



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MARSABIT**

**MATRIMONIAL CAUSE NO.1 OF 2017**

**MAA.....PLAINTIFF**

**VERSUS**

**AR.....1<sup>ST</sup> RESPONDENT**

**MAR.....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

The application dated 13/2/2020 is seeking the following orders: -

- 1) **That pending the hearing and determination of this application inter parties, the Honourable court be pleased to order and it is hereby ordered the stay of execution of the Ruling of the Honourable Court dated 3<sup>rd</sup> February 2020.**
- 2) **That upon hearing and determination of this application inter parties the Honourable Court be pleased to order and is hereby ordered and declared that:**
  - a) **The Applicant having been married to the 2<sup>nd</sup> Respondent at the time the property known as plot [particulars withheld] was gifted to him by his mother she is also entitled to it as a matrimonial property.**
  - b) **That the Ruling dated 3<sup>rd</sup> February 2020 and the earlier one dated 26<sup>th</sup> November 2019 are hereby reviewed and set aside.**
  - c) **That the applicant is entitled to a portion of plot [particulars withheld] which is matrimonial property in which all wives of the 1<sup>st</sup> respondent are entitled in the polygamous union.**
  - d) **That the property known as plot No. [particulars withheld] which is matrimonial property should not be sold but retained as family property and be used to take care of the needs of the family or used as shall be agreed by the family members.**
- 3) **That upon hearing and determination of this application inter parties the Honourable Court be pleased to order and it is hereby ordered that plot [particulars withheld] was acquired during subsistence of a polygamous union and the applicant is also entitled to it.**
- 4) **That the cost of this application be provided for.**

The application is supported by the applicant's affidavit sworn on 14/2/2020. The plaintiff filed a replying affidavit opposing the application.

Mr Kirimi appeared for the applicant. Counsel submitted that the applicant was seeking only the prayer for stay of execution pending inter parties hearing. The applicant is in a polygamous marriage. Her Interests were not considered The applicant would like to have the property preserved. If the ruling of the Court is executed, then the applicant's interest will be rendered nugatory. The applicant has children and if the property is not preserved then she will be rendered destitute. Mr Kiogora, counsel for the plaintiff did not appear despite having been served.

The application herein was filed under certificate of urgency. It was placed before me on 17/2/2020 and it was not certified as urgent. The Court directed that it be listed for hearing at the registry. The presumption was that the applicant was to serve the application for inter parties hearing. It is evident that the application was served and a replying affidavit in response to the application was filed on 3/3/2020. Despite the

service, Mr Kirimi informed the Court that all what the applicant wanted was an order for stay of execution pending inter parties hearing.

In view of the position taken by the applicant counsel, I will deal with the issue of stay of execution.

**In the case of NEW STANLEY HOTEL LIMITED VERSUS ARCADE TUBACCONISIS LIMITED (1986) KLR,757. The Court (Porter J as he then was) held inter alia: -**

**Before making an order staying the execution of the judgement, the Court has to be satisfied that substantial loss may result to the applicant unless the order was made and that the application was made without unreasonable delay.**

The plaintiff herein initiated these proceedings by way of Originating Summons dated 4/8/2017. The 1<sup>st</sup> respondent also filed his Originating Summons dated 4/9/2017 and the two Originating summons were fully heard by way of oral evidence and judgement delivered on 23/7/2018. The Court awarded the plaintiff 30% of plot number [particulars withheld], Marsabit. Throughout the hearing of the case the first respondent appeared in Court. The evidence shows that at that time the plaintiff and the applicant herein were living together and were the ones taking care of their mother in law.

The Court has already determined the respective shares between the plaintiff and the 1<sup>st</sup> respondent. The applicant herein is not a party to the dispute and is yet to prove to the Court the extent of her contribution towards the property. She can do that through the taking of oral evidence as it was the case with the plaintiff. The only logical conclusion I can make is that should the applicant prove her claim; her share will be deducted from the 70% share of the 1<sup>st</sup> respondent. The applicant simply filed an application seeking stay of execution without seeking permission to be enjoined in this dispute. I am satisfied that she was aware of the Court case all along. The Court was told at one time that posters were placed on the two properties warning prospective buyers. She lives in one of the properties and must have seen those posters.

Given the nature of the application, I do find that the prayer for stay of execution lacks merit as the applicant will have to first establish her claim to the property and prove that she is entitled to a share thereof. Thereafter the Court will consider her share and have it hived off from the defendants 70% share. There is no substantial loss that will be suffered by the applicant. The 70% equivalent of the defendant share has been deposited in Court and the defendant is pursuing his appeal to the Court of Appeal. The application is not contesting the finding that the plaintiff is entitled to 30% share of plot No. [particulars withheld], Marsabit. All along the defendant was aware that he had a second wife. The applicant is still married to the defendant and should claim her share from the defendant.

I do find that the applicant's prayer for stay of execution as contained in her application dated 13/2/2020 lacks merit and is hereby dismissed with no orders as to cost.

***Dated, Signed and Delivered at Marsabit this 24<sup>th</sup> day of March, 2020***

***S. CHITEMBWE***

***JUDGE***