



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
CIVIL APPLICATION 329 OF 2009**

A.O.G APPLICANT

AND

S.A.J 1ST RESPONDENT
THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

(An application for Stay of Execution of the judgment and order and stay of all consequential orders of the High Court of Kenya at Nairobi (Rawal, J) dated 17th day of March, 2009 and 18th day of March, 2009

In

H.C. Misc. Civil Appln. No. 15 of 2009)

REASONS FOR THE RULING

The applicant A.O.G, filed an application by way of notice of motion expressed as brought under **Rules 5(2)(b) and 42 (1)** of the Court of Appeal Rules (the Rules) seeking one main relief; viz:

“1. THAT there be a stay of Execution of the order of the superior court made on the 17th day of March 2009 and all other consequential orders thereto including any other order for the enforcement of a case No. FD 08PO2541 of the High Court of Justice in England pending the hearing and determination of the Appeal.”

That application which was under certificate of urgency, was filed in this Court on **16th November, 2009** and the same came up for inter partes hearing on 26th November, 2009 . The application was brought on the following grounds:-

“(a) The Applicant herein has an arguable appeal including the issue of jurisdiction.

(b) The Appeal herein will be rendered nugatory in the event that a Stay of Execution is not granted.

(c) It is in the interest of justice to allow the application.

(d) The appeal relates to matter of public importance.”

During the hearing of the application Ms. Z Janmohamed appeared with Mr. J. Kaunah for the applicant, while Mr. J. Harrison Kinyanjui appeared for the 1st respondent. Mr. C.N. Menge appeared for the 2nd Respondent (Attorney-General) and Mrs. W. Wambugu appeared for one described as affected/interested party.

We considered the rival arguments by counsel appearing for the parties and allowed the application. In our order made on 26th November, 2009 we stated:-

“Our view of the matter is that before the full court gives its ruling there is a notice of appeal filed by leave of the single judge. As we intend to give reasons for our decision we need not go into the details of the matter since this Court is moving to Kisumu session which ends on 4th December, 2009.

In view of the foregoing we now grant prayer 1 of the notice of motion dated 16th November, 2009 and a reasoned ruling will be delivered on 5th February, 2010.”

The background to this matter is that the applicant and 1st respondent S.A.J were married under Islamic Law in April, 2003. The applicant is a Kenyan citizen while the 1st respondent is a British Citizen. They both lived in United Kingdom and their marriage was blessed with one child born on 5th May, 2005 in Bolton, United Kingdom. The minor, who, for the purposes of the proceedings, is referred to as Z is a British citizen. In November, 2007 the applicant and the minor (Z) came to Kenya. And that appears to be the genesis of the problem that has seen the applicant and the respondent engage in acrimonious litigation in various courts not only in Kenya but also in the United Kingdom.

The 1st respondent had obtained certain orders from the Family Division of the High Court of Justice in England. These orders were as follows:-

- “(1) The child Z be a ward of this court during his minority or until further order of this court.***
- (2) The Defendant mother shall cause the return of the child forthwith to England and Wales and following his return shall not remove him from the jurisdiction without the permission of this court.***
- (3) Liberty to the Defendant to apply to vary or discharge paragraph 1 and 2 above on 48 hours notice to the Plaintiff’s solicitors.***
- (4) Permission to serve this order by facsimile transmission.***
- (5) Permission to serve the orders herein, the Originating Summons and Affidavits out of the jurisdiction.***
- (6) Penal notice be attached to paragraph 2 of this order.***
- (7) Costs reserved.”***

Armed with those orders the 1st respondent filed a notice of motion under ***sections 4 (1) (2) (3), 6 (1) and 6 (3) 10 (1) and 8), 13 (1), 22, 76, 81, 87 (1), 88, 114 (f) and (g) and 115*** of the Children Act and under several provisions of the Civil Procedure Act. That is the application that was placed before Rawal, J for determination. The learned Judge carefully considered all that was urged before her and in the course of her judgment dated and delivered in Nairobi on 18th March, 2009 stated inter alia:-

“It has been contended that this court should not take cognizance of a foreign judgment which pertains to family matters as provided by Section 3 (3) (E) of Foreign judgment (Reciprocal enforcement) Act (cap. 43), and designated court does not include the United Kingdom court which issued the order. Moreover, I am not asked by the applicant to enforce the order by recognizing the orders as binding. I am simply asked to give deference to the order of the competent court of law. I may also note that Section 24 of the Children Act recognizes that both parents have parental responsibility and no one has a superior right or claim against the other in exercise of such parental responsibility. The 1st Defendant, according to the Applicant is violating or hindering in exercise of his parental rights.

Having concluded that this court will be hampered to decide the issue of welfare of the child appropriately under the circumstances of the case, specially as regards the accusations of criminal cases and conviction, as well as financial incapacity, and also this court’s conviction,

(sic) as well as financial incapability, and also this court's conviction that the Family Division of High Court of Justice and other courts shall also consider the best interest and welfare of the child as its paramount consideration, as well as no averments by the 1st Respondent that she will face prejudice or any serious risk by presenting her case before those courts, I do tend to give my deference to the orders of the United Kingdom court. I also do thereby uphold the dignity and sanctity of a court order duly made by that of a foreign court so that any person even if a parent cannot play with the life of a minor."

