



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. E018 OF 2021 (OS)**

**IN THE MATTER OF SUMMONS FOR DECLARATION OF MATRIMONIAL PROPERTY**

**IN THE MATTER OF MATRIMONIAL PROPERTY ACT, 2013**

**IN THE MATTER OF MATRIMONIAL CAUSES ACT, 2014**

**IN THE MATTER OF ARTICLES 45, 28, 27, 40, 19 & 20 OF THE CONSTITUTION**

**BETWEEN**

**DKG.....PLAINTIFF**

**VERSUS**

**EG.....DEFENDANT**

**RULING**

1. Before the Court is an application dated 17<sup>th</sup> August 2021 seeking stay of execution of the Court’s Ruling delivered on 12<sup>th</sup> August 2021 pending the hearing and determination of the intended appeal to the Court of Appeal. The Ruling of 12<sup>th</sup> August 2021 allowed the Plaintiff access to the parties’ former matrimonial home with the option of provision of alternative premises for her occupation pending the hearing and determination of the case. The Ruling also ordered the release of motor vehicle registration number KBV xxxx to the Plaintiff as well as an order restraining dealings on all other matrimonial property.

2. The Defendant/Applicant is dissatisfied with the Ruling and intends to appeal to the Court of Appeal. In the meantime, he seeks stay of execution for the reason that unless stay is granted, his appeal will be rendered nugatory.

***The Application***

3. The Defendant/Applicant’s application is supported by the grounds on the face of it, by his supporting affidavit sworn on 17<sup>th</sup> August 2021 and by his supplementary affidavit sworn on 31<sup>st</sup> August 2021. He urges that he has already filed a Notice of Appeal and Memorandum of Appeal. That the orders issued on 12<sup>th</sup> August 2021 will prejudice him and his two adoptive children and that the best interests of the children are to stay the orders. He urges that the motor vehicle registration number KBV xxxx is needed to transport the children to school and that the Respondent already has a car KAU xxxx. He urges that he had agreed with the Plaintiff that he should have motor vehicle KBV xxxx because it had some pending loan. He further urges that the Respondent also has a house in Meru where she has been living and residing since March 2020 when she deserted the matrimonial house. He urges that it is not possible for them to stay in the same house because they had irreconcilable differences leading to the dissolution of the marriage and that the Plaintiff was abusive to him and the children. He urges that their late son owned two properties namely KIIRUA/N/xxxx and NTIMA/I/xxxx and that the latter is developed with a two bedroomed residential house and 20 rental houses wherefrom the Plaintiff collects rent and that these two properties were inherited by the Plaintiff vide Succession Cause No. 283B of 2014. He urges that he has no other means of providing the Plaintiff with an alternative house because he has school fees and maintenance for his children. He urges that allowing the Plaintiff to go back to the matrimonial home would traumatize the children following the cruel and inhuman treatment she gave them before the dissolution of the marriage.

4. In his supplementary affidavit, the Applicant urges that an appeal to the Court of Appeal lies as a matter of right and so does an application for stay. He urges that he filed a notice of appeal within time and that he is still within time for filing a record of appeal. He denies being the one who filed the application dated 22<sup>nd</sup> July 2021. He denies using children as an excuse and he urges that it is impossible for the Respondent to live with him and the children under the same roof following the animosity and cruelty experienced from her during the subsistence of their marriage. That his sister has only been appointed as a guardian ad litem in the adoption cause. That they only have one vehicle, KBV xxxx as matrimonial property. That Toyota Prado KDC xxxx which the Respondent keeps alluding to is not matrimonial property because he bought it after the dissolution of their marriage. That the businesses the Respondents refers to are company properties

and she is a shareholder.

### ***Plaintiff/Respondent's response***

5. The Plaintiff/Respondent opposed the application by her replying affidavit sworn on 26<sup>th</sup> August 2021. She urges that the Applicant is dishonest and that he filed a mischievous application dated 22<sup>nd</sup> July 2021 in the guise of an interested party to arm-twist justice. That she has not been served with any notice of appeal. That the excuse of children intended for adoption is being used as a smoke screen behind the Applicant's hand of justice. That the Applicant is admitting that he has no ability of his own to adopt and maintain the said children unless she allows him to use her property. That she solely took care of the children from when they were toddlers and the Applicant lived in Nairobi in his own pleasures. That it is actually the Applicant's cruelty that has separated her from the children. That the Court formally discharged him from adoption proceedings in Meru Adoption Cause No. 5 of xxxx and thereafter, the Applicant took up his sister SN, a professional teacher, to apply to be an adoptive mother.

6. She urges that they owned several motor vehicles which are all in the Applicant's custody to date and that as admitted by the Applicant, he has a brand new Toyota Prado KDC xxxx which he can use as he desires and further, without prejudice, the children's schools have school buses that can collect and drop the children every day and that the Applicant's sister also has a vehicle that can be used to drop the children. That the purported vehicle KAU xxxx owned by her is a lorry and is in the Applicant's custody in an unroadworthy condition.

7. She urges that the Applicant is controlling massive family wealth for which she used to manage after she resigned in 2012 before the Applicant threw her out. That they have fully developed flats on NYAKI/K/xxxx, a 5-storey building comprising 56 units fetching more than Ksh 765,000/= per month and NYAKI/K/xxxx, a 3-storey building comprising 88 units fetching Ksh 528,000/= per month. That there are other properties in Nairobi with rental incomes under the management of the Applicant who cannot therefore purport to be in any form of financial stress. That she is currently being house by well wishers because she has no other place for shelter. That the allegation that she has properties inherited from their son is a diversionary tactic. That motor vehicle KBV xxxx has no pending debt as they fully paid for it during the subsistence of their marriage. That the Applicant has already sold a family property at Gong at Ksh 11,500,000/=.

8. Counsel for the parties made oral submissions in support of their respective contentions.

### ***Determination***

#### ***Stay of Execution***

9. An applicant seeking for stay of execution is required under the provisions of Order 42 Rule 6 of the Civil Procedure Rules to demonstrate that he is likely to suffer substantial loss should stay not be granted; that he is ready and willing to offer security for payment of any sums that may be found due to the other party after the appeal; and that he has come to Court without unreasonable delay.

#### ***Substantial Loss***

10. Substantial loss within the context of matrimonial property cause such as the one before court must be that the applicant will suffer loss of or damage to property to which he is entitled under the matrimonial property law in a manner that causes substantial damage or waste, or an irredeemable conversion of the property, which cannot be undone should the appeal eventually be successful.

11. The Applicant seeks to appeal against among others, an order giving the Respondent access to the former matrimonial home located at NYAKI/M/xxxx which is registered in the parties' joint names, with the alternative of providing other premises for her accommodation and an order requiring him to surrender motor vehicle registration number KBD xxxx to the Applicant pending the hearing and determination of the cause. The Court in granting the orders considered that pending the hearing and determination of the main case, the *prima facie* evidence of marriage, divorce and possible contribution of the property during subsistence of the marriage, it was necessary to give temporary orders of access.

12. The court considers with respect to the matrimonial property home that the respondent has an equal right to access as a registered co-proprietor. As regards the motor vehicle, the court has found that there is possibility of contribution by the plaintiff to acquisition of the motor vehicle and other properties acquired by the spouses during their mirage but registered in the sole name of the defendant/applicant.

13. The balance of convenience on the application invites the Court to look at two possible eventualities dependent on the outcome of the appeal and weigh which is the more convenient order to make. Should the Respondent be granted access to the matrimonial home, if the Applicant is successful in his appeal, he may as well succeed in having the Court to order for her to vacate the premises. The same applies to the vehicle which the Court may order her to return. On the other hand, should the Court stay the impugned orders thereby denying the Respondent access to either the home or the vehicle, if the Applicant is unsuccessful in his appeal, the Respondent will have been prejudiced as she will have been kept off the properties to which she has a legal and equitable interest, to her great suffering as regards a place of abode and a motor vehicle for her daily use.

14. With respect to the assertion that the parties and the adoptive children of the applicant cannot live under the same roof, the Court finds that the provision of alternative accommodation to be made by the Applicant as the Court had already ordered should meet the justice of the case pending determination of the dispute. Despite urging that the Respondent was cruel and hostile to the children as well as himself, thereby making it impossible for them to live under the same roof, and however valid this assertion may be, the fact is that both the Plaintiff and Defendant are equal owners of the matrimonial home, NYAKI/M/xxxx, and consequently both are entitled to the property not only by virtue of overriding interests but also on account the registration as co-proprietors. Furthermore, besides the mere assertions made by the Appellant, no convincing material has been placed before the Court to prove this fact of non-feasibility of joint occupation of the property. Indeed, the Court had ordered for Counsel and the parties to inspect the premises to determine the suitability of joint occupation and thereafter appear before Court to report on the matter on 26<sup>th</sup> August 2021, but this was not done. Instead, the Applicant opted to file an

application even before the 14 days period leading up to 26<sup>th</sup> August 2021 expired and before attempting the inspection as directed by the court. Clearly, he was determined not to comply with the court order.

15. This Court has also considered the Applicant's assertion that the Respondent inherited two properties from their late son one of which she occupies. To this end, this Court finds that the subject matter of the instant proceedings are matrimonial properties and it is not for this Court to consider whatever properties may have been obtained through inheritance in extraneous succession causes or other means. Moreover, even if the applicant has a place where he can stay at her son's inherited property, it does not take away her entitlement to the matrimonial home to which she is registered as co-owner.

16. With respect to the order requiring release of the motor vehicle, this Court having had the benefit of perusing the evidence adduced in the application culminating in the impugned Ruling observed that there were several motor vehicles registered in the Defendant/Applicant's name, totaling to 4. This is in addition to the Toyota Land Cruiser KDC xxxx which he claims to have bought after the dissolution of their marriage and it therefore does not form part of matrimonial property. The Court considers that the vehicle ordered to be released to the Applicant, KBV xxxx was purchased during the subsistence of their marriage and could with contribution therefore rightfully form matrimonial property.

17. On a balance of probabilities, this Court does not find that substantial loss is likely to be suffered by the Defendant/applicant. The children may be given alternative means of transport to school noting that the Applicant has other vehicles registered in his name. The Court further takes note of the Respondents assertion that motor vehicle KAU xxxx which the Applicant uses as a justification for stay is an old lorry in un-roadworthy condition and it is in the Applicant's custody.

### **Security**

18. One of the other conditions for grant of stay is the deposit of security. While it may be hard to quantify security it being that parties are both interested in the matrimonial property as opposed to primary monetary entitlements, this Court has observed that the Applicant has not made any offer for security. Such security would in any event be for the loss incurred by the plaintiff/respondent in securing alternative accommodation and vehicular services pending the determination of the appeal in accordance with the order of the court, in the event that the appeal is unsuccessful.

### **Undue Delay**

19. Ruling in the matter was delivered on 12<sup>th</sup> August 2021 and the present application was filed on 26<sup>th</sup> August 2021, 14 days later and the application was therefore filed promptly without undue delay.

### **Conclusion**

20. This Court finds that although the application was filed without undue delay, no substantial loss likely to be suffered has sufficiently been demonstrated and neither has any security been offered to justify the Court granting the Applicant stay of execution. This Court finds that the interests of justice demand a refusal of the order for stay sought. If indeed parties are not able to occupy the premises jointly owing to the bitter divorce and history between them, provision for alternative accommodation ought to be made for the Plaintiff/Respondent, bearing in mind that the respondent is a registered co-owner of the matrimonial property and her assertion that she is being housed by well-wishers. This Court does not see any substantial loss to be suffered because whatever arrangements will be made may very well be withdrawn and remedied following the conclusion of the appeal. Any monies expended in provision of accommodation for the plaintiff/respondent, should that be so, will be from income properties acquired during their marriage and it may be accounted for in the eventual determination of the rights of the parties in the said properties.

21. The Court also takes note that despite the Court having ordered for an inspection to be done and for parties to appear back in Court on 26<sup>th</sup> August 2021 to report on the suitability of parties' joint occupation and/or the provision of alternative accommodation for the Respondent, pending hearing and determination of the case, the Applicant ignored these directions. The Court is, therefore, denied of opportunity to determine any alternative suitable arrangements pending the intended appeal.

### **ORDERS**

22. Accordingly, for the reasons set out above, the Court makes the following orders:

- i) The Applicant's application for stay of execution pending appeal dated 17<sup>th</sup> August 2021 is hereby dismissed.
- ii) As the applicant is under Order 42 Rule 6 (1) of the Civil Procedure Rules and Rule 5 (2) (b) of the Court of Appeal Rules entitled to move the Court of Appeal for stay of execution/proceedings this court's refusal thereof notwithstanding, the court orders that **status quo** be maintained for seven (7) days to allow the applicant, if so minded, to move the Court of Appeal for appropriate orders.
- iii) The order for **status quo** to be maintained shall upon expiry of seven (7) days hereof lapse and be of no effect, if the applicant will not have obtained stay of execution from the Court of Appeal, unless that Court orders otherwise.
- iv) Costs in the cause.

*Order accordingly.*

DATED AND DELIVERED THIS 15<sup>TH</sup> DAY OF SEPTEMBER 2021.

EDWARD M. MURIITHI

JUDGE

Appearances

M/S Thangicia M. David & Co. Advocates for the Plaintiff/Respondent.

M/S Laichena, Mugambi & Yieko Advocates, LLP for the Defendant/Applicant.