S.J.M…..……..….APPELLANT/APPLICANT

-AND-

D.J.M....……....…..RESPONDENT

RULING

There is a pending appeal between the parties herein, lodged on ***28th July, 2010;*** but in the meantime, the appellant has moved this Court by Notice of Motion, dated ***4th October, 2010*** and brought under Order XLI, Rule 4 of the earlier edition of the Civil Procedure Rules, and s.3A of the Civil Procedure Act (Cap.21, Laws of Kenya). The main prayer pending at this moment is:

"*THAT this Court be pleased to grant stay of execution of the decree emanating from the Judgment delivered on* ***9th July, 2010*** *against the applicant in Taveta SRMCC No.35 of 2009 and/or proceeding of the said suit pending hearing and determination of the appeal herein."*

The application rests on the following grounds:

(i) that, the Judgment appealed against is an open-ended Judgment constituting an injustice;

(ii) that, the appeal filed by the applicant herein has high chances of success;

(iii) that, the applicant herein will suffer irreparable loss and damage if stay of execution and proceedings is not granted;

(iv) that, it is fair and reasonable and in the interest of justice, in the circumstances, to allow this application.

The appellant, ***S.J.M*** swore a supporting affidavit dated ***4th October, 2010***; and the same is responded to by the respondent's replying affidavit sworn on ***11th November, 2010***.

D.J.M depones (in summary) as follows: by SRM Div. Cause No.[PARTICULARS WITHHELD] the deponent had commenced proceedings for divorce and division of matrimonial property (on ***9th November, 2009***); the Judgment in that matter was delivered on ***9th July, 2010***; the Court dissolved the marriage, and made Orders on the distribution of jointly-acquired property; the deponent was ejected from the matrimonial home by the applicant, and she has been kept out for more than a year; if the Judgment aforesaid is not given effect, the deponent stands to suffer irreparably.

The applicant in his averments, contradicted the respondent in material particulars; he thus deposed: "*the respondent did not…contribute to [the] acquisition of any of [his] properties";* the respondent had brought no evidence before the trial Court, of joint-acquisition of any properties; "*an open-ended*

Judgment was entered for the respondent for distribution of property allowing her to file and serve an inventory of the property by way of an application within twenty days from the date of Judgment"; the deponent is "*bound to suffer irreparable loss and damage in the event the respondent proceeds with the application for inventory and execution of decree*"; the respondent will not be prejudiced in any manner incapable of compensation in costs.

Counsel for the applicant, while acknowledging that *"a stay is not required to perfect [an] appellant's rights"*, submits thatthe continuing proceedings pending the hearing of the appeal "*may undermine or even eliminate the very basis of the appeal."*

Counsel proceeded from the terms of Order XLI, which are that:

"(2)….No order for stay of execution shall be made under sub-rule (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."

Counsel submitted that the applicant has demonstrated he stands to suffer substantial loss. He urged that the applicant is apprehensive if the respondent is given rights over half of his property, she would not be able to refund it, were the appeal to succeed – in view of the fact that the respondent is "*not a person of means";* and besides, the respondent would proceed with her application for inventory – which itself is an object of the appeal; this will defeat the appeal.

Counsel submitted that in the event the Orders sought are not granted, the respondent would proceed to possess and/or acquire part of the applicant's property and may dispose of the same: so that a successful appeal would be rendered nugatory.

Learned counsel urged that the lower Court, by calling for an application for *inventory* following the delivery of Judgment, created a *loophole:* and the respondent "*who had failed to prove her case sufficiently as to entitlement to property necessitating the appeal*", would have the ability to radically alter the state of affairs on the ground.

Counsel submitted that the application had been brought "*timeously and in good faith."*

Counsel relied on the Court of Appeal decision in ***Keter & 6 Others v. Kiplagat & 2 Others*** [2004] 2KLR 159 and urged that the test prescribed thereby were fulfilled in this instance (p.159):

"The applicants had to show both that they had an arguable appeal and that the success of their intended appeal would be rendered nugatory if the injunction sought was not granted."

Learned counsel, ***Ms. Ireri*** for the respondent, submitted that the applicant's gravamen is essentially the *equal distribution of property* between the parties – but that this ought not to be a proper foundation for the appeal and the application; that it is not a proper basis for continued litigation because "*learned counsel in this appeal participated in the said suit [Civil Case No.35 of 2009] but never raised a concern over the same."*

Counsel proceeded to urge that the application be refused: because "*what is raised in the appeal and the application are mere facts and….there is no law in support at all."*

Learned counsel submitted that "*the appeal and application herein are frivolous and [an] abuse of …Court process with intent to delay the respondent from enjoying the fruits of her labour."*

Counsel urged a justification for the decision of the trial Court, as follows:

"The respondent was the legal wife to the appellant herein. They acquired property while [living] together as husband and wife, which property is supposed to be split or shared when the two…divorce. The law is so clear. [No] violation has been established by the appellant as against the respondent in [respect of] the ….matrimonial property which [is] to be shared equally… [nor is there a] violation of a common law right. No special circumstances have been set forth by the appellant to….persuade this….Court…."

