IN THE COURT OF APPEAL AT NAIROBI

CORAM: KARANJA, KIAGE & M'INOTI, JJ.A.

CIVIL APPLICATION NO. NAI 91 OF 2013 (UR 61/2013)

BETWEEN

PETER NJUGUNA NJOROGE ……..……...… APPLICANT AND

ZIPPORAH WANGUI NJUGUNA ……..……..…… RESPONDENT

(Application for stay of execution pending the lodgement, hearing and determination of an intended appeal from the judgment and decree of the High Court of Kenya at Nairobi (Nambuye, J) dated 28th September, 2012

in

HCCC NO. 10 OF 2004 (O.S))

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RULING OF THE COURT

By a motion on notice dated 30th April, 2013, and taken out under *Rule 5(2) (b) of the Court of Appeal Rules*, the applicant, *PETER NJUGUNA NJOROGE* applied for stay of execution of the judgement and decree of the High Court (Nambuye, J *[as she then was])* pending the hearing and determination of an intended appeal against the said judgment. The motion was based on the grounds that the applicant had filed a notice of appeal against the said judgment and that the intended appeal raised several arguable points. The motion was further supported by an affidavit sworn by the applicant on 30th April, 2013 in which he deponed of his apprehension that in the absence of an order of stay of execution pending the hearing and determination of the intended appeal, the decree of the High Court would be executed and half of his property would be transferred to the respondent, with the additional risk that the respondent would dispose of the properties, thus rendering the appeal, if successful, nugatory.The respondent opposed the motion vide a replying affidavit sworn on 28th May, 2013 in which she challenged the competence of the applicant's notice of appeal as well as the intended appeal. The respondent further deponed that the properties in dispute were matrimonial properties, the bulk of which were in the exclusive possession of the applicant, and that the application for stay of execution was a mere stratagem to delay her enjoyment of the fruits of her judgment.

The short background to the present application is as follows. The applicant and the respondent are estranged husband and wife, married on 16th December, 1961 under the African Christian Marriage and Divorce Act. The dispute involves some 5 properties registered in the name of the applicant, namely:

i) *Nyahururu/Gilgil West/31 (approx. 20 Ha)*

ii) *Bahati/Kabatini Block 1/2338 (approx. 0.65 Ha)*

iii) Bahati/Kabatini Block 1/2339 (approx (0.65 Ha)

iv) Donholm LR No. Nairobi/Block 82/181 v) Bahati/Kabatini LR No TBA

By an Originating Summons dated 22nd April, 2004, the respondent applied to the High Court for declarations that the above properties were owned jointly by the applicant and the respondent, that the applicant held the same in trust for the respondent and for settlement of the properties to the benefit of the applicant in such manner and proportion as the court deemed fit. The respondent's claim was based on the grounds that the properties were acquired during the marriage and that the respondent had contributed both directly and indirectly to their acquisition and development. The applicant contested the Summons, contending that the properties in question were his absolute properties the acquisition and development of which was financed exclusively by himself.

The dispute was heard by Nambuye, J *(as she then was)* who by a judgment dated 28th September, 2012, issued a declaration that all the properties save *Bahati/Kabatini LR No TBA*, were matrimonial properties to be shared equally between the applicant and the respondent. It is common ground that when the hearing was concluded, the court file went missing and the respondent applied *ex parte* for reconstitution of the same. The file was reconstructed on 31st July, 2012 and a notice was served upon the applicant for mention of the suit for directions on 10th October, 2012. On 28th September, 2012, the matter was listed before Majanja, J, who read the judgment on behalf of Nambuye, JA. The respondent's advocates saw the suit listed before Majanja J and attended to take the judgment. The applicant's advocates did not. They only came to know of the delivery of the judgment on 1st November, 2012. The notice of appeal, dated 7th November 2012, was lodged on 19th November, 2012.

