



REPUBLIC OF KENYA -STAY

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT NO. 22 OF 2015 (OS)

IN THE MATTER OF ARTICLE 45(3) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 17 OF THE MATRIMONIAL PROPERTY ACT. 2013 (NO. 49 OF 2013)

AND

IN THE MATTER OF SECTION 13 OF THE MARRIAGE ACT, 2014

AND

IN THE MATTER OF ORDER 40 RULE 1 AND 2 OF THE CIVIL PROCEDURE RULES AND SECTION 63 (E) OF THE CIVIL PROCEDURE ACT.

AND

IN THE MATTER OF SECTIONS 1A, 1B, 3 & 3A OF THE CIVIL PROCEDURE ACT, CAP 21 AND ALL ENABLING PROVISIONS OF THE LAW

BETWEEN

ANM.....PETITIONER/RESPONDENT

VS

VN.....RESPONDENT/APPLICANT

RULING

INTRODUCTION

1. By a Notice of Motion dated 16th December, 2019, the applicant (VN) moved this court under a Certificate of Urgency, seeking a stay of execution of the judgment delivered at the High Court in Eldoret on 10th December, 2019. The application is anchored under **Order 42 Rule 6 of the Civil Procedure Rules, Section 1, 1A, 1B, 3A and 63 (c) and (e) of the Civil Procedure Act cap 21**. The Applicant seeks orders that;

1. Spent

2. That this court be pleased to grant stay of execution of judgment delivered on 10th December, 2019 and all the consequential orders there from pending the hearing and determination of this application.

3. That this court be pleased to grant stay of execution of judgment delivered on 10th December, 2019 and all the consequential orders therefrom pending the hearing and determination of the intended appeal to the Court of Appeal.

4. Such other orders be made as are just and expedient in the interest of justice.

5. Costs of this application be provided for.

2. The application is premised on the following grounds;

- i. That the Respondent/Applicant has lodged a Notice of Appeal against part of the judgment delivered on 10th December, 2019.**
- ii. That the Respondent/Applicant is aggrieved by part of the said judgment.**
- iii. That further the said Appeal raises serious, weighty and triable issues of both fact and law and has high chances of success hence ought to be heard on merit.**
- iv. That the Respondent/ Applicant is in occupation of the matrimonial property namely Eldoret Municipality Block [...] as it is a risk of being disposed of the said property in line with the court's judgment delivered on 10th December, 2019.**
- v. The Respondent/Applicant believes that his appeal stands good chances of success and that the appeal may be rendered nugatory if stay of execution of the judgment is not granted and the judgment be stayed pending appeal.**
- vi. That unless the orders sought herein are granted, the Plaintiff may proceed and execute the said judgement hence subjecting the Respondent/Applicant herein to substantial loss and damage and render the said appeal nugatory.**
- vii. In the interest of justice this application ought to be allowed.**

3. By a supporting affidavit the applicant deposes that he is in occupation of **Eldoret Municipality Block [...]** which is at risk of being disposed of in compliance with the judgment of this Court. That being aggrieved by the said judgement the Applicant lodged an appeal to the Court of Appeal which he believes has overwhelming chances of succeeding as the issues as to whether which property forms matrimonial property and issues of financial and non-financial contribution in acquisition of the matrimonial properties of the parties herein needs to be re-analyzed by the Court of Appeal.

4. The applicant further deposes that he will suffer substantial loss unless the said application is allowed as he is in physical occupation of **Eldoret Municipality Block [...]** and risks being disposed of the said property in compliance with this Honourable Court's judgement delivered on 10th December, 2019.

5. ANM (the respondent), by a replying affidavit opposes the application, saying it is a ploy to deny her the fruits of a lawfully obtained judgement. That this instant application is full of half-truths hence demonstrating bad faith on the part of the Applicant, he works in **Ongata Rongai** and does not reside on **LR No. Eldoret Municipality Block [...]** as alleged. That the Applicant has not substantiated the portion of the judgment he is aggrieved by nor has he stated which part of the judgment he is agreeable with so as to enable the Respondent execute partially, and staying the entire judgement will be prejudicial to her. The applicant is also faulted for failing to annex a copy of a draft Memorandum of Appeal to confirm his allegations that his appeal raises triable issues. That the Applicant has not met the threshold to warrant issuance of orders of stay pending appeal pursuant to the provisions of Order 42 Rule 6.

APPLICANT'S SUBMISSIONS

6. The applicant's counsel filed written submissions on 5th March 2020, in support of the Notice of Motion Application.

Substantial Loss: On the issue of whether the applicant stands to suffer substantial loss in the absence of orders of stay, the applicant submitted that this court has power to stay execution if justice requires that the person against whom judgement is to be enforced requires this protection. The applicant cited the case of **Wilfred Nyawira Maina Vs. Peterson Onyengo Gichana (2015) eKLR in which Aburili J** at paragraph 24 laid out the pre-requisites that courts should consider in ordering stay of execution. The applicant maintains that this has met the prerequisites to grant stay of execution, and argues that he currently resides in the suit property being **Eldoret Municipality Block [...]**. He contends that although he works in **Ongata Rongai**, this court should take note that it is normal for one to work in one town and while reside in a different town due to professional callings. The applicant further argues that he visits the suit property on weekends, which is formally his matrimonial home with the respondent herein. That the applicant in his application dated 16th December, 2019, he has clearly illustrated the loss and prejudice he is likely to suffer should stay not be granted.

7. The applicant also points out that his advocates on record have applied for certified copies of proceedings and judgement which are essential to filing of the intended appeal, and the Notice of Appeal dated 13th December, 2019 was filed in court. That both the Notice of Appeal and letter to the Deputy Registrar requesting for typed proceedings and judgement were served upon the respondent's counsel on record in good time and duly received. In addition, it is contended that the applicant is well-versed with the fact that an appeal does not act as automatic stay in accordance with provisions of **order 42 Rule 6 (1)**.

8. **Security for costs:** With regard to the issue of security for due performance of the decree the applicant cited the decision in **Joseph Nyadala Muyesu Vs Thomas Kimutai Boit & Another (2019) eKLR** to submit that the court in delivering its judgment on 10th December 2019, did not order for payment of costs to either party. That the most important part of the judgment which the applicant is aggrieved with and which is capable of execution is that relating to the matrimonial home which the court apportioned entitlements of the aforesaid property to the parties herein and ordered that a valuation be done within 14 days to facilitate and sale so that each party gets their respective share of from the sale. The applicant contends that on the face value of the judgment nothing can be offered as security for due performance of the intended appeal.

Does the intended appeal raises triable issues.

9. The applicant further submitted that as illustrated in his supporting affidavit that the issue with regard to both financial and non-financial contribution in the acquisition of the matrimonial properties needs to be re-analyzed by the Court of Appeal. That the issue of the other properties which were acquired during the subsistence of the marriage should also form part of the matrimonial properties ought to be considered by the Court of Appeal. That these are undoubtedly arguable issues to be determined by the superior appellate court, and he refers to the case of **UAP Insurance Company Vs. Ephantus Kanyua Ngugi & Another (Suing on their own behalf and the true Administrators of the Estate of Daniel Mwatete Kanyua-Deceased) 2017 eKLR**. He points out that he is contesting the entire decision delivered on 10th December, 2019, and prays that the application be allowed as prayed.

10. The respondent in her submissions takes issue with the fact that the applicant herein is not in occupation of the suit property as alleged since he works and lives in Rongai, a fact which was confirmed by him during trial. She argues that a casual perusal of the application reveals that the applicant is only aggrieved with part of the judgment delivered on 10th December, 2019. That the applicant however does not specify which particular part of the said judgement that he is aggrieved with. That from the foregoing this Court may not be in a position to issue specific orders of stay as insinuated by the applicant.

11. It is further submitted that the applicant has not satisfied the provisions of **Order 42 Rule (2)** and thus is underserving of the orders in he seeks, as he has not demonstrated the substantial loss he is likely to suffer should stay be denied nor has he stated his readiness to furnish security for due performance of the decree. On the issue of security for due performance the respondent cited the case of **Mathu Vs. Gichimu [2004] eKLR**.

12. The respondent further submitted that **Section 1A (1) of the Civil Procedure Act** expressly provides that the overriding objective of the Civil Procedure Act is **“the facilitation of the just, expeditious, proportionate and affordable resolution of civil disputes governed by this Act.**

Citing the case of **Siegfried Busch V MCSK [2013] eKLR**, the respondent also contends that the three (3) pre-requisite conditions set out in **Order 42 Rule 6 of the Civil Procedure Rules, 2010** cannot be severed, and all the three conditions must be met simultaneously.

This court is urged to dismiss the application with costs on grounds that it lacks merit.

ANALYSIS AND DETERMINATION

13. Upon considering the application, the response and the written submissions the issues which arise for determination are;

Whether stay of execution pending appeal is merited?

Whether there is an arguable appeal to warrant the issuance of the orders sought?

The principles that guide Court when deciding on application for stay of execution pending appeal are clearly set out under **Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules**, which provides:

(1) No appeal or second appeal shall operate as a stay of execution or proceedings 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 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.

