



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI. NO. 86 OF 2008 (UR. 49/08)

ROSE MBITHE NDETEI.....APPLICANT

AND

MATHEW KYALO MBOBU.....RESPONDENT

(Application for stay of execution of a decree pending the filing, hearing and determination of an intended appeal from a ruling and order of the High Court of Kenya at Nairobi (Khamoni J) dated 21st April 2008 and subsequent order issued on 29th April 2008

in

H.C.C.C No. 155 of 2004)

RULING OF THE COURT

The record before us shows that the applicant, in this notice of motion dated and filed on 7th May 2008, **Rose Mbithe Ndetei**, had divorce proceedings against her former husband. The respondent, **Mathew Kyalo Mbobu**, who is an advocate, was representing her husband. After the divorce proceedings, the applicant filed a suit under **section 17** of the Married Women's property Act, 1882 of England for settlement of matrimonial property. That was HCCC No. 6A of 2002 between herself, then known as Rose Mbithe Mulwa and her former husband, Professor David Musyimi Ndetei. The respondent continued to represent the applicant's husband. The applicant, in the course of that suit wrote a letter which was published to various persons and institutions which the respondent considered defamatory of himself in his profession as a lawyer. The respondent filed H.C.C.C No. 155 of 2004 against the applicant in which he claimed in the amended plaint general and exemplary and/or aggravated damages for defamation; an injunction order to restrain the applicant from further utterances and or publication or causing to be published similar or the said words defamatory of the respondent; an order directed at the applicant to retract and publish the retraction of the parts of the letter allegedly defamatory of the respondent and costs of the suit. That suit was heard ex-parte by Mugo J. who, in a judgment dated 11th November 2005, entered judgment for the respondent and awarded him a sum of Ksh.1,500,000/= being general and aggravated damages. She also granted injunction as prayed in the amended plaint, interest on

the damages awarded at court rates and costs of the suit. The applicant did not appeal against that decision, as in any case, there is no notice of appeal on record against that judgment. The respondent then proceeded and prepared his bill of costs which was taxed and allowed at Ksh.208,830/= by the learned Principal Deputy Registrar on 6th September 2006. Attachment order was then issued on 16th November 2006, over one year after the judgment was pronounced and the applicant's goods were proclaimed on 18th December 2006. On 28th December 2006, the applicant filed chamber summons dated 27th December 2006 seeking the setting aside of the judgment and the resultant decree and warrants of attachment and sale of the applicant's movable property and stay of execution pending the hearing and disposal of that application which was made under a certificate of urgency and was certified urgent and ordered by Aluoch J. (as she then was) to be heard on 29th December 2006. On 29th December 2006, the application came up for hearing before Visram J. who ordered it to be heard interpartes on 23rd January 2007 but with a rider as follows:

“Meanwhile, I grant temporary stay of execution until 23.1.07 on condition that Sh.500,000 is deposited in court by 3.1.07 as security, failing which this order shall lapse.”

The application was not heard on 23.1.2007, and was adjourned from time to time till 4th March 2008 when it came up before Khamoni J. for hearing. In a ruling dated and delivered on 21st April 2008, it was dismissed. In dismissing it, the learned Judge had this to say:

“The purpose of Order IX B rule 8 of the Civil Procedure Rules is not to come to the aid of such an indolent litigant but to assist where judgment is entered by an excusable mistake or due to a reasonably explainable inadvertence by a party. If a party who has instructed an advocate to act for it in a case fails to give full or sufficient instructions and co-operation to that advocate and as a result that party loses the case to the opposite (sic) side, that party thereby soils its hands and has no legitimacy to ask the court to set aside the judgment on the basis the applicant is doing in this application.

From the above therefore, I find no merits in defendant's application before me and the same, that is chamber summons dated 27th December, 2006, be and is hereby dismissed with costs to the plaintiff/respondent.”

The applicant felt aggrieved by that ruling and intends to appeal against it. She lodged a notice of appeal dated 21st April 2008 on the same day. She now comes to us by way of this notice of motion and seeks the following orders:

- “1. That the execution of the decree given on 11th November 2005 be stayed pending the hearing and determination of the intended appeal against the ruling and orders given on 21st April 2008.**
- 2. That cost of this application be provided.”**

Her grounds in support of the application are that she intends to lodge an appeal against the ruling delivered by Khamoni J. on 21st April 2008 by which the learned Judge refused to set aside an ex-parte judgment and thus in the interest of justice, the decree and all orders subsequent thereto should be stayed till that appeal is determined; that the intended appeal has good chances of success; is arguable and not frivolous; that the intended appeal will be rendered nugatory if stay of execution is not ordered since the substratum of the intended appeal will have been taken away if execution proceeds and that will result in irreversible and adverse consequences upon the applicant, and that she will suffer substantial and irreversible loss if the decree given on 11th November 2005 is executed as she will be left condemned without having been heard.