In this application the applicant is required to satisfy us that the intended appeal is arguable or is an appeal that is not frivolous and that, if ultimately it succeeds, it will be rendered nugatory absent an order of stay of

execution. See *EAST AFRICAN POWER MANAGEMENT LTD V THE OWNERS OF THE VESSEL "V ICTORIA EIGHT" , NAIROBI CIVIL APPLICATION NO. 245 OF 2009* and *TRUST BANK LIMITED & ANOTHER V INVESTECH BANK LTD & 3 OTHERS, CIVIL APPLICATION NO. NAI. 258 OF 1999*. The applicant is

obliged to satisfy both of these principles, for it will not suffice to satisfy only one of them. See *PETER MBURU NDURURI V JAMES MACHARIA NJORE,*

CIVIL APPEAL NO. 29 OF 2009 (UR 14/2009). We also bear in mind that it will suffice if the applicant presents a single bona fide arguable ground *KENYA HOTEL PROPERTIES LTD VS WILLISDEN INVESTMENTS LTD & OTHERS,*

CIVIL APPLICATION NO. NAI 24 OF 2012 and that an arguable appeal is one which ought to be argued fully before the court, not one which must

necessarily succeed *JOSEPH GITAHI GACHAU & ANOTHER VS PIONEER*

HOLDINGS LTD & 2 OTHERS, CIVIL APPEAL NO. 124 OF 2008.

Before us Mr D. Musyoka, learned counsel for the applicant submitted that the notice of appeal was competent to enable this Court assumejurisdiction for purposes of the application under *Rule 5(2) (b) of the rules of this Court*. He explained the circumstances set out above, which made it impossible for the applicant to file the notice of appeal within the prescribed

time. He relied on the decision of this Court in *NATIONAL INDUSTRIAL*

CREDIT BANK LTD VS AQUINAS FRANCIS WASIKE & ANOTHER, CIVIL APPLICATION NO. NAI

238 OF 2005 (UR 144/2005) where it was held that in an application under *Rule 5(2) (b) of the Court of Appeal Rules*, the Court does not have to determine the validity of a notice of appeal.

On whether the appeal was arguable, Mr Musyoka relied on some seven draft grounds of appeal, as follows:

i) The learned judge erred in law and fact by finding and holding that the respondent had made direct and indirect contribution towards the acquisition of any of the properties in question despite there being no credible evidence to support the finding;

ii) The learned judge erred in law and fact by shifting the burden of proof from the respondent to the applicant;

iii) The learned judge erred in law and fact when she failed to hold and find that the respondent did not prove her case to the required standard;

iv) The learned judge erred in law and fact by not giving due weight to the applicant's documentary and affidavit evidence and explanation as to how he acquired each of the properties in question;

v) Despite agreeing that the decision of the Court of Appeal in Echaria vs Echaria (2007) 2 EA 139, was binding on her, the learned judge erred in not following or being guided by the decision especially where it was held that indirect contributions cannot be taken to

account for the purposes of considering a spouse's contribution in matrimonial property disputes;

vi) The learned judge erred in law and fact by holding that the respondent was entitled to 50% of the properties registered in the name of the applicant without first determining how much the respondent had contributed towards the acquisition of the properties, whether directly or indirectly, vis-a-vis that of the appellant; and

vii) The learned judge erred in law in relying on the provisions of article 45(3) of the Constitution of Kenya

2010 and other international conventions which were not relevant to the dispute between the parties.

Learned counsel submitted that the applicant's appeal was arguable to the extent that there had been no authoritative pronouncement, since the promulgation of the Constitution of Kenya, 2010, that the decision of this

Court in *Echaria vs Echaria*, (supra), a decision of this Court, was no longer good law.

On whether the intended appeal would be rendered nugatory, Mr Musyoka submitted that the respondent had initiated steps for the transfer of portions of the properties to her name with the risk that she could dispose of the same thus rendering the intended appeal nugatory if it was ultimately successful.

Ms Judy Thongori, learned counsel for the respondent vigorously opposed the application contending that there was no competent application before the Court because to invoke the jurisdiction of this Court under *Rule*

5(2) (b) there had to be a valid or competent notice of appeal on record. In this

instance, Ms Thongori submitted, the judgment intended to be appealed was delivered on 28th September, 2012, and the purported notice of appeal was not filed within fourteen [14] days of the date of the judgment as required by the Court of Appeal Rules.

