliminary objection and as a consequence struck out the application for judicial review with costs. The order striking out the application is not capable of execution against the applicant.”***

The Court further held that in such circumstances it had no jurisdiction to grant an order of stay.

Similarly, in **DEVANI & 4 OTHERS vs. JOSEPH NGINDARI & 3 OTHERS**, Civil Application No. NAI 136 of 2004, an application was made under rule 5 (2) (b) of this Court's Rules for interim stay of execution of an order/deGREE of the High Court dismissing an application for judicial review. The Court found the application before it grossly incompetent, saying:

***“By dismissing the judicial review application the superior court did not thereby grant any positive order in favour of the respondents which is capable of execution. If the order sought is granted it will have the indirect effect of reviving the dismissed application.”***

We respectfully adopt the above reasoning herein. The application for stay of execution having been dismissed because of the applicant's failure to comply with the second condition set by the High Court, there is nothing that can be stayed by this Court. We agree with the respondent's counsel that the applicant is attempting to stay execution of the orders made on 24<sup>th</sup> May, 2011. This Court lacks jurisdiction to entertain the application now before us.

But even if the Court had jurisdiction, we do not think that the intended appeal would be rendered nugatory unless an order of stay of execution is granted. The applicant was required to deposit a sum of £20,750.97 pending the hearing and determination of the intended appeal. The applicant did not demonstrate how the appeal would be rendered nugatory if he were to make the deposit as required and eventually succeeds in the appeal. The issue of his arrest and committal to civil jail is not the subject of this application and in any event, we doubt whether the respondent would be keen to pursue it if the deposit of the money is made, albeit late. The respondent's desire, we believe, is to see the children of the dissolved marriage enabled to pursue their education in Scotland and not the incarceration of the applicant.

In view of the foregoing, we find this application lacking in merit and hereby dismiss it with costs to the respondent.

***Dated and Delivered at Nairobi this 5<sup>th</sup> day of July, 2013.***

**P. KIHARA KARIUKI**

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**PRESIDENT, COURT OF APPEAL**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**W. OUKO**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

**/dkm**