Having so stated the learned Judge concluded her judgment thus:-

"The upshot of all the above is that I make the following orders:

- 1. The male minor Z. A. J. be returned to the High Court of Justice, Family Division as a ward of the said Honourable Court.**
- 2. The child Z. A. J. be accompanied by the 1st Respondent A.O.G. and the Applicant shall bear the costs of their Air-travel.**
- 3. The Passport of the child Z. A. J. in the custody of this court be released to the representative of the 2nd Respondent jointly with a representative of the British High Commission, Nairobi, Kenya.**
- 4. An officer of the Foreign or Home Ministry at U.K. shall receive the child and 1st Respondent at London Airport and produce them before the High Court of Justice, Family Division.**
- 5. England within 24 hours of their arrival.(sic)**
- 6. The Applicant S.A.J shall provide adequate living facility to the 1st Respondent and the child.**
- 7. No order as to costs with these orders.**

I shall make a special request to the High Court of Justice, Family Division to hear and determine with utmost urgency the issue of custody of the child."

Being aggrieved by the foregoing the applicant, through her legal advisers, filed a notice of appeal indicating her intention to challenge that judgment. We were told that the appeal had already been filed. But pending the hearing and final determination of that appeal the applicant sought a stay of those orders of the superior court.

As this application was brought under **rule 5 (2) (b)** of this Court's Rules, the discretion of the Court on an application of this kind has to be exercised upon the established principles which require an applicant to satisfy the Court both that the intended appeal or the appeal (as the case may be) is arguable and that unless the order sought is granted the appeal if successful, would be rendered nugatory. In BOB MORGAN SYSTEMS LTD & ANOTHER V. JONES [2004] 1 KLR 194 at p. 196 this Court said:-

"The powers of the Court under rule 5 (2) (b), aforesaid, are specific. The Court will grant a stay or an injunction, as the case may be if satisfied, firstly, that the applicant has demonstrated that his appeal or intended appeal is arguable; and secondly, that unless a stay or injunction is granted his appeal or intended appeal, if successful, will be rendered nugatory."

We hasten to add that an arguable appeal does not mean an appeal which must succeed. All that an applicant has to show is that his appeal or intended appeal is not frivolous – see KETER & 6 OTHERS V. KIPLAGAT & 2 OTHERS [2004] 2 KLR 159.

In her submission in support of the application Ms Janmohamed argued that the orders issued were in breach of Children's Act. She pointed out that the applicant who had not submitted to the English Court was being handed over to United Kingdom and yet she was a Kenya citizen holding a Kenyan passport.

On the nugatory aspect of the application it was submitted that if the applicant and the minor left Kenyan soil for United Kingdom the appeal will be rendered nugatory as the minor will have left the country, without clear indication as to whether the minor will be brought back or not.

To counter the foregoing submissions Mr. Kinyanjui appreciated the two principles that guide this Court in the application of this nature but he asked the Court to go further and consider whether the order of stay would be an abuse of the court process. Mr. Kinyanjui reminded us that there were peculiar circumstances in this case in that there was abduction of the child. He was of the view that the learned Judge of the superior court had jurisdiction to issue the order she issued.

On the nugatory aspect of the matter, Mr. Kinyanjui submitted that the child's grandmother had offered herself to take the child to England.

In his brief submissions, Mr. Menge told us that he was appearing as a friend of the court. He told us that the welfare of the child (now aged 5 years) had to be taken into account. Mr. Menge further submitted that the applicant should not be forced to go to England as it was her suit and it was upon her to decide whether to go and pursue the suit or not. Finally, Mr. Menge submitted that the Attorney-General would respect the decision of the court since Kenya was a sovereign State with its own judicial system.

On her part, Mrs. Wambugu supported the application reminding us that the intended appeal was not frivolous.

Considering all that was urged before us we must remember that this is a dispute between husband and wife and involving a child of that marriage. We have referred to the judgment of the superior court which issued the orders that are to be challenged in the appeal filed by the applicant. We are not hearing the appeal and it would be inappropriate to express any firm views on the filed appeal at this stage. Having considered the rival arguments especially regarding the provisions of Children's Act and the fact that Kenya is not a signatory to the Hague Convention it cannot be said that the applicant's appeal is frivolous. We think that the appeal raises arguable issues which will engage the bench that will hear the appeal.

On the nugatory aspect of the application it is to be noted that the order of the superior court directs the applicant and the minor Z to proceed to England where they are to be produced before the High Court of Justice, Family Division. It is not clear as to what will happen to the appeal in Kenya while the applicant and the minor (together with the 1st respondent) are in England.

We are of the view that since we are dealing with a family dispute relating to a child aged 5 years it would be inappropriate to allow the orders of the superior court to stand without the final determination of the appeal or further orders of either this Court or the superior court.

It is for the foregoing reasons that we allowed this application. We make no orders as to costs.

Dated and delivered at NAIROBI this 5th day of February, 2010.

E.O. O'KUBASU

.....

JUDGE OF APPEAL

D. K.S AGANYANYA

.....

JUDGE OF APPEAL

J.G. NYAMU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.