



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**CIVIL APPEAL NO. 19 OF 2017**

**NDEGWA GICHINE.....APPELLANT**

**VERSUS**

**SICILY WARWARE NJIRA.....RESPONDENT**

**RULING**

1. This is the ruling of an application which is brought by way of Notice of Motion by the appellant **Ndegwa Gichine** who was the defendant in Wanguru Principal Magistrate's Court Civil Case No. 133 of 2013 (to be referred to as the 'applicant'). He seeks orders that pending the hearing and determination of this appeal there be a stay of execution of the decree issued on 15<sup>th</sup> May, 2017. The application is based on the grounds that the appeal raises *prima facie* bonafide triable issue that ought to be ventilated fully at the hearing. It is further averred that if stay is not ordered, the appeal will be rendered nugatory and his entire family shall suffer irreparably. That even if the lower Court was minded to find in favour of the Respondent, at least it ought not to have brought into litigation property, that is Rice Holding No. 2326 that is owned by a party who was not party in the proceedings (more so a wife of the Appellant Mary Njeri whose property) was protected by the same set of laws just like those the Court cited to find in favour of the Respondent.

2. The application is also supported by the affidavit of the applicant Ndegwa Gichine reiterating the prayers and the grounds on the application.

3. The Respondent, **Sicily Warware Njira** opposed the application and filed a replying affidavit contending that the application is vexatious, frivolous and an abuse of the due process of the Court. She further contends that the Appellant has not demonstrated that he is likely to suffer irreparable loss as the decree issued was for judicial separation between the Applicant and the Respondent. That the other order seeking stay has not been granted and the application has no merits.

4. The parties agreed to proceed by way of written submission. I have considered the application. The background of this application is that the Respondent Sicily Warware Njira filed a plaint before the Principal Magistrate's Court at Wanguru and her main prayer was that a decree for judicial separation between the plaintiff and the defendant with the plaintiff occupying the matrimonial home in the village plot in Thiba North Village attached to rice holding No. 2326 and cultivating 2 acres of the rice holding thereof. The 2<sup>nd</sup> prayer was for costs.

5. The defendant who is the applicant herein filed a defence and prayed that the suit be dismissed or struck out with costs.

6. After a full trial, the prayers in the plaint were allowed with costs. A decree was issued that judgment is hereby entered that a decree for judicial separation between the plaintiff and the defendant with the plaintiff occupying the matrimonial home on the village plot Thiba North attached to Rice Holding No. 2326 and cultivating two (2) acres of the rice holding thereof and costs.

7. The Applicant has filed this appeal against the judgment of the trial court and seeks an order for stay of execution of the decree pending appeal.

8. I have considered the application.

### **1. Stay of execution pending appeal**

The principles of granting stay of execution in High Court are provided for under **Order 42, rule 6** of the **Civil Procedure Rules**. It provides:

*“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.”*

The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:

a. Substantial loss may result to the applicant unless the order is made.

b. The application has been made without unreasonable delay, and

c. Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

The appellant needs to satisfy the Court on the following conditions before they can be granted the stay orders:

#### **a. Substantial loss occurring**

The decision of the Court on whether substantial loss will occur will depend on the balancing act between the rights of the parties; the applicant’s right to his appeal and the right of the Respondent to the fruits of his judgment. The onus of proving that substantial loss would occur unless stay is issued rests upon and must be discharged accordingly by the applicant. It is not enough to merely state that loss will be suffered, the applicant ought to show the substantial loss that it will suffer in the event the orders sought are not given.

The Applicant must establish that the loss he is likely to suffer is such that the appeal if successful would be of no consequence and failure to order a stay will have rendered the appeal nugatory. The power of the Court to order a stay is discretionary.

