



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAROK**

**CIVIL APPEAL NO 47 OF 2017**

**J N .....APPLICANT**

**VERSUS**

**A S S.....RESPONDENT**

**RULING**

1. The applicant seeks an order of this court to sell part of their matrimonial property being land reference plot numbers [particulars withheld] situated in Lenana Estate within Narok town. The purpose of selling that part of property is to enable the respondent to pay school fees for their children and to cater for their family upkeep. The application is brought under sections 3, 5 and 25 of the Children's Act No. 8 of 2001 and all other enabling provisions of the law. The application is supported by the grounds set out on the face of the chamber summons and supporting affidavit of the respondent.

2. The husband has opposed the application in his replying affidavit dated 13/2/2018. He has stated in that affidavit the following major matters. He has stated that following rulings by the trial court in Narok Chief Magistrate's Court Children's Case No. 12/2016 on 21/9/2017, he was granted stay orders made therein by that court. It is important to point out that the stay orders of the magisterial court are still in force. As a result, the husband filed an appeal in this court being Civil Appeal No. 47 of 2017, which is yet to be heard. In the interim period, the husband of the applicant filed an application in this court seeking stay of execution of the decree and order of the magisterial court dated 21/9/2017 pending the hearing of his application inter-parties. He similarly sought an order of stay of the proceedings in that court pending the hearing and determination of his application.

3. Furthermore, the husband has stated that the respondent's application to sell part of the matrimonial property is intended to render his appeal to this court and his subsequent application of 26/9/2017 nugatory. He also has stated that the respondent's application is made in bad faith in view of the grounds raised in the appeal.

4. I have considered the affidavit evidence of the applicant and that of the husband. In the light of that evidence and submission of counsel for the applicant, I find the following to be the issues for determination.

1. Whether or not it is proper for the applicant to proceed with the instant application in view of the pending appeal and the pending of the main suit in the magisterial court.

2. Who should pay the costs of this application?

**5. Issue No. 1**

5. I find that the main suit is still pending in the magisterial court and is yet to be finalized. The applicant has not shown to this court as to why her instant application to sell part of their matrimonial property should not have been filed in that magisterial court. Furthermore, I find that the instant application should not have been filed in this court, when the applicant had another forum in the magisterial court to pursue her application. This is improper.

6. Furthermore, I find that it is not proper to proceed with the instant application in view of the pending application for an order stay of execution of the magisterial orders in this court. If the instant application prejudice both the husband's pending appeal and this application for an order of stay of execution of the magisterial decree. In the circumstances, I hereby stay the instant application pending the hearing and determination of the husband's application and the appeal.

**6. Issue No. 2**

On the issue of cost, I bear in mind that these are matrimonial proceedings concerning both parties. In the circumstances, I make no order as to costs.

7. The upshot of the foregoing is that the application fails and is hereby dismissed.

Ruling delivered in open court this 8<sup>th</sup> day of March, 2018 in the presence of Mr. Lembaa holding brief for Mr. Mugunya for the appellant and Mr. Ombati for the respondent.

**J. M. Bwonwonga**

**Judge**

8/3/2018