**Chanandin v Chanandin & 3 others; Lacheka Lubricants Limited & another (Interested Parties) (Civil Suit 29 of 2005) [2018] KEHC 8470 (KLR) (Civ) (9 February 2018) (Ruling)**

*Anju Chanandin v Jahangir Alandin Chanandin & 5 others [2018] eKLR*

Neutral citation: [2018] KEHC 8470 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL SUIT 29 OF 2005**

**LK KIMARU, J**

**FEBRUARY 9, 2018**

**BETWEEN**

**ANJU CHANANDIN ..... PLAINTIFF**

**AND**

**JAHANGIR ALANDIN CHANANDIN ..... 1ST RESPONDENT**

**DILIP KUMAR PATEL ..... 2ND RESPONDENT**

**PIYUSH PATEL ..... 3RD RESPONDENT**

**CHHAYEBEN PATEL ..... 4TH RESPONDENT**

**AND**

**LACHEKA LUBRICANTS LIMITED ..... INTERESTED PARTY**

**FEMIDA DEAN ..... INTERESTED PARTY**

**RULING**

1. The 1st and 2nd Interested Parties (Applicants) were aggrieved by the judgment of this court which was rendered on 9th February 2017. They have applied to this court pursuant to the provisions of Order 42 Rule 6 of the *Civil Procedure Rules* seeking to have the execution of the said judgment stayed pending the hearing and determination of the Applicants' appeal that is intended to be lodged by the Applicants to the Court of Appeal. As proof of their intention, the Applicants have annexed in the affidavit in support of their application a Notice of Appeal which was lodged before this court on 17th February 2017.

2. The Applicants contend that if stay of execution is not granted, the Applicants will suffer substantial loss for the reasons that the two parcels of land that are the subject of the order of division in the judgment delivered by this court do not belong to the 1st Respondent but rather to the 2nd Interested Party. The Applicants states that the 1st Respondent had never held shares in Lacheka Lubricants Limited that is a subject of the order of division of matrimonial property made by this court. The Applicants were of the view that if stay of execution is not granted, it was likely that the Plaintiff will executed the judgment and thereby render the appeal nugatory if it were to be successful. The application is supported by the annexed affidavit of the 2nd Interested Party.

3. The application is opposed. The Plaintiff (Respondent) swore an affidavit in opposition to the application. She deponed that the application brought by the Applicants lacked merit, was frivolous and did not demonstrate the loss that the Applicants would suffer if stay is not granted. The Respondent denied that in the event that the intended appeal succeeds, she would not be in a position to reimburse whatever amount that would have been paid to her pursuant to the decree of the judgment. She took issue with the fact that it is the Applicants, who are essentially third parties, were seeking to frustrate the execution of the judgment. She urged the court to disallow the application as it was unmeritorious.

4. Counsel for parties to the application agreed by consent to file written submission in support of their respective positions. The written submission were duly filed. The parties further agreed that the court writes its Ruling on the basis of the written submission. This court has read the said submission and the pleadings filed by the parties in support of their respective opposing positions. For the Applicants to succeed in their application for stay of execution pending the hearing of the appeal, they must establish that they would suffer substantial loss if stay is not granted. The application for stay must be filed without unreasonable delay. The Applicants must also be prepared to provide such security as may be required by the court for the due performance of the decree that may ultimately be bidding on the Applicants (See Order 42 Rule 6 of the *Criminal Procedure Rules*).

5. In *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, F. Gikonyo J held thus at page 3 of his Ruling:

> " 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 a successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein v Chesoni* [2002] 1 KLR 867, and also in the case of *Mukuma v Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in 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:
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> > "...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."

6. In the present application, it was the Applicants contention that they would suffer substantial loss if the court did not stay the execution of its judgment pending the hearing of the intended appeal.

They claim that they are either the registered owners or shareholders of some of the properties that this court decreed to be matrimonial property available for division as between the Plaintiff and the 1st Respondent in the suit. It is important to point out that although the Applicants were earlier enjoined in the suit as interested parties, during the hearing of the case, they chose not to adduce evidence in support of their pleadings. The Applicants did not therefore support their position by adducing evidence in support of their case in court. The judgment of this court was therefore rendered in the absence of any input, by choice, by the Applicants.

7. The Applicants have argued that they would suffer substantial loss if this court did not stay the execution of its judgment pending the hearing of the intended appeal. In its judgment, this court noted that an attempt was made by the 1st Respondent to transfer the particular properties that the Applicants claimed to be their properties during the pendency of the hearing of the suit. The transfer was stopped pending the hearing and determination of this suit. This court wonders on what basis the Applicants are claiming the properties in question if they chose not to adduce evidence during the hearing of the case to establish their claim to the said properties. In that regard, this court is unable to see what substantial loss the Applicants will suffer if the orders of stay of execution are not granted. Whereas this court cannot comment on the strength or otherwise of the intended appeal, this court is certain that the Applicants, who made no effort to support their alleged ownership of the suit properties before this court, cannot claim they will suffer substantial loss if the Respondent (in the application) is allowed to execute the judgment in this suit.

8. The upshot of the above reasons is that the application for stay of execution lacks merit and is hereby dismissed. Should the Applicants chose to file an application under Order 5(2)(b) of the *Court of Appeal Rules*, this court hereby grants them 45 days to do so. Temporary stay of execution is granted for the said 45 days. The Respondent (Plaintiff) shall have the cost of the application. It is so ordered.

**DATED AT NAIROBI THIS 9TH DAY OF FEBRUARY 2018**

**L. KIMARU**

**JUDGE**