14. A stay of execution under order 42 of the Civil Procedure Rules is an interim order to suspend the rights of one party who is aggrieved with the judgment of the trial; court or tribunal and wishes to exercise his or her right of appeal. Its main objective is to protect the substratum of the suit by delaying the execution process like attachment until the determination of the appeal. Being a discretionally remedy the applicant must demonstrate that he or she has approached the court of equity with clean hands as succinctly stated in the case of **Jajbhay v Cassim 1939 AD 537-551** the court held on this maxim that: **“All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice.”**

The general principle of law is that the successful litigant in possession of a valid court judgement is entitled to the fruits of judgement unless there exist exceptional circumstances to deny him or her that right.

15. In considering an application for stay of execution I am guided by the case of **Butt vs Rent Restriction Tribunal Civil App No. NAI 6 of 1979 (Madan, Miller and Porter JJA)** where the following guidelines were given: -

“The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should

be exercised in such a way as not to prevent an appeal.

The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements."

16. The first limb of consideration is whether there was unreasonable delay in filing the application for stay of execution. Judgment was delivered on 10th December, 2019 and the applicant filed their notice of motion under certificate of urgency on 16th December, 2019, this was six days from the date judgment was delivered. There was no delay in the filing of this instant application.

17. In the case of Kenya Women Microfinance Ltd ...Vs...Martha Wangari Kamau [2020] eKLR the Court cited the case of Samvir Trustee Limited ...Vs... Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997 which held that;

"Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...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. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...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. Justice requires the court to give an order of stay with certain conditions."

18. From the cited decision, it is clear that for the Court to grant stay of execution of the Ruling, the Applicant needs to satisfy the Court that he will suffer substantial loss. In the case of Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007 the court stated

"The word "substantial" cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words "substantial loss" must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue.

The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment."

In Bungoma HC Miscellaneous Application No 42 of 2011 James Wangalwa and another Vs. Agnes Naliaka Cheseto the court further discussed what substantial loss entails:

"The application 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."

19. The applicant should not only state that he is likely to suffer substantial loss but he must also prove that he will suffer loss. The applicant says he currently resides in Eldoret Municipality Block [...]908, and argues that although he works in Ongata Rongai, on weekends he visits the suit property, which is formerly his matrimonial home with the Respondent.

20. The Applicant bears the burden of proving that by refusal to grant stay of execution he stands to suffer substantial loss. In this instant application the Applicant save for, mentioning that he resides on the suit property does not tender any evidence to show the nature loss he is likely to suffer should an order of stay be denied. He does not for instance claim that if the stay is not granted, he will be rendered destitute with no place to lay his head.

Whether there is an arguable appeal

21. The mere filing of a Notice of Appeal does not automatically warrant the issuance of orders of stay of execution of the decree. In the

present situation, apart from annexing a copy of letter dated 13th December, 2019 in which the Applicant herein is seeking copies of proceedings and judgement to enable him file an appeal the Applicant has not annexed any certificate of delay to demonstrate that he has not been supplied with copies of proceedings and or judgement to enable him pursue his appeal.

The record discloses that the Applicant filed the Notice of Appeal on 13th December, 2019, and more than a year has lapsed. **In the case of Dickson Miriti Kamonde Vs Kenya Commercial Bank Ltd [2006] eKLR**, it was held that:

“.....the delay cannot be excused and an indolent party must reckon with consequences of inaction”.

In *Gideon Sitelu Konchella Vs Daima Bank Ltd [2013] eKLR citing Mobil Kitale Service station Vs Mobil Oil(K) Ltd and Another [2004] eKLR*, it was held:

“It is the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiously. The overriding objectives of the Act and the Rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”

22. The applicant has not offered any explanation as to why there has been delay in filing of the intended appeal. I certainly take judicial notice of the fact that the Covid-19 outbreak caused the downscaling of court activities,

but I also take note that this is a case that was determined before the outbreak of Covid-19 and I hold that there has been inordinate delay in filing of the intended appeal, and this warrant invoking the equitable maxim that delay defeats equity.

23. From my perusal of the Notice of Appeal on record I am not able to determine what is this exceptionally compelling ground of appeal that can persuade this court that the intended appeal has high chances of success. I find that the Applicant has failed to demonstrate that there exists an arguable appeal with high chances of success nor has he satisfied the pre-requisite conditions set out in **Order 42 Rule 6 of the Civil Procedure Rules, 2010** to warrant grant of stay of execution of decree pending the hearing and determination of the intended appeal.

24. In view of the foregoing, the applicant has not met the conditions precedent set out under **Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules** and the application thus lacks merit and is hereby dismissed with costs to the respondent.

E-DELIVERED AND DATED THIS 11TH DAY OF MAY 2021

H. A. OMONDI

JUDGE