



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**FAMILY DIVISION**

**HIGH COURT CIVIL SUIT NO. 25 OF 2012**

**RWW.....PETITIONER/RESPONDENT**

**VERSUS**

**EKW.....RESPONDENT/APPLICANT**

**RULING**

1. The Application coming for consideration in this Ruling is the Respondent/Applicant's Notice of Motion dated 25.2.2019 seeking the following orders;

**(i) THAT this Court be pleased to extend the time for leave to appeal to 28 days from the date of Supply of Proceedings by the Court.**

**(ii) THAT this Court be pleased to grant Stay of Execution of the Judgment delivered on 15.12.2019 pending the hearing and determination of the Respondent/Applicant's intended Appeal.**

2. The Application is supported by the Affidavit of the Respondent/Applicant of even date.

3. The Petitioner/Respondent who opposed the Application filed grounds of opposition and a Replying Affidavit both dated 12<sup>th</sup> March, 2019. It was her deposition that the Applicant/Respondent had refused to address himself to her plight although the Court's determination was to her favour. Further, that he has denied her any contribution to the family wealth and the intended appeal was an attempt to continue denying her the fruits of the Judgement.

4. She asserted that the intended Appeal has no merit as it is grounded on repealed law. She averred that the intended Appeal would not be rendered nugatory if the Judgment is executed. She sought strict conditions for due performance of the decree to be put in place in the event that the Court allowed the prayer for stay of execution.

5. In a further affidavit dated 2<sup>nd</sup> May 2019, the Applicant reiterated stated that he had no intention of disposing off any of the properties in dispute. He reiterated that he had met the requirements for granting of stay of execution. He alluded to the position made by the Respondent on strict orders for due performance of the decree noting that it was not clear what the Respondent envisages in the event the Court grants the stay orders. He asserted that this case was not suitable for security to be offered as the subject matter is made up of immovable properties whose value will increase during the pendency of the Appeal.

6. Having carefully considered the pleadings and the submissions of the parties to this matter, it is my view that the substantive issue for determination is whether the application meets the threshold for granting the orders of stay of execution of the judgment pending Appeal.

7. Stay of Execution is provided for under order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

**6. (1) 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.**

**(2) No order for stay of execution shall be made under sub rule (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 has been given by the applicant.**

8. The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent. In that regard what is at stake in this cause is that if the stay herein is not granted the Respondent would be at liberty to sell the immovable property and the proceeds thereof distributed or distribute the property 50:50.

10. I have proceeded to determine whether the conditions stipulated for grant of stay have been met. On whether the appellant will suffer substantial loss, I am reminded of the sentiments of **Gikonyo J in James Wangalwa & another v Agnes Naliaka Cheseto Misc Application No 42 of 2011 [2012] eKLR.**

**No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.**

**The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein Vs .Chesoni [2002] 1KLR 867, and also in the case of Mukuma Vs. Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:**

**“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”**

11. Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending Appeal. Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum. – See the decision of Musinga J (as he then was) in the case of **Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001.**

12. It is not in dispute that the distribution of the assets the subject of the decision in the High Court was contested. The Applicant has demonstrated an intent to challenge that decision. In my view the Applicant will suffer substantial loss if he is forced to distribute the property 50:50 or sell them pending the intended appeal.

13. The other condition for granting stay orders is on the security to be offered. The law is that a party seeking stay must offer such security for the due performance of the orders as may ultimately be binding on the appellant. I am however of the considered view that in the circumstances of this cause and it being a matrimonial cause, the court can grant stay of execution of its orders without demanding that the Applicant furnish the Court with security for the due performance of the orders. As to whether the application was made without, unreasonable delay, I find in the affirmative.

14. In view of the foregoing, I find that Substantial loss will be occasioned if the Judgment is executed at this stage. I accordingly allow the Respondent/Applicant an opportunity to pursue the appeal.

15. The Application dated 25.2.2019 is allowed on the following terms;

**(i) THAT the time for leave to appeal be extended to 28 days from the date of supply of proceedings.**

**(ii) THAT Stay of Execution be and is hereby granted pending the Appeal.**

Orders to issue accordingly.

**DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 21<sup>ST</sup> DAY OF JUNE, 2019**

**ASENATH ONGERI**

**JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.**