



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**CIVIL CASE NO. 18 OF 2010(O.S)**  
**IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S**  
**PROPERTY ACT OF 1882**

**M B O.....PLAINTIFF/ APPLICANT**

**VERSUS**

**J O O.....DEFENDANT/ RESPONDENT**

**RULING**

1. The plaintiff/ applicant hereinafter referred to as the applicant through a Notice of Motion dated the 20<sup>th</sup> of February 2017 brought under Order 42 Rule 6 of the Civil Procedure Rules Cap 21 of the Laws of Kenya seeks the following orders:

**i. Spent**

**ii. That there be a stay of execution of the decree issued on the 2<sup>nd</sup> of February 2017 pending the interpartes hearing and determination of the application**

**iii. That the Orders issued by Justice Kimaru on the 28<sup>th</sup> of October 2011 to remain in force pending the hearing and determination of the application.**

**iv. That there be a stay of execution of the decree issued on the 2<sup>nd</sup> of February 2017 pending the hearing and determination of the intended appeal.**

**v. That the Orders issued by Justice Kimaru on the 28<sup>th</sup> of October 2011 to remain in force pending the hearing and determination of the application.**

**vi. That the costs of the application be provided for.**

2. The application is grounded on the grounds on the face of the application and the applicant's supporting affidavit dated the 20<sup>th</sup> of February 2017. She avers as follows; that on the 2<sup>nd</sup> of February 2017 this Court delivered its Judgment dividing the Matrimonial home Nairobi/ Block [particulars withheld] in Tassia Estate, Embakasi principally in the ratio of 70:30 in favour of the defendant and directed that a valuation be done in 45 days for purposes of executing the division. That she was aggrieved by the said decision and has filed a Notice of Appeal signifying her intention of filing an Appeal against the whole decision. That her advocates have timeously requested for the certified copies of proceedings decree and judgment. That the intended appeal will be rendered nugatory if the stay of

execution is not granted. That her draft Memorandum of Appeal has an arguable appeal to the Judgment. That she has reliably learnt the defendant has since began cohabitation with one R N N at his **[particulars withheld]** where he also resides with the children of the marriage. That the said children who are slightly younger than R are not in very good terms with her and hence they shall inevitably require to visit their mother's home which unless a stay is issued it may be passed on to the new bride or other third parties. That with the delivery of the judgment she shall be required to vacate the only house she has known for the last 2 decades and thereby be rendered homeless thereby rendering the intended appeal an academic exercise. That pending the hearing and determination of the suit, Hon. Mr. Justice Kimaru in a ruling delivered on his behalf by the Hon. Justice Maraga ( now Chief Justice) ordered that the defendant be restrained from taking adverse action against the matrimonial home namely Title No. Nairobi/ Block **[particulars withheld]** that she remains in possession and occupation of the matrimonial home and that she be entitled to collect rent from the 4 rental units at the said home. That her advocate has advised her that if the decree is executed then the property will not be recovered easily should the appeal become successful and thus will render the appeal nugatory. That it would be in the interest of justice that the status quo prevailing is conserved and the Orders issued previously by Justice Kimaru on the 28<sup>th</sup> of October 2011 do remain in force pending the hearing of the intended appeal.

3. The application was opposed. The respondent filed a replying affidavit dated the 2<sup>nd</sup> of March 2017. He depones as follows; the applicant is his former wife they are divorced. That the orders issued by Justice Kimaru were issued temporarily pending the hearing and determination of the suit which has since been heard and determined and the judgment issued on the 2<sup>nd</sup> of February 2017 in its specific terms. That the appeal would not be rendered nugatory as the judgment sets a clear process in the distribution of the property which both parties will be involved. That the stay if granted will prejudice him as he will not be able to collect his proportion of rent from the said properties wherein he shall be required to pay land rent and rates which the applicant refused to pay during the term of collecting rent. That the 2 children are adults have been staying with him and his new wife happily; the applicant is put to strict proof of her allegations. That his advocates have advised him that the applicant has failed to demonstrate any prejudice, loss or in any way her intended appeal will be rendered nugatory for the reason that her occupancy of the matrimonial property was only temporary pending the hearing and determination of the suit which judgment has been delivered. That he has been advised that the intended appeal challenges the proportion in which the matrimonial property was divided and does not pray for award of the said home to her and therefore no prejudice would be suffered should the orders of 2<sup>nd</sup> February 2017 not be stayed. That the court ordered that the said home be shared between her and him and that the applicant is an able bodied person of good health and able to fend for herself. That should the court be inclined to grant her a stay but he strongly opposes it, then the applicant should be condemned to deposit in Court a proportion of the rent equivalent to the proportion she has collected from the date of judgment and intends to collect for a period of two years in court or an agreed joint account within 21 days from the date the court grants the stay plus security for costs. That the amount is arrived as follows;

- a. 70% of total rent from 5 bedroom and shop house at 50,000/- per month for a period of 24 months starting from the 2/2/2017 which totals Kshs. 840,000/-
- b. Balance of rent at 80% from the 4 flats in the same plot for a period of 24 months starting from 2/2/2017 which totals Kshs. 576000/-
- c. Total rent due to the respondent over a period of 24 months that should be deposited in (a) plus (b) court totals Kshs. 1, 416,000/-
- d. Security for costs at Kshs. 1,500,000/-

4. In a further affidavit in response to the respondent's relying affidavit the applicant depones that she is asking the Court to protect the subject matter of the suit pending the hearing and determination of the appeal, that the orders of 28th of October 2011 have been in force for the last five years and that the respondent will not be prejudiced. That her appeal has high chances of success and that the respondent is demanding the immediate execution of the said judgment by proposing that the property be sold despite the application. That the respondent has gone ahead to declare her as a tenant in her only known home for

the past 20 years and now requires her to pay rent to him like a tenant without her consent and without consulting her. That the request by the respondent that she pays for security as a condition precedent to the execution of judgment being stayed is unreasonable and cannot apply in such a case because the property is immovable and will not be tampered with in any way.

5. The application was canvassed by way of oral submissions. The applicant reiterated what is deponed in the affidavits adding that the application for stay has been made without delay, as they have filed Appeal No. 81 of 2017 in the Court of Appeal. That the security for performance is not required as this is not a money decree. The property is land and the appellant will not run away with it. That should the appeal fail the respondent can recover the loss as per the judgment. The appellant relied on the following cases of **Ahmed Ali Shaush Vs. Tauhida Mohamed Swaleh (2006) eKLR, JAO V. N A (2014) eKLR, Francis Mukono Kiruthu V. Agnes Wamuyu (2015) eKLR, Umi Kulthum Abdulrahman Hatimy V. Mohidin Omar Mohamed (2008) eKLR and M.M.K V. K.W (2008) eKLR.**

6. The respondent too reiterated what is deponed in the respondent's affidavit and submitted that though the application has been made timeously as provided under Order 42 rule 6 they have an issue with the substantial loss. That the appellant has failed to demonstrate the loss she will suffer. That though she claims the property has been her matrimonial home for 20 years there was no guarantee that the property could be hers **and** therefore that cannot be counted as substantial loss. On security of costs it was submitted that if Justice Kimaru's orders remain in force then she will receive 50% of the rent until the determination of the suit and the respondent will have lost 20% for the rent. They therefore seek security of costs so that the respondent can recover the 20% if the appeal is successful. The respondent relied on the following cases; **Justus Wambua Kavyu Vs. Kenya Commercial Bank Limited (2014) eKLR and Antoine Ndiaye Vs. African Virtual University (2015) eKLR.** Counsel sought to distinguish the case they relied on with that of the appellant.

7. In reply the appellant argued that the status quo as per the ruling of Justice Kimaru is the best way so that the parties can have a 50% :50% share and the 20% can be recovered from the appellant's portion. On substantial loss it was argued that the respondent intends to sell the property and if sold to a 3<sup>rd</sup> party it will not be easy to get it back.

### **DETERMINATION**

8. I have considered the affidavits, oral submissions, the Law and the cases cited. The application is brought under Order 42 Rule 6 (2). Under the said order it is provided that;

***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.***

9. The principles to be applied for a stay of execution as stated above are clear. The application for stay of execution was filed on the 20<sup>th</sup> February 2017. This was done timeously as the judgment was delivered on the 2<sup>nd</sup> of February 2017. The applicant is under duty to show the substantial loss she is likely to suffer and to provide security for due performance of the decree or order that was given if need be. Her argument is that if the matrimonial home is sold she will suffer substantial loss as it will be hard to recover the property from a third party. The respondent on the other hand argues that she has not explained the substantial loss she will suffer and that he shall suffer loss of rent if the decree is stayed as sought by the appellant. The Court of Appeal in the case of **Kenya Shell Limited Vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018** held that substantial loss in its various forms is the corner stone of both jurisdiction for granting a stay. The applicant's Memorandum of Appeal attached to her application was so faint and illegible. In balancing both arguments I am persuaded that the applicant is likely to suffer substantial loss if the stay is not granted for if the property is sold and

transferred to a third party the process of reverting the property back to the parties would take considerable time. Justice Kimaru's orders were interim orders granted pending the hearing and determination of the suit which has happened and a judgment delivered. This court has not been persuaded that the said orders should remain in force as sought. The issue of security for the due performance is an issue of discretion of the court and this Court shall not make an order of the same. There shall be a stay of execution of a decree issued on the 2<sup>nd</sup> of February 2017 for **90 days** as the applicant files her appeal in the Court of Appeal. Costs be in the cause. It is so ordered

**Dated, signed and delivered this 16<sup>th</sup> Day of August 2017**

**R. E. OUGO**

**JUDGE**

In the presence of:

Applicant Absent

Miss Ombwegh h/b for Mr. Nyamisi For the Defendant/Respondent

Charity Court Clerk