



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

MATRIMONIAL CAUSE NO. 1 OF 2017

EWM..... APPLICANT

VERSUS

MOM..... RESPONDENT

ANM.....1ST INTERESTED PARTY

JTM.....2ND INTERESTED PARTY

RULING

By a Notice of Motion dated 7th November 2018 and filed on 13th November 2018, the applicant moved this court under a Certificate of Urgency, seeking a stay of execution of the judgment delivered at the High court in Kajiado on 16th October 2018. The application is expressed under Order 51 Rule 1 and 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, under section 5 and 25 of the high court (Organisation and Administration) Act No. 27 of 2015 and under the interest powers of the courts.

- 1. That there be a stay of execution of the order issued by this Honourable court on the 16th of October 2018 pending determination of this application.**
- 2. That pending the hearing and determination of the intended appeal herein an order be granted stay of execution of the order made by the high court in Kajiado on 16th October 2018.**
- 3. That this Honourable court makes appropriate orders to preserve the matrimonial property, the subject matter of the intended appeal.**
- 4. That cost of this application be provided for.**

Orders are premised on the following grounds;

- 1. That this Honourable court in its judgment delivered on 16th October 2018 partly allowed the plaintiff/applicant's originating summons filed on 4th April 2017.**
- 2. That the plaintiff/applicant aggrieved by the decision by the Honourable court lodged a notice of appeal on 18th October, 2018 of her intention to appeal from the said judgment. The intended appeal shall raise arguable grounds to challenge the decision and has good prospects of success.**
- 3. That the plaintiff/applicant has since applied for certified copies of the proceedings and has since only been able to obtain a copy of the certified judgment delivered herein.**
- 4. That upon the Honourable court distributing to the defendant the bulk of the matrimonial properties and in particular the property known as title No. Loitokitok/Rombo "x"/xx in which the plaintiff has been residing since 1970, the defendant may proceed to evict the plaintiff from the said matrimonial home thereby rendering the applicant homeless.**
- 5. That Unless an order staying execution herein is granted the applicant will be evicted from the said matrimonial home thus occasioning untold sufferings to the plaintiff and rendering the appeal nugatory.**

6. Application has been brought without undue delay and no prejudice will be caused to the respondent if it is granted as prayed.

7. That this Honourable court has jurisdiction grant the orders sought

EWM, the applicant herein swore a supporting affidavit on 7th November 2018. She deponed that she has been at the matrimonial home, title Number Loitokitok/Rombo'x'/xx, since 1970 and in the event stay of execution is not granted, she stands to risk becoming homeless at her advanced age. The intended appeal raises arguable grounds to challenge the decision and has good prospects of success. Unless an order of stay of execution is granted the respondent may evict me from the matrimonial home thus rendering my intended appeal nugatory.

The deponent further deponed that it is in the interest of justice to order stay of execution disinclining to grant stay she may risk suffering colossal loss by becoming homeless. In the event the appeal fails she would be in a position to satisfy the decree and attendance costs.

MOM, the respondent, swore a replying affidavit on 16th November, 2018 in opposition to the application, he deponed that the application and affidavit simply reiterate matters that have been canvassed in the main suit and the applicant wants the honourable court to seat on its own appeal against its own well-reasoned judgment which cannot be faulted and the chances of the application on appeal is remote. That he obtained a loan from M/s Agricultural Finance Corporation and charged land reference number Loitokitok/Rombo "x"/xxx, a fact known to the applicant. He further deponed that on 2001 and 2004 he sold part of the land to get money to pay agricultural finance corporation, a fact the applicant knew and she alleges the land was recently sold to make the court's passionate. The respondent avers that the land is intact as shown by the mutation forms attached as exhibits dated 16th November, 2018.

The applicant deponed a supplementary affidavit sworn on 23rd November 2018, she averred that the affidavits sworn by the interested parties to the application for stay are not relevant as this matter involves matrimonial property between herself and the respondent. The applicant further avers that she is not introducing new facts which are not in evidence before court, valuation of the suit property is a matter of course taken into account at distribution of matrimonial property. It is in the court's discretion to evaluate the viability or a lack thereof of chances of success of my appeal.

Order was issued on 15th November 2018 whereby the judge ordered that the certificate of urgency be certified urgent ex parte in the first instance. Inter parties hearing scheduled on 22nd November 2018. Interim order will be part of the issues ventilated at the hearing of the notice of motion.

Applicant's Submissions

The applicant presented her written submissions dated 28th November 2018 and filed on 29th November 2018 where she submitted that she will suffer substantial loss by demonstrating as follows:

- a) That property No. Loitokitok/Rombo'x'/xx which comprised her matrimonial home/residential home, where she has resided since 1970 was given to the defendant. Effectively she is being uprooted from the only home she has ever lived in.**
- b) That plot No. 70 Rombo which was given to the applicant does not exist as the respondent has admitted he sold it in 2001 and 2004, sale agreements have been provided by the respondent vide his replying affidavit deponed on the 16th November 2018.**
- c) That all the matrimonial properties were/are in the respondent's names. The applicant is disadvantaged and incapable of knowing which properties exist and/or which ones the respondent has sold or disposed off.**
- d) That the four properties allocated to the applicant none of them are residential properties, while the respondent has at his disposal.**

To bolster this point she relied in the case of *Siegfried Busch Vs MCSK 2013 eKLR*; where the court held that, ***"It would be best in those circumstances to preserve the status quo so as not to render the appeal nugatory....."***

On undue delay, the applicant demonstrated haste and not laches. Judgment was delivered on 16th October 2018 certified copies of the judgment were issued on 18th October, 2018. On security as to costs the applicant submitted that this is a family matter, it would be unjust and unfair to impose further burden on a disadvantaged party wishing to exercise his or her right to appeal if further conditions are attached to the said right.

Respondent's Submissions

Mr. Kinuthia Wandka, learned counsel for the respondent presented his written submissions dated 10th December 2018 and filed 11th December, 2018. In opposition of the application he submitted that the applicant has not shown what loss she may suffer if orders for stay are not granted. The subject matter is land which is in the name of the respondent. The court has discretion to dismiss this application and place conditions that the respondent should not sell or dispose land in any way pending determination of the applicant's appeal. The respondent relied on the case of *James Wangalwa and another Vs. Agnes Naliaka Cheseto quoted in the case of Masisi Mwita Vs. Damaris Wanjiku Njeri 2016 Eklr, Civil Appeal No 107 of 2015.* The court held in this case 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 entails, a question that was aptly discussed in the case of Silverstein vs. Chesoni...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

In conclusion, the respondent submits that the court should dismiss her application with costs of the application.

Legal Analysis

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. For purposes of preserving the decree which has been passed against a party stay gives room for maintenance of status quo pending the outcome of the appeal. This principle was stated in the *Nigeria Case of SPDC v Amadi 2011 INLR* where the court held:

“If stay of execution is not granted the beneficiaries of the judgment would go into the shell Residential Area (the Res) driven by all kinds of desires and the end is best imagined. The Res may be destroyed before the appeal is determined. A return to the status quo ante bellum in the event the appellant wins and that will be bad for the stream of justice which must be kept pure at all times. The court would be presented with a fait accompli before its judgement is delivered.”

In considering an application for stay of execution the court should be guided by the Court of appeal case of *Butt vs Rent Restriction Tribunal Civil App No. NAI 6 of 1979 (Madan, Miller and Porter JJA)* the court gave the following guidelines: -

“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.”

The governing procedural law to satisfy an application for stay of execution is provided under order 42 rule 6 of the Civil Procedure Rules, 2010 which states as follows;(a)That the application for stay has been made without unreasonable delay. (b)That substantial loss may result to the applicant unless an order is made. (c)That such security as the court may order for the due performance of such decree or orders as may ultimately be binding o him has been given by the applicant.

(a) Unreasonable Delay in Filing the Application

The first limb of consideration is whether there was unreasonable delay in filing the application for stay of execution. Judgment was delivered in the High court of Kenya at Kajiado on 16th October, 2018 and the applicant filed their notice of motion under certificate of urgency on 13th November, 2018, this was less than a month from the date judgment was delivered. This principle is undisputed by the respondent and I concur with the applicants’ submissions that the application was filed in a timely manner hence there was no inordinate delay.

(b) Substantial Loss

Substantial loss is provided under Order 42 Rule 6(b) of the Civil Procedure Rules, 2010. Our first step is to define substantial loss, substantial loss is not defined in statute; a dearth of judicial decisions have embarked on defining what substantial loss entails. In the case of Antoine Ndiaye vs Africa Virtual University 2015 the learned Judge Gikonyo. J. Cited the case of Sewankambo versus Ziwa Abby HCT-00-CCMA0178 of 2005 where it was held that:

“Substantial loss is a qualitative concept, it refers to any loss, great or small, that is real worth or value as distinguished from a loss without value or loss that is merely nominal...insistence on a policy or practice that mandates security for the entire decretal amount is likely to stifle possible appeals..”

In the case of 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.”

On the principle of substantial loss, the applicant should not only state that she is likely to suffer substantial loss but she must also