9. The Appellant submits:

*“It is a fact, if stay is not granted the intended appeal shall be rendered nugatory because the respondent cannot be able to compensate the appellant or pay back after the appeal succeeds as follows:-*

*a. The respondent had already submitted the decree in Wang’uru PMCC No. 133 of 2013 at the*

*offices of National Irrigation Board (NIB) Mwea so as to send surveyors on Rice Holding No. 2326 so as to have the Holding be registered in her name. It is the served order of temporary stay granted by this Hon. Court that stopped that process.*

*b. Rice Holding No. 2326 is in the name and/or registered as property of MARY NJERI NDEGWA the legally married wife of the appellant. She (MARY) is not a party to these proceedings. She is the wife and part of the appellant's family. They depend on the Rice Holding, Rice Farming is the subsistence way of life at MWEA where the family resides. If stay is not granted, the appellant's family shall be rendered actually destitute.*

*c. If stay is not granted the appellant shall have to pay even costs of the suit. The Respondent cannot be able to refund even if it is only the Ksh.46,075/= being sought (see pages 69, 70 and 71 of this record). If the appeal later succeeds therefore the appellant shall have substantially lost a big chunk of his success."*

10. I am inclined to find that substantial loss may result as a portion of the rice holding may be transferred to the Respondent despite the fact that it is registered in the name of a person who is not a party to these proceedings as submitted above. In this regard I am also of the view that the appeal has raised weighty and arguable issues. As submitted by counsel for the appellant, the appeal raises bonafide *prima facie* issues that ought to be ventilated at full hearing.

11. Where the applicant satisfies the Court that he is likely to suffer substantial loss, the Court ought to exercise its discretion in favour of the applicant to mitigate such loss and to ensure that the appeal which is pending is heard conclusively and not rendered nugatory. The Court of Appeal while dealing with the issue of substantial loss stated as follows in the case of **James Wangalwa & another Vs Agnes Naliaka Cheseto (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 Civil Procedure Rules. 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 N. Chesoni [2002] 1KLR 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 the granting of stay of execution, under Order 42 of the Civil Procedure Rules 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."*

12. The Respondent in her replying affidavit depones that the appeal is vexatious, frivolous and an abuse of court process. This is not the case as the appeal as I have pointed out raises substantial issues for determination by this Court. An appeal is a matter of a right to a party as enshrined in the Constitution, **Article 50 (1)** refers and **Section 65 (1) Civil Procedure Act** which provides:

*"Except where otherwise expressly provided by this Act and subject to such provisions as to the furnishing of security as may be prescribed an appeal shall lie to the High Court – from any original decree or part of a decree of a sub-ordinate court other than Magistrate's Court of the 3<sup>rd</sup> class on a question of law or fact"*

and cannot be an abuse of Court process. If a party is not satisfied with the decision of the lower Court, it is within his rights to pursue his appeal to the High Court. The Applicant can therefore not be said to be abusing Court simply because he has filed an appeal.

13. I find that the Applicant has satisfied this Court that he is likely to suffer substantial loss and the appeal may be rendered nugatory.

14. The second requirement is security. The party seeking an order of stay is supposed to provide security. The Applicant has not given security but it is expected that if stay is granted he would abide by any order the Court may issue for him to provide security. It is the Court which exercised discretion as to what kind of security a party should provide based on the circumstances of the case. Security will be ordered where a court grants the prayer for stay of execution.

15. The third ground for consideration is **Delay**. The Court has to consider whether the application is brought without undue or inordinate delay. The judgment in the lower Court was delivered on 8<sup>th</sup> May, 2017. The Appellant filed the Memorandum of Appeal on 17<sup>th</sup> May, 2017. This application was in turn filed on 8<sup>th</sup> June, 2017. This was well within the stipulated time as provided under **Section 79 G** of the **Civil Procedure Act** which provides:

*“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree.....”*

## **16. Conclusion**

The Appellant has satisfied the conditions for granting a stay of execution pending appeal. I will therefore make the following orders:

1. The application has merits and is allowed.
2. There will be a stay of execution pending the hearing and determination of the appeal.
3. The Appellant shall provide security by depositing Ksh.46,000/- in Court within 14 days.
4. Costs to the applicant.

***Dated and delivered at Kerugoya this 9<sup>th</sup> day of February, 2018.***

**L. W. GITARI**

**JUDGE**

Read out in open Court, Mr. Maina Kagio holding brief for Mr. Kariuki for Applicant, Respondent absent, court assistant Naomi Murage this 9<sup>th</sup> day of February, 2018.

**L. W. GITARI**

**JUDGE**

**9.02.2018**