



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 179 OF 2019

DAVID MACHARIA GITONGA.....APPELLANT

VERSUS

JOYCE WANJIKU MACHARIA.....RESPONDENT

RULING

1. Before me is a motion filed on 18th November 2019 and expressed to be brought under Orders 43 Rule 2, 42 Rule 6 and 51 Rule 1 of the Civil Procedure Rules. **David Macharia Gitonga**, the Appellant/Applicant, seeks that pending the hearing and determination of the appeal filed herein, orders do issue to stay further proceedings whatsoever in Kikuyu Senior Principal Magistrate's Court Miscellaneous Civil Application No. 44 of 2018, and specifically, to stay the notice to show cause in the matter, requiring him to show cause why he should not be punished for disobedience of an order made therein.

2. The application is based on grounds inter alia that the Applicant will suffer substantial loss if the order for stay of proceedings is not granted and that in any case no prejudice shall be occasioned to the Respondent if the order for stay of proceedings is granted.

3. The Applicant deposes in his supporting affidavit that he had filed the miscellaneous application in the lower court for orders against the Respondent, **Joyce Wanjiku Macharia** who is his wife, and the Land Registrar Kiambu for the removal of a restriction lodged on land parcel **LR. No. Muguga /Muguga/T.198** and that a consent recorded therein effectively divided the matrimonial property. It was his contention that at the time of recording the consent, he was grieving his daughter and as such his judgment was clouded; that upon realising that the consent was erroneous and made without jurisdiction, he filed an application to review and/or set aside the said consent which application was dismissed; that the Respondent thereafter filed an application to have him punished for contempt of court; that he stands to suffer irreparable loss through possible imprisonment for contempt of court; and that his children will also suffer in such eventuality. He stated that he has an arguable appeal and urged the court to grant his prayers.

4. The Respondent by her affidavit opposing the motion deposed that the consent order of 30th October, 2018 was recorded freely by the parties and that claims by the Applicant that he was not in the right state of mind have no basis, and besides, there is no evidence of undue influence. She defended the consent order as regular and lawful and asserted that the lower court had the requisite jurisdiction. It was contended that the Appellant will not suffer substantial loss whereas the Respondent herself stands to be prejudiced.

5. The application was canvassed by way of oral arguments. For the Applicant it was submitted that he has satisfied the principles guiding the grant of an order to stay proceedings; that appeal herein raises serious issues of procedural and substantive law; and further that the Applicant is apprehensive he might be imprisoned for contempt and thereby suffer substantial loss together with his children who are of school-going age.

6. The Respondent submitted on her part that there is no existing appeal in respect of the consent order whose stay the Applicant, as the appeal herein relates to the court's refusal to review the consent order. It was argued that the Appellant will not suffer any prejudice as the subject matrimonial property was to be vested in the Respondent to hold in trust for the couple's children.

7. The court has considered the material canvassed in respect of the application. The brief facts of the case are that the parties herein are a married couple, with several children, some of them minors, between them. It appears that prior to 2018, relations between the parties had soured. The Respondent had proceeded to place a caveat/restriction in respect of a parcel of land namely, **L R No. Muguga/Muguga/T. 198** registered in the Applicant's name and on which the couple's matrimonial home was erected.

8. In 2018, the Applicant approached the subordinate court at Kikuyu *vide* Miscellaneous Application No. 44 of 2018 seeking to have the restriction raised. The Respondents in that cause were Respondent herein and the Land Registrar Kiambu. However, on 30th October 2018 when the parties appeared in court, they recorded consent in terms *inter alia* that the land parcel **LR No. Muguga/Muguga/T. 198** (hereafter the suit property) be subdivided into two equal portions. The portion upon which the matrimonial home was erected was to be transferred to

the Respondent herein to hold in trust for herself and the issues of the marriage, while the second portion was to be transferred in favour of the Respondent absolutely. Part of the terms of the consent recorded related to the maintenance of the couple's children *inter alia*. The final term was that the restriction or caveat registered against the suit property would be removed or lifted subject to these terms.

9. It appears that there was no compliance on the part of the Applicant and the Respondent subsequently filed a motion dated 22.5.2019 seeking that the Applicant be cited for contempt of court. For his part the Applicant filed his own application seeking the review, discharge and or settling aside of the consent orders on grounds *inter alia* that the orders were contrary to court policy, based on insufficient material facts, misapprehension or ignorance of material facts. The trial court heard both applications together. In the ruling delivered on 31st October 2019, the court dismissed the Applicant's motion while allowing the Respondent's.

10. That ruling prompted the present appeal. The grounds of appeal challenge *inter alia* the jurisdiction of the lower court and legal propriety of the consent orders. Filed contemporaneously was the instant motion. The live prayers being no. (2) and (3) which effectively seek the stay of proceedings in the lower court. The application is expressed to be brought under Order 42 rule 6 of the Civil Procedure Rules, *inter alia*. Order 42 rule 6(1) of the Civil Procedure Rules provides as follows:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.”

11. The jurisdiction to stay proceedings is discretionary and is primarily intended to obviate a situation where the appeal by the Applicant may be rendered nugatory in that he would suffer substantial loss if stay were refused. In **Re Global Tours and Travels Ltd Civil Application No. NAI 322 of 2006 (UR)** the court stated 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 interests 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 timeously brought.”

12. In **Niazons (Kenya) Ltd v China Road and Bridge Corporation Kenya) Ltd NRB HCC No.126 of 1999** it was held that:

“Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render orders made nugatory and render the exercise futile ... stay should be granted”

13. The Court of Appeal stated in **Cooperative Bank of Kenya Ltd v Banking Insurance and Finance Union (Kenya) (2015 e KLR** that whether or not an appeal would be rendered nugatory, if successful, would depend on the peculiar circumstances of each case. See **Reliance Bank v Norlake Investments Ltd [2002] I E.A 227 and Machira t/a Machira & Co. Advocates v East Africa Standard [2002] e KLR.**

14. The Applicant has repeatedly emphasized that he will suffer substantial loss and his appeal rendered nugatory if proceedings in the lower court are not stayed. The trial court by its ruling allowed the Respondent's motion to cite the Applicant for contempt of court and by the date of the hearing of the instant motion, the matter before the lower court was set for 10th March 2020. In the circumstances of this case, the Applicant's apprehension does not appear exaggerated. The risk that he would be punished through imprisonment or other penalty for failure to comply with the consent orders appears real. An eventuality such as imprisonment would in the circumstances of this case not only cause the Applicant substantial loss, but also affect the welfare especially the minor of the children of the litigating couple who appear to have been brought into the couple's disputes.

15. Secondly and consequently, the Applicants appeal would have been rendered nugatory. Given the circumstances that gave rise to the orders impugned on this appeal, the Applicant's appeal *ex facie* is arguable and not frivolous. The justice of the situation to my mind appears to favour the granting of the order to stay proceedings upon conditions, so that the Applicant may have the opportunity to ventilate his appeal which principally challenges the jurisdiction and exercise thereof by the lower court. The Respondent has pointed out that the present appeal does not challenge the consent order. That is correct and as should be. By virtue of the provisions of Order 45 rule 1 of the Civil Procedure Rules, once the Applicant elected to apply for review of the consent order, the right to appeal the said order was extinguished. Therefore, he can only properly appeal against the ruling on the application for review as he has done.

16. Weighing one thing against another, the court is persuaded to grant an order to stay the proceedings in the lower court, pending the determination of the appeal, but subject to the condition that the Applicant will take all necessary steps to perfect his appeal and to prosecute it within the 12 (Twelve) months of the date of this ruling. In default the stay order will lapse automatically. The Applicant will bear the costs of the application.

DELIVERED AND SIGNED VIRTUALLY THIS 23RD DAY OF OCTOBER 2020.

C. MEOLI

JUDGE