



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND AT NYAMIRA

ELC APPEAL NO. E003 OF 2022

JAMES NYAMBANE MOMANYI.....APPELLANT

=VERSUS=

MONICAH MORAA GORI.....1ST RESPONDENT

VICTOR MORURI GORI.....2ND RESPONDENT

ROSE KERUBO GORI.....3RD RESPONDENT

DUKE ABONGO BUNDI.....4TH RESPONDENT

RULING:

This is an Application for stay of Execution of the orders of the Honourable Principal Magistrate, M.C. Nyigei –made on 09/03/2022 in Nyamira CMCC NO. 30 of 2020 until the determination of the Appeal. The same is dated 21/3/2022.

The orders against which the appeal is sought are as follows: -

1. THAT the 2nd, 3rd and 4th Plaintiffs be subject to DNA testing with the Defendant, together to ascertain paternity.

2. The exercise to be done within the next thirty (30) days and the Plaintiffs (sic) to meet the costs of the same.

The Application is brought under Order 22 Rules 18, 31 (1) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act.

Order 42 Rule 6 (1) and 2 of the Civil Procedure Rules provides that:

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) 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.”

I have considered the application, the Supporting Affidavit, the Replying Affidavit and the submissions made by both Counsel.

In **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365**, the Court of Appeal held that:

“..... whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 (now Order 42) Rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further, the Application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause.....”

As to the ground of unreasonable delay, the order was made on 09/03/2022 and the Application was filed in Court on 01/04/2022, less than a month later. This cannot be said to be unreasonable delay.

Coming to the issue of establishment of a sufficient cause, it is important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question or of the failure to do so. The Court ought to weigh the likely consequences of not granting the stay and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the principle of equality aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to ensure that any transitional motions before the Court do not render nugatory the ultimate end of justice.

In Suleiman **vs. Amboseli Resort Limited [2004] 2 KLR 589**, Warsame, J (as he then was) expressed himself as hereunder:

“.....The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner.At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court.”

Bearing the above position in mind, Prayer (a) of the Plaintiff is as follows:

“An order directing the Defendant to carry on DNA together with the 3 issues of the marriage”.

If the stay of execution is not granted at this stage, prayer No. (a) of the Plaintiff above will have been granted if the order of the lower court is executed the same is irreversible and the Applicant’s rights will have been infringed. The same will have been determined prematurely and summarily and without the Hearing of the suit. **The court will not have ensured that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. These are the special circumstances which would sway the discretion of the court in favour of the Applicant.**

I also agree with the opinion expressed in **Bungoma High Court Misc Application No 42 of 2011 - James Wangalwa & Another vs. Agnes Naliaka Cheseto** that:

“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 is all about.....”

If the stay of execution is not granted, there would be no need to pursue the Appeal because the Respondents will have achieved what they wanted when filing the suit albeit through a short cut and the Applicant’s Appeal, if successful, would be rendered nugatory.

Taking all relevant factors into account and in order not to render the intended appeal illusory while at the same time securing the interests of the successful plaintiff I grant an unconditional stay of execution to the Applicant.

Prayer No. 5 in the Application dated 21/3/2022 for the stay of proceedings in the lower court i.e. Nyamira Chief Magistrate’s Court E.L.C. No. 20 of 2020 until the Hearing and determination of the Appeal herein is equally granted.

The costs of the application are awarded to the Applicant in any event.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 25TH DAY OF APRIL, 2022.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Sibota

Appellant: Ms. Bundi

Respondents: Mr. Mongare