



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT EMBU**

**CIVIL CASE NO. 14 OF 2013**

**IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT 1882**

**NM.....APPLICANT**

**VERSUS**

**EMN.....RESPONDENT**

**R U L I N G**

**A. Introduction**

1. This is the ruling for the application dated 18/09/2018 in which the applicant seek orders for stay of execution of the judgement of this court delivered on 23/05/2018 pending the hearing of his appeal.
2. The applicant argues that unless his application is allowed, his appeal will be rendered nugatory. He states that his appeal has a high probability of success and that unless the application is allowed, the respondent will evict him from the suit. It is further stated that the appeal has been brought without undue delay.
3. Vide a replying affidavit sworn on the 8/10/2018; the respondent opposes the application on among others the grounds that the application had been brought with an unexplained delay of over 5 months. The respondent also deposes that the application is fraught with deceit as the applicant claims that he will be evicted despite the fact that the court made no such order. The applicant is entitled to 55% of the suit property according to the judgment.
4. The respondent further deposes that there is no appeal before the Court of Appeal as no notice of appeal was served upon her and that no request of proceedings was filed within 14 days from the date of judgement as provided by the Court of Appeal rules.

**B. Applicant's Submission**

5. The applicant submits that the net effect of executing the judgement of this court will be for the respondent to cause a share of 45% to be demarcated in the four properties including clan land being land parcel no. Nthawa/Riandu/xxx which has since been subdivided into Nthawa/Riandu/xxxx and xxxx and on this basis the applicant stands to suffer substantial loss.
6. The applicant further submits that the application was brought without unreasonable delay as the judgement was delivered on 23/5/2018 and the application filed on 18/9/2018. He relied on the case of **Florence Hare Mkaha v Pwani Tawakal Mini Coach & Another [2014] eKLR** where a similar application was filed almost a year later and accepted by the court. Similarly, in the case of **Amal Hauliers Limited v Abdunasir Abukar Hassan [2017] eKLR** where the application was brought four months after delivery of judgement was held to be without undue delay.

7. In conclusion, the applicant submits failure to allow the application shall render the appeal nugatory as the notice of appeal was filed on the 25/5/2018 only two days after the delivery of the judgement and thus the applicant is still within the confines of the law to file an appeal.

**C. Respondent's Submission**

8. The respondent submits that the applicant has failed to satisfy the requirements for grant of stay of execution set out in **Order 42 Rule 6 of the Civil Procedure Rules**.
9. It is further submitted that there is no appeal lodged in the Court of Appeal as per the provisions of **Rule 75 (2) of the Court of Appeal**

**Rules 2010.** The applicant relies on the fact that the notice of appeal was filed on the 7/06/2018 and served on the respondent on the 19/06/2018 after judgement was delivered on 23/5/2018.

10. It is for this reason that the respondent submits that the application ought to be dismissed with costs as there is no appeal instituted.

#### **D. Analysis & Determination**

11. It is important to point out at the outset that the conditions for a stay of execution pending appeal in the Court of Appeal and the High Court are different.

12. **Rule 5(2) (b) of the Court of Appeal Rules** provides as follows: -

*“Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may: -*

*In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75 order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just”.*

13. In the Court of Appeal, the court will only grant a stay of execution pending appeal if the following two (2) conditions are met: -

*“1. The applicant should have demonstrated that his appeal or intended appeal is arguable;*

*2. The applicant should have demonstrated that unless a stay or injunction is granted, his appeal or intended appeal, if successful will be rendered nugatory.”*

14. As the application for stay of execution is presently before the High Court, the relevant provision of law to consider herein is **Order 42 Rule 6(2) of the Civil Procedure Rules**. The same provides as follows: -

*“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 has been given by the applicant.*

15. **Order 46 Rule 6(2) of the Civil Procedure Rules**, therefore provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following: -

*“1. Substantial loss may result to the applicant unless the order was made;*

*2. The application was made without unreasonable delay; and*

*3. 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.”*

16. Evidently, the three (3) prerequisite conditions set out in the said **Order 42 Rule 6 of the Civil Procedure Rules, 2010** cannot be severed. The key word used is **“and”** which connotes that all three (3) conditions must be met simultaneously.

17. As the court proceeds to determine this application, it will take into account that it is not the practice of the courts to deprive a successful litigant of the fruits of his/her judgment. Further the Court will take into account that the purpose of stay of execution pending appeal is to preserve the subject matter. See the case of **Consolidated Marine v Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)**, where the Court held that: -

*“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 appellants who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.*

18. The conditions that the applicant herein should satisfy is as stated in Order 42 Rule 6(2). The Court will now consider each of the condition and juxtapose them with the available evidence herein to determine whether the applicant is deserving of the orders sought.

19. Firstly, the applicant must satisfy that he will *suffer substantial loss*, unless the orders sought are issued. It is evident that the Court did direct that the applicant be entitled to 45% share of each of the matrimonial property. The specific properties are Gaturi/Githimu/xxx,xxx,xxx and Nthawa/Riandu/xxx. The applicant lives on L.R. Parcel No. Gaturi/Githimu/xxx and she cultivates the land whereas the defendant cultivates L.R. Parcel No. Gaturi/Githimu/xxx. The applicant alleges that the respondent seeks to realise her 45% by selling of the same share in the aforementioned parcels.

20. The respondent did not respond to the applicant's assertion. Even without going to the merit of the appeal, if the applicant was never in possession and the orders sought are not granted, there is no evidence that he will not suffer substantial loss. The court makes this finding taking into account that it is not the duty of the court to deny a successful litigant the fruits of his/her Judgement. Further, the applicant should also have an assurance that her appeal will not be rendered nugatory.

21. The applicant must satisfy the court that the application was made without *unreasonable delay*. The court noted that the *Notice of Appeal* was lodged on the 7/06/2018 and the application for stay filed three months later on the 18/9/2018. It is my opinion that the delay of three months is not unreasonable. The applicant cannot be shut out from the doors of justice. My view is that he should be given an opportunity to ventilate the appeal.

22. The subject matter being land, the deposit of security is not necessary. This was the holding of the court in the case of **David Oyiare Ntungani v Matuiya Ole Naisuaku Orket [2017] eKLR**.

23. Consequently, I am of the considered opinion that the judgment of this court should be stayed pending the hearing of the appeal.

24. The application dated 18/09/2018 is allowed in the following terms: -

*a) Pending the hearing and determination of the intended appeal, an order be and is hereby issued staying execution of this court's judgment delivered on 23/05/2018 on condition that the applicant causes the appeal to be admitted and record of appeal filed and served within three (3) months.*

*b) Pending the hearing and determination of the intended appeal, the parties to maintain status quo on the properties listed in this judgment.*

*c) Each party to meet their own costs.*

25. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 25<sup>TH</sup> DAY OF JULY, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Muthoni for Mugambi Njeru for Plaintiff/Respondent**

**Ms. Kungu for Ndorongo for Applicant**