



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

MATRIMONIAL CAUSE NO. 1 OF 2017

MAAPLAINTIFF/RESPONDENT

VERSUS

ARH..... DEFENDANT/APPLICANT

R U L I N G

1. The parties were man and wife before they were divorced. Subsequently, they both filed Originating Summons for the determination of the matrimonial properties and the division thereof.

2. By a Judgment made on 23/7/2019, this Court (Chitembwe J) determined that Plot No.xx, Marsabit Town (hereinafter “the suit property”) was matrimonial property belonging to the two in the proportion of 70% for the applicant and 30% for the respondent.

3. Pursuant thereto, on 26/10/2019, the applicant applied for orders, *inter alia*, that the suit property be sold to a willing buyer and the proceeds be shared between him and the respondent in the proportion of 70/30. By a ruling delivered on 26/11/2019, the Court ordered, *inter alia*, that the said property be valued and the valuations be filed in Court. However, the Court did not make any determination on prayer 5 of that application which sought the sale of the suit property and the sharing of the proceeds as aforesaid.

4. Pursuant to the said orders, the parties filed in Court their respective valuations which the Court considered. The respondent’s valuation put the value of the suit property at Kshs.16 million while that of the applicant was Kshs.16.5 million. The Court observed that, throughout the proceedings, the respondent was not for the idea of the suit property being sold but that she wanted to be allowed to keep her share thereof. On the other hand, it had been throughout the contention of the applicant that the suit property be sold and the proceeds be shared in accordance with their respective shares.

5. In view of the foregoing, by a ruling made on 3/2/2020, the Court upheld the applicant’s valuation of Kshs.16.5 million as the value of the property. The Court further directed that the respondent do pay the applicant a sum of Kshs.11,550,000/- being his 70% share of the property within 60 days whereupon the same be transferred to and registered in her name.

6. That then is the background to the application under consideration. The same is a Motion on Notice dated 29/4/2020 brought by the applicant under **sections 1A, 1B, 3A and 6 of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules and Article 159 of the Constitution of Kenya.**

7. In the Motion, the applicant sought a total of 8 prayers. Prayer Nos. a), b), c) and d) are spent while prayer no. h) is for the costs of the application. The main prayers which are for consideration in this ruling are prayer nos. e), f) and g) which I will set out hereunder for clarity:

“e. THAT upon hearing of the Application herein, the Honourable Court be pleased to order and it is hereby ordered that all rent collected from the tenants of Plot No. xx Marsabit be utilized by the family including the Applicant/Respondent pending the determination of the Appeal at the Court of Appeal in Misc. Civil Application 20 of 2020.

b. THAT upon hearing of the Application herein, the Honourable Court be pleased to order and it is hereby ordered that the orders of the Honourable Court made on the 27/2/2020 are hereby set aside.

c. THAT upon hearing of this Application herein, the Honourable Court be pleased to order and it is hereby ordered that all tenants occupying Plot No. 37 and who are subject to paying rent do pay rent for the premises to MAR and the same be utilized for the family including MAA, the Applicant/Respondent herein”.

8. The grounds upon which the Motion was grounded upon were contained in the body of the Motion and the supporting affidavit of **ARH** sworn on 29/4/2020. These were that; the applicant is aggrieved by the order of 23/2/2020 and has appealed to the Court of Appeal against

the said order; that the rent from the suit property was what the entire family, including his mother, the original owner thereof depend on for their livelihood; that the money deposited in Court had not been accessed until after the appeal. It was further contended that the stay order will not prejudice the respondent in that she will still be entitled to her share of the rent.

9. The application was opposed by the respondent through her replying affidavit sworn on 20/5/2020. She deposed how she had purchased the suit property for Kshs.11,550,000/- pursuant to the Court order of 3/2/2020 and the property transferred to her. That in the premises, the application had been overtaken by events. That the applicant's mother and his 3rd wife have at all times known of these proceedings and are not parties thereto. That the application was but a waste of time for the Court.