Learned counsel supported the judgment as sound because the properties in dispute were acquired during the marriage and that both the applicant and the respondent had been in formal employment as civil servants, earning money with which they bought the properties, in addition to taking development loans from the Settlement Fund Trustee, which they repaid jointly. Counsel further submitted that the intended appeal was not arguable

because *Echaria vs Echaria* could not override *Art 45(3) and Art 2(6) of the Constitution*. Ms Thongori also cited the recognition of the rights of a spouse under *section 93(1) of the Land Registration Act, 2012* to support the judgment of the High Court.

On whether the appeal would be rendered nugatory if ultimately successful, counsel submitted that any property transferred to the respondent could be transferred back to the applicant if the court so ordered. In any event, she added, there was no evidence that the respondent intended to sell the property upon transfer of the same in her name.

We are conscious that at this stage we are not dealing with the merits of the intended appeal. In our opinion, the applicant's intended appeal is not frivolous and is an appeal that deserves to be heard by this Court on merit. It raises issues that merit consideration regarding the law on matrimonial

property as it existed before 2010 and the extent to which it has been modified by the Constitution of Kenya, 2010.

We have anxiously considered the respondent's objection that there is no valid notice of appeal on record. In our view, we must avoid making a determination on that issue because the rules of this Court expressly provide the parties with solutions, which they are yet to invoke. The first is that a party who contends that a notice of appeal on record is invalid has a clear remedy under the rules how to deal with that notice. The second is that a party who has lodged a notice of appeal that is alleged to be invalid has an option under the rules to take steps to regularize any irregularity. As of now, neither the applicant nor the respondent has availed themselves of the remedies at their disposal under the rules.

In *NATIONAL INDUSTRIAL CREDIT BANK LTD VS AQUINAS FRANCIS*

WASIKE & ANOTHER (supra), this Court was confronted with an objection similar to that raised by the respondent on the validity of the notice of appeal. The Court expressed itself as follows:

"The applicant filed its notice of appeal against the said decision on 26th May, 2005; the Court accordingly has jurisdiction to hear and determine the motion for stay. Mr Ohagga, learned counsel for the respondents …tried to argue before us that the notice of appeal filed by the applicant is invalid and that, therefore the Court cannot grant the order of stay prayed for. We, however take note of the fact that no application has been made by the respondents for the striking out of the notice of appeal and as the Court has repeatedly pointed out Rule 5(2)(b) does not

provide that "…where a valid notice of appeal…"

the Rule simply provides that:

"In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 74…"

Rule 74 itself does not talk about a valid notice of appeal. The validity or otherwise of a notice of appeal is to be determined in accordance with the provisions of Rule 80 under which a notice of appeal can be struck out. We do not see any reason for determining the validity or otherwise of a notice of appeal when an application under rule

5(2) (b) is being considered."

Turning to whether the intended appeal, if ultimately successful, will be rendered nugatory, in

RELIANCE BANK LTD V NORLAKE INVESTMENTS

LTD, (2002) 1 EA, 227, this Court stated that what may render a successful

appeal nugatory must be considered within the circumstances of each particular case. Considerations such as the expense and length of time it may take to reverse or recover what has changed hands pending the appeal are

relevant considerations. In *THE STANDARD BANK LIMITED VS G. N. KAGIA*

T/A KAGIA & COMPANY ADVOCATES, CIVIL APPLICATION NO. NAI 193 OF

2003, it was stated:

"If the applicant's appeal ultimately succeeds, either wholly or partially, such success will not be totally effectual if the applicant will not easily recover the money it paid and if it has to institute other civil proceedings to recover the money. Such an eventuality should in the interest of justice be taken into account."

As in virtually every case, we are called upon to balance competing rights: on the one hand the rights of the respondent that have accrued from the judgment and on the other, the applicant's constitutional right to appeal that judgment. In an application under *Rule 5(2) (b) of the rules of this Court*, the Court has discretion to make orders on such terms as are just. The order that best commends itself to us to ensure that the interests of both parties in this appeal are safeguarded is to grant a stay of execution of the judgment dated 28th September, 2012 on terms that the applicant shall not transfer or part with possession of the properties, the subject of the intended appeal. In addition, the respondent shall continue to occupy and utilize parts of the suit properties that she is presently occupying and using without interference from the applicant. Costs of this application shall be in the intended appeal.

Dated and delivered at Nairobi this 15th day of November, 2013.

W. KARANJA

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR