



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 19 OF 2021**

**ASK.....APPELLANT**

**VERSUS**

**MN.....RESPONDENT**

**RULING**

1. By a Notice of Appeal dated 22<sup>nd</sup> July 2021, the applicant herein moved to this court pursuant to order 42 Rule 6 and order 22 rule 22 of the civil procedure rules and Section 1A and 3A of the civil procedure Act seeking;

**a. Spent**

**b. That there be stay of execution pending hearing and determination of Appeal No.19 of 2021**

**c. That judgment delivered on 23<sup>rd</sup> June 2021 be set aside pending hearing and determination of appeal no. 19 of 2021**

**d. That costs of this appeal be provided for.**

2. The application is anchored on the grounds stated on the face of it and further amplified by averments contained in the affidavit in support sworn on the 22<sup>nd</sup> July 2021 by the applicant. He averred that he is aggrieved by the judgment and decree delivered on 2<sup>3rd</sup> June 2021 by the hon. Juma Ali Abdalla Kadhi Mombasa which decree is due for execution anytime. That if stay of execution is not granted, the appeal herein which is arguable will be rendered nugatory as the applicant will be evicted from the said property. Further, that the application has been filed within reasonable time and that there will be no prejudice if the statusquo is maintained thereby preserving the property in question from being disposed of.

3. When the application was placed before the duty Judge Hon. Ong'injo, prayer two was granted in the interim pending hearing and determination of the application. Upon being served, the respondent filed a reply to the memorandum of appeal dated 12<sup>th</sup> August 2021. He also filed a replying affidavit sworn on the same date stating that the appeal herein lacks merit and that the same is fatally defective hence should be struck out. It was further stated that the applicant has a sinister motive with the intention of destroying the property if put in possession and that there will be no prejudice if the orders sought are not granted.

4. When the matter came up for hearing, parties agreed to dispose the application by way of written submissions. Consequently, the applicant through the firm of Mwarandu and company advocates filed their submissions on 14<sup>th</sup> October 2021. Basically, the applicant reiterated the averments contained in the affidavit in support. It was submitted that the applicant is likely to suffer immense substantial loss and that the appeal herein has high chances of success. Lastly, counsel submitted that the Kadhi's court had no jurisdiction to determine land ownership disputes.

5. On his part, the respondent filed his submissions dated 18<sup>th</sup> October 2021 through the firm of Barayan and associates who literally adopted the averments contained in the affidavit in reply. It was submitted that the house in dispute was acquired by the respondent before he got married to the appellant and that the burden of proof lies on the appellant to prove contribution towards acquisition of the said property under Section 6(3) of the Matrimonial Property Act.

**Analysis and determination**

6. I have considered the application herein, response thereto and submissions by both counsel. The only issue that renders itself for determination is; whether the applicant has met the threshold for grant of stay of execution orders.

7. The criteria for consideration before granting or refusing to issue an order for stay is clearly set out under order 42 rule 6(2) of the civil procedure rules which provides that the onus lies with the applicant seeking the court to exercise its discretion in his favour to satisfy the following conditions; Firstly, that he is likely to suffer substantial loss should the court decline to grant an order of stay; Secondly, that the application for stay has been filed without undue delay; Thirdly, that security for due performance of the decree has been furnished or proposed to be furnished.

8. The aforesaid conditions were succinctly echoed in the case of Stephen Wanjohi vs Central Glass Industries Ltd Nairobi HCC No.6726 of 1991 where the court held that;

**“ for the court to order stay of execution there must be;**

**i. Sufficient cause**

**ii. Substantial loss**

**iii. No unreasonable delay**

**iv. Security and the grant of stay is discretionary.**

9. However, it is worth noting that issuance of stay of execution order is at the discretion of the court which is judiciously exercised bearing in mind that the objective for issuing such orders is to preserve the subject of appeal. See Consolidated Marine vs Nampija & another Civil Application No.93 of 1999(Nairobi) where the court held as follows;

**“the purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”**

10. It is trite that in the course of exercising its wide discretionary powers, a presiding court should bear in mind the other side of the coin in that a successful litigant in the impugned judgment or order equally has a right to enjoy the fruits of his judgment. It therefore calls for a delicate balancing act of the scales of justice. In buttressing similar sentiments, Warsame J in the case of Samvir Trustee Limited vs Guardian Bank Limited Nairobi(milimani)HCCC795 of 1997 expressed himself as follows;

**“...the court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment...”**

11. In the instant case, the impugned judgment was delivered on 23<sup>rd</sup> June 2021 and the application herein filed on 22<sup>nd</sup> July 2021. Accordingly, the application was filed within time. Regarding the claim that the applicant is likely to suffer substantial loss, one would have to evaluate the background of the case. The issue in contestation is matrimonial property out of which the appellant claims a share having separated.

12. The respondent on the other hand claimed that the property was obtained before their marriage hence not matrimonial property. At the centre of the dispute is whether the Kadhi had jurisdiction under Article 170(5) of the constitution to arbitrate over Matrimonial property disputes. There is also the argument that the applicant stands the risk of being evicted from the subject property thus rendering the appeal nugatory.

13. As stated above, the role of the court is to try as much as possible to facilitate a litigant to the extent legally possible to exhaust his legal redress up to the highest level possible. This is because recourse to a court of law is quite often the last option for any litigant hence the doors of justice should not be shut where grant of the orders sought will not prejudice the other party.

14. The subject property is land which is emotive in Kenyan legal system. If the order of stay is not granted, execution by way of eviction is the inevitable outcome and possibly sale to a third party. In the event the appeal succeeds, it will be costly to have the property revert back hence substantial loss. Further, in case of eviction, the appellant may be rendered destitute with no alternative accommodation. Since this is a dispute involving family members regarding division of matrimonial property and considering that the appellant is in occupation of the property, there will be no prejudice in granting a stay of execution to maintain the status quo.

15. AS to whether the appeal is arguable, prima facie, there is an arguable appeal to the extent that the court is being call upon to determine the element of contribution towards acquisition of the property and also, the question of jurisdiction of the Kadhi's court in determining issues touching on land ownership. I am however a live to the fact that an arguable appeal is not necessarily one which must succeed. See Halai and another vs Thornton & Turpin (1963) Ltd (1990) KLR 365.

16. As to furnishing of security, this is a family dispute to which the order of security may not be appropriate. In any event, nobody has raised it hence I will not make any order. Accordingly, it is my finding that the application is merited and the same is allowed and stay of execution do issue pending determination of the appeal. The appellant to expedite the process by filing the record of appeal within 30days.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS DAY OF 17<sup>TH</sup> DECEMBER, 2021**

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**J.N. ONYIEGO**

**JUDGE**