10. A keen reading of the prayer shows that it is an application for stay of execution and review of the order of this Court made on 23/2/2020. As for stay, the principles applicable are well known. The application should be made timeously, the applicant must demonstrate that if the stay is not granted and the appeal is successful, he will suffer substantial loss and the offer of security for the performance of the decree that might be found ultimately binding on the applicant.

11. The applicant has already filed a Notice of Appeal in the Court of Appeal evincing his intention to appeal. He has also filed an application for stay before that Court under a certificate of urgency being, **Nyeri CA Civ. Appn. No. 20 of 2020.**

12. In view thereof, I doubt if this Court can entertain the present application for stay when a similar application is pending before that Court. I think the prayer that should have been sought is a stay of execution pending the hearing of that application in the Court of Appeal. However, if I am wrong and it is found that this Court can entertain the application notwithstanding a similar jurisdiction having been invoked in the Court of Appeal, my take on the prayer for stay is as following.

13. As to the timeous filing of the application, the order appealed against was made on 23/2/2020. The present application was lodged on 7/5/2020, 74 days after the order appealed against was made. That in my view is inordinate.

14. The requirement for lodging an application for stay timeously is well founded. It is meant to preserve the status quo obtaining as at the time the order is made. Any delay might lead to changed circumstances thereby prejudicing either the parties to the proceedings or third parties who may have obtained an interest pursuant to the order in question.

14. In the present case, the respondent has sworn and it has not been denied that since the making of the order, she has already paid a whooping sum of Kshs.11,550,000/-, and being the applicant 70% share thereof has had the property registered in her name. In my view, to stay the order at this juncture would be prejudicial to the respondent.

15. As to the substantial loss, there is no evidence that the applicant will suffer any. It may be true that the applicant and his family may have been depending on the suit property for their upkeep. However, ever since October, 2019, the applicant was the one pressing for the sale of that property. If the Court had upheld his position and the property sold to a third party, it is doubtful if the applicant would still be pressing that the rent be collected by his 3rd wife. To my mind, the alleged substantial loss is but a red herring meant to keep the respondent away from the fruits of her judgment.

16. As to security, no security for the performance was ever offered by the applicant. For the foregoing reasons, the prayer for stay was not well founded and it is rejected.

17. The other prayer was for review of that order. The principles applicable for an application for review are well set out under ***Order 45 of the Civil Procedure Rules***. An applicant must establish an error on the face of the record, or that there has been discovery of new evidence that was not available or could not be produced by the applicant at the time the order was made despite exercise of diligence or for any sufficient reason.

18. The Motion did not state under which of the three limbs the order was being sought to be reviewed. I have carefully considered the supporting affidavit. There was no allegation that there was any error apparent on the face of the ruling. Neither can this Court find any.

19. As to the discovery of new evidence, there was none that was alleged. A close scrutiny of the supporting affidavit will show that all the information deponed to therein was within the knowledge of the applicant. There was nothing new that was shown not to have existed at the time the ruling of 23/2/2020 was made.

20. That leaves us with the third principle, for any sufficient reason. The reason given is that his mother is aged 80 years old; she was the original owner of the suit property; she and the applicant's family depends on the rent from the suit property.

21. Can the foregoing be called sufficient reason? The mother of the applicant may have been the original owner of the suit property. However, the property passed over to the applicant and the respondent and was adjudged as such in this Court's Judgment which has not been appealed against.

22. Further, she must have been aware of the existence of these proceedings and she has never sought to be joined and stake her claim, if any, on the suit property. To this Court's mind, the applicant's share of the suit property having been amortized in terms of money, Kshs.11,550,000/-, he is free to collect the same from Court and use it to fend for his family, his mother included.

23. In view of the foregoing, I find the application to be without merit and I dismiss the same in its entirety with costs.

DATED and **DELIVERED** at Meru this 16th day of June, 2020.

A. MABEYA

JUDGE