Counsel urged that the respondent had, by SRM Divorce Cause [.....], acquired certain *rights of matrimonial property*, which this Court has not been properly moved to place in abeyance: "*mere annoyance and minor inconvenience [on the part of] the appellant are not enough to induce this Honourable Court to [make any Order limiting the scope of] a successful party enjoying her right of ownership or acquisition."*

The foregoing argument, quite clearly, presumes *facts* which, however, the applicant is contesting on appeal: the applicant asserts, in the Memorandum of Appeal of ***28th July, 2010*** that "*the learned trial Magistrate erred in law and fact by failing to critically analyze the evidence on record, thereby arriving at a wrong conclusion."* Counsel states on a matter of fact: "*The property in issue was acquired and developed jointly by both parties herein."*

Although the taking of property *inventory*, which entrenches the trial Court's verdict, is at the centre of the appeal itself, learned counsel asserts that: *"The said inventory being questioned by the appellant was procedural and in tune with the law."*

Counsel urged that the application lacks merit, for the appeal in the background is "*bound to fail"*. She went on to submit: *"It is an application based on [a] frivolous appeal. It would be wrong to grant stay Orders based on such an appeal, or where such an Order if granted would inflict greater hardship than it would [avert]."*

Counsel relied on the Court of Appeal decision in ***Madhupaper International Limited v. Kerr*** [1985] KLR 840, in which it was thus held (p.841):

"The Court of Appeal's jurisdiction to grant an injunction pending an appeal is discretionary and is to be exercised judicially and not arbitrarily. It would be wrong to grant the injunction where the appeal is frivolous or where to grant it would inflict greater hardship than it would avoid."

Counsel submitted that *"the respondent needs security…in respect of accommodation and welfare, because she has spent much of her time and resources on the properties which are now in the custody of the appellant*." Counsel urged that if the Court should be minded to grant the Orders sought, then it is desirable *"the respondent gets access to some of the matrimonial properties especially a house and land to cultivate to sustain herself."* Counsel also asked that the appellant *"be ordered not to dispose any property at all until [the] determination of the appeal."*

It emerges as a fact that the bond of matrimony between the parties was ended with SRM Divorce Cause No.[.....]; that the scheme of division of property between the parties in that case is strongly contested; that the conclusions on evidence, in respect of the said property, are being contested on appeal; and that there are delicate aspects of the *property* question that touch on the parties.

Firstly, a dispute of such a kind is, by *judicial notice*, a seriously-felt and sensitive matter, and is for the most conscientious resolution through the judicial process; and it follows that a question taken on appeal, in that regard, is for granting a *fair day in Court*. Secondly, whenever the Court is so convinced of the existence of such a valid and proper *lis*, the process of resolution must be *sustained*, by ensuring that the final decision shall not be rendered nugatory.

Even as the applicant makes an urgent case at this stage, that he seeks justice in the distribution of property-after-divorce, the respondent too, states clearly that she is now in *hardship*, as she lacks access to properties that were always available for her use, during marriage. Considering both positions, within

the broader scheme of a just resolution to the dispute, I will make ***Orders*** as follows:

(1)I grant stay of execution of the decree emanating from the Judgment delivered on *9th July, 2010* ***in Taveta SRMCC No[.....].***

(2)Neither the appellant nor the respondent shall charge, lease, sell, dispose of, or otherwise commit the properties the subject of the said Judgment of SRMCC No[.....], save with leave of the High Court, prior to the hearing and disposal of the appeal.

(3)During the pendency of the appeal, either party seeking access to, or possession of, or use of any of the properties the subject of SRMCC No[.....], shall, by application supported by affidavit evidence, seek leave of the High Court.

(4)The appellant shall exercise due diligence in the prosecution of the appeal.

(5)The parties shall have the liberty to apply.

(6)The costs of the instant application shall be costs in the appeal.

SIGNED at **NAIROBI** …….

J.B. OJWANG
JUDGE

DATED and **DELIVERED** at **MOMBASA** this 5th day of March, 2012.

MAUREEN ODERO
JUDGE