



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**DIVORCE CAUSE NO. 8 OF 2019**

**MN.....PETITIONER/APPLICANT**

**VERSUS**

**CMM.....RESPONDENT**

**RULING**

1. The applicant moved this court by a Notice of Motion application dated 13.5.2020 under Certificate of Urgency seeking stay of execution of the orders issued by this court on 30.4.2020 to preserve parcel of land known as Eldoret Municipality/Block [...] by maintaining the status quo pending the hearing and determination of the intended appeal. The application is premised on the grounds that this court on 30.4.2020 issued injunctive orders in respect to parcels number Eldoret Municipality block [...] and Eldoret Municipality block [...] and declined to grant the said orders in respect to Eldoret Municipality block [...] and Eldoret Municipality block [...]. The applicant was therefore dissatisfied with the same and lodged an appeal which has high chances of success and if the order of stay of execution is not granted then the appeal would be rendered nugatory. In addition it was averred that there has been no undue delay in filing this instant application and that if not granted she shall suffer substantial loss. Further she is willing to furnish any security as shall be directed by the court.

2. The application is supported by an affidavit sworn by Margaret Ndung'u the petitioner/applicant. She avers that she purchased the land known as Eldoret Municipality/block [...] at a consideration of Kshs.2,500,000/- and the respondent was only a witness, a sale agreement to the transaction was annexed as MN3. Further she is the one repaying the loan with Equity bank secured by the respondent to avoid the bank from exercising its statutory power of sale (bank statement annexed as MN4). She had asked for the proceedings to be typed so as to expedite the appeal process.

3. In addition to the above her advocate had advised her that the Matrimonial Property Act No. 49 of 2013 allowed for monetary and non-monetary contribution which she personally had contributed towards purchase of the said property and both Eldoret Municipality/block [...] and Eldoret Municipality Block [...] are part of the matrimonial home. These properties could therefore not be leased or mortgaged without written and informed consent of both spouses, she had given her consent to charging parcel number Eldoret Municipality/Block [...].

4. Further the orders she is asking would preserve the subject matter to avoid any undue hardship that may be occasioned. She urged this court to allow the application.

**Grounds of opposition**

5. The respondent filed its grounds dated 19.5.2020 strongly opposing the application on the grounds that the application is misconceived, fatally defective and an abuse of the court process and the same should be dismissed with costs. That this instant application is devoid of merit since there is no positive order being sought to be appealed against thus it is a waste of the judicial court time. The application offends the provisions of *Order 42 rule 6(2) (a) of the Civil Procedure rules 2020* and the same has been filed after more than a month since delivery of judgment.

**Submissions**

6. Respondent has not filed his submissions.

**Petitioner's submission**

7. The court was urged to refer to *Order 42 rule 6(2) of the Civil Procedure Rules* in granting the said application since it had discretionary power to do so. Further that one had to establish the following ingredients for the court to grant the same:

- i. Substantial loss may result unless the orders of stay are granted.
- ii. Whether the application was made without unreasonable delay.
- iii. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on her has been given by the applicant.

8. The court was reminded that the applicant had bought the suit property though the respondent had registered the same in his name, and he had even secured a loan using the said property. The property therefore formed part of the matrimonial property as provided for by Section 6 of the *Matrimonial Property Act No. 49 of 2013*. If the respondent sold off the property she would suffer and she will be subjected to deprivation of her right to property as provided for by Article 40 of the *Constitution*. In the circumstances, the appellant would suffer substantial loss if the sought stay is not granted, as was held in **Daniel Chebutui Rotich & 2 others V. Emirates Airlines Civil Case No. 368 of 2001**.

9. The court is urged to find that the application was filed timely without undue delay.

10. The applicant urged that she was willing and ready to abide by the orders to be given by the court. The respondent failed to show he had the means to compensate the applicant should she be successful on appeal and after the property has already exchanged hands.

11. The sought orders are positive and could be implemented contrary to the respondent's allegation.

### **Analysis and determination**

12. The issue for determination is whether the applicant has satisfied the legal grounds to warrant stay of execution order.

13. The applicant is seeking stay of execution of orders issued on 30.4.2020. The threshold in granting orders for stay of execution was established in **Giella V. Cassman Brown (1975) A ER 504** which stated that an applicant has to demonstrate the following:

- (a) There must be a serious issue to be tried.
- (b) Damages are not adequate remedy
- (c) Whether the balance of convenience lies in favor of granting or dismissing the application.

14. This court is guided by the decision in **Butt V Rent Restrictions Tribunal [1979]eklr (Madam Miller and Potter JJA)**. In this case the court held inter-alia that:

*i. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*

*ii. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.*

*iii. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.*

*iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirement."*

15. The applicant has relied on Order 42 rule 6 of the *Civil Procedure*

Rules which provides that:

**6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**

**(2) No order for stay of execution shall be made under subrule (1) unless-**

**(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**

**(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him as been given by the applicant"**

16. The applicant has already filed a notice of appeal to the court of appeal by the annexure attached to the application marked as MN2.
17. This court had failed to grant injunctive orders in respect to parcel Eldoret Municipality block [...]. In this instant application the applicant has annexed a sale agreement dated 13.9.2004 which indicates her as the purchaser of parcel of land known as Eldoret Municipality/Block [...] measuring 0.08 ha at a value of Kshs.2,500,000/-. It further shows the respondent as a witness. There is also an annexure of a bank statement for account [...] for the period 1.8.2019 to 11.5.2020. The offer letter for the loan is addressed to the respondent and not the applicant.
18. This court had declined to grant injunctive orders against this parcel of land for the reason that the applicant had failed to establish any relationship between herself and the loans she alleged to be repaying. It is for this reason that the applicant has attached the said documents. The applicant previously had failed to annex these documents but does so now.
19. The applicant has not stated the security she is willing to offer to enable the court grant stay of execution.
20. The respondent in his grounds of opposition has stated that the orders being sought cannot stand as there is no positive order. The applicant in this application is seeking for injunctive orders which were granted in respect of two of the parcels and the same was not granted to the other two.
21. The right to be heard is a constitutional right under Article 48 of the Constitution and therefore the applicant can be given the benefit of doubt as per annexed documents. The court is further guided by the case in *Global Tours & Travel Limited v. Five Continents Travel Limited [2015] eKLR* where it was held that:

***“Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interest of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously.”***

Having weighed all the foregoing factors, I do find it would be at interest of justice to issue orders of stay of execution in relation to land parcel No. Eldoret/Municipality Block [...], pending the hearing and determination of the appeal. The application is therefore allowed.

Costs be in the cause.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 15<sup>th</sup> day of September, 2020.**

In the presence of:-

Mr. Mathai for the Applicant

Mr. Teti for the Respondent (absent)

Ms. Gladys - Court clerk