



REPUBLIC OF KENYA



FWK v JGK (Civil Case 19 of 2017) [2023] KEHC 26222 (KLR) (30 November 2023) (Ruling)

Neutral citation: [2023] KEHC 26222 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL CASE 19 OF 2017
TW CHERERE, J
NOVEMBER 30, 2023**

BETWEEN

FWK PLAINTIFF

AND

JGK DEFENDANT

RULING

1. By judgment dated July 13, 2023, this court made the following orders:
 1. LR. Kianjai/mituntu/xxx is matrimonial property
 2. LR. Kianjai/mituntu/xxx shall be distributed in equal shares to the Plaintiff and the Defendant with the Plaintiff's portion being excised from the part where the permanent house is situated
 3. This being a family matter, each party shall bear its own costs to these proceedings
2. Applicant appealed the judgment vide notice of appeal filed on July 20, 2023 in Nyeri Coaca/Exxx/2023.
3. By notice of motion dated and filed on September 13, 2023, supported by an affidavit sworn by Applicant on September 13, 2023, the firm of OMK Advocates LLP seeks leave to come on record for the Applicant which I allow for purposes of arguing this application. Also sought in the application is an order for stay of execution of the judgment pending the hearing and determination of the appeal mainly on the ground that the appeal is arguable.
4. Respondent opposed the application vide her replying affidavit sworn on November 15, 2023 mainly on the ground that the Court of Appeal was already seized of this matter and it is to that court that the Applicant ought to apply for stay of execution under the provisions of rule 5(2) (b) of the *Court of Appeal Rules*.



5. I have considered the application in the light of the Applicant's supporting and supplementary affidavit, the Respondent's replying affidavit and annexures to the affidavits and the issue for determination is whether this court has jurisdiction to grant the orders sought.
6. In *Equity Bank Limited v West Link MBO Limited* Civil Appeal 91 of 2014 (UR), the Court of Appeal stated as follows:

Rule 5 (2)(b) is a procedural innovation designed to empower the Court to entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals. The procedure recognises that the court has only jurisdiction to hear appeals but deems an intention to appeal as manifested by a Notice of Appeal as an appeal. Thus, the true nature of rule 5(2)(b) applications is for all intents and purposes, an interlocutory application in the appeal. Since rule 4 of order 42 Civil Procedure Rules and rule 2 of Court of Appeal Rules deem an appeal as filed upon filing of the Notice of Appeal, there is, no practical difference as in both cases the application is filed and heard within the appeal.
7. Since Applicant has filed the notice of appeal in NYERI COACA/Exxx/xxxx, his intention to appeal is deemed as an appeal. That being the case, the application for stay of execution ought to be filed in Court of Appeal which has jurisdiction under the provisions of rule 5(2)(b) of the Rules to determine all manner of applications that impact on or were incidental or related to the appeals including whether Applicant's appeal is arguable.
8. An "arguable" appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court." (See *Kenya Commercial Bank Limited v Nicholas Ombija* [2009] eKLR). This court lacks the jurisdiction to determine if an appeal filed against its orders is arguable.
9. In the end, the prayer for stay of execution of the judgment rendered on 13th July, 2023 is dismissed with costs to the Plaintiff/Respondent.

DATED AT MERU THIS 30TH DAY OF NOVEMBER 2023

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti/Munene

For Plaintiff/ Respondent - Mr. Muthomi for John Muthomi & Co. Advocates

For Defendant/Applicant - Mr. Mwirigi for OMK Advocates LLP