There is an affidavit in support of the application which on the whole merely explains the genesis of the application and highlights the grounds cited in support of it. In response to the supporting affidavit, the respondent has filed a replying affidavit which states in brief that the intended appeal is not arguable

and that the success of the intended appeal would not be rendered nugatory as the appeal is against refusal by the superior court to set aside its judgment and is not against the main judgment. Further, the respondent depones in that affidavit that as the decree sought to be stayed is a money decree, and as the respondent is financially capable of refunding the decretal amount should the applicant succeed in that intended appeal, the success of the intended appeal would not be rendered nugatory.

From what is stated above, it is clear that the applicant is seeking to stay the decree given on 11th November 2005 by Mugo J, against which no appeal was preferred and no notice of appeal was filed. The application is brought under **rule 5(2) (b)** of this Court's Rules which states:

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

(a)

(b) In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 74, order stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just.”

(underlining supplied)

Our jurisdiction is donated when hearing an application under **rule 5(2) (b)** by the existence on the record of a notice of appeal filed against a decree or an order we are sought to stay. In this application, we are being asked to stay a decree granted by Mugo J. on 11th November 2005, against which no notice of appeal was lodged. Mr. King'ara, in an attempt to persuade us to ignore that provision, submitted that the order given by Khamoni J. on 21st April 2008 in effect confirmed Mugo J.'s judgment and so the notice of appeal filed against Khamoni J.'s Order would cover the decree issued by Mugo J. We find it difficult to buy that argument mainly because, first, the notice of appeal lodged against Khamoni J.'s orders is specific. It says:

“TAKE NOTICE that the defendant, Rose Mbithe Ndeti, the defendant being dissatisfied with the ruling of the Honourable Justice Khamoni given at Nairobi on the 21st day of April 2008 intends to appeal to the Court of Appeal of Nairobi against the whole of the said ruling.”

It does not state that it in any way seeks to appeal against any decree issued earlier on. Secondly, we find it difficult to accept Mr. King'ara's argument because, in any event, any legal issues that may arise from the judgment of Mugo J. which was on substantive suit and those that may arise from the ruling of Khamoni J. which was based on the court's exercise of its discretionary powers are, in our view, different and thus grounds of appeal in respect of the two may not be the same or similar. It is necessary to note that one of the matters to be considered under **rule 5(2) (b)** is the arguability of the appeal or intended appeal. However, we would find it difficult to accept that in law, we can stay execution of a decree such as the one before us, under **rule 5(2) (b)** against which no notice of appeal was filed.

What about the issue of stay of the ruling of Khamoni J.? First, we are not asked to do that. Secondly, even if we were asked to do so, we would not in law issue such an order since Khamoni J.'s order was negative in that all the learned Judge did was to dismiss an application for setting aside the judgment. He never made any positive order that can be executed. That being the case, the stay of execution of his order is out of question and cannot conceivably be granted.

What we have stated above should have been enough to dispose of this notice of motion. However, we feel we should consider the substantive application as well. The law as regards the principles to be considered by this court when dealing with an application brought pursuant to **rule 5(2) (b)** of this Court's Rules is now well settled. The applicant seeking such stay order or injunction as the case may be has to demonstrate, first, that the appeal or intended appeal as the case may be, is arguable; that is to say it is not frivolous. Secondly, he has to show that if the application for stay or injunction is refused, the

success of the appeal or intended appeal will be rendered nugatory. See the cases of **Githunguri vs. Jimba Credit Corporation (No. 2) (1988) KLR 838** and **J.K. Industries vs. Kenya Commercial Bank Ltd & another (1987) KLR 506**. In the matter before us, the superior court had discretion on the matter which was before it which was on the question of whether to set aside an ex-parte judgment or not. It exercised the same discretion and gave reasons for doing so. We are not to decide here on whether it did exercise that discretion properly and whether the court hearing the intended appeal will be inclined to interfere with that discretion. We are however prepared to accept that that intended appeal is arguable.

However, the next hurdle, whether the success of the appeal if it were to succeed, would be rendered nugatory, is not easy to scale. We note that of the Ksh.1,500,000/= awarded and costs of Ksh.208,830/=, Ksh.500,000/= was deposited in the court leaving a balance of Ksh.1,208,830/= to be paid out plus interest that has accrued since the judgment was given. We were told, and it was not challenged, that the respondent is an Advocate of the High Court of Kenya, a lecturer at the Kenya School of Law and an arbitrator. The applicant has not demonstrated that the respondent is a man of straw, who, once paid the decretal amount, would not be able to refund it in case the intended appeal succeeds. On the other hand, the respondent has stated through his learned counsel that he will be capable of refunding any amount found due should the intended appeal succeed after he is paid the decretal amount. In those circumstances, the second requirement that the applicant shows that the success of the intended appeal, should it succeed, would be rendered nugatory by the refusal of this application has not been satisfied.

In the result, and for all the above, this notice of motion is for dismissal. It is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 11th day of July, 2008.

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR