



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL CASE NO. 75 OF 2014 (OS)

MWM.....APPLICANT

VERSUS

HMM.....RESPONDENT

RULING

1. The applicant MWM and the respondent HMM got married in 1994 under Kikuyu customary law. The marriage was solemnized on 10th April 1999. The applicant petitioned for divorce which was granted on 26th March 2003. She filed the present originating summons for determination of matrimonial property. On 30th October 2017 the court rendered its judgment in the matter. It was found that LR No. [.....] Ruiru and Plot No. [.....] – Kayole were matrimonial property to which each party was equally entitled. The court directed that each be sold and the proceeds be shared equally. Each party was to give the other priority to buy the other out in regard to either property after valuation. Lastly, each party was to bear own costs.
2. The respondent was aggrieved by the judgment and on 6th November 2017 filed a Notice of Appeal. On 5th December 2018 he filed the present application seeking the stay of execution of the decree pending the hearing and determination of the appeal. He was aggrieved by the finding that the applicant had contributed to the development on LR No. [.....]. His case was that if the property is sold, and there is no dispute the applicant wants it sold as ordered, the appeal, if successful, would be rendered nugatory as the applicant is an American citizen who lives in the USA with her husband and he would not be able to recover the proceeds. In terms of security, he undertook not to dispose off or charge the property until the appeal was heard and determined. The property is in joint names of the parties.
3. The applicant opposed the application through grounds of opposition. On her part, on 3rd May 2018 she had filed a motion seeking to execute the decree arising from the judgment. Specifically, she sought that the respondent be ordered to deposit into court the title documents to the two properties to facilitate the sale; the deputy registrar be empowered to execute all documents to enable the sale in the event the respondent was not willing; and, in the meantime, the rent from the properties be shared equally. For purposes of rent collection, she wanted M/s Damas Services Auctioneers be the ones appointed to collect the same. Her case was that she had valued the properties and had requested the respondent to buy her out but there had been no response. The respondent was the one enjoying all rents from the properties.
4. The respondent responded by saying that he had the appeal which he wanted heard and determined before the said sale.
5. The court directed that the two applications be heard together.
6. The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal is safeguarded and the appeal, if successful, is not rendered nugatory (**Consolidated Marine –v- Nampijja and Another, Civil Application No. 93 of 1989 at Nairobi**). It is also trite that a successful litigant should not be deprived of the fruits of his success (**F.K. Kiongo -v- V.P.N. Mukubwa & Another, Civil Application No. 63 of 1988 at Nairobi**).
7. Under **Order 42 rule 6** of the **Civil Procedure Rules** the respondent has to show that he will suffer substantial loss if the application is not allowed, he has brought the application timeously and he has offered security for the due performance of such decree as may be binding on him. Ultimately, whether or not to grant stay is a matter that is depended on the discretion of the court. This is a judicial discretion that is guided by the peculiar facts of each case.
8. The application was brought on 5th October 2018, after the judgment was delivered on 30th October 2017 and the appeal filed on 6th

November 2018. It is clear there was no delay in bringing the application.

9. LR No. [.....] is in joint names while Plot No. A3-524- Kayole is in the name of the respondent. The respondent states that he will not sell or charge them during the pendency of the appeal. There is no dispute that the properties are fetching rent which the respondent is utilising alone.

10. These properties are valuable. The Court of Appeal will be called upon to review the judgment of this court and determine if the properties constitute matrimonial property and, if so, what each party should get from them. If the court agrees with the applicant and allows their sale, and the Court of Appeal ultimately finds for the respondent then substantial loss will have been occasioned. Further, the averment by the respondent that the applicant will not be in a position to refund the proceeds of sale was not at all challenged.

11. In the circumstances of this case, I allow the respondent's application for stay pending the hearing and determination of the appeal on condition that each property shall have an order registered against it prohibiting its sale, lease or charge. Secondly before the appeal is allowed and determined, Damas Services Auctioneers shall from 1st July 2019 be collecting rent from the tenants and sharing it equally to the parties. This will be less management fees and other outgoings.

12. Each party shall bear own costs.

DATED and SIGNED at NAIROBI this 22ND day of MAY 2019

A.O. MUCHELULE

JUDGE

DATED and DELIVERED at NAIROBI this 30TH day of MAY 2019

A.N. ONGERI

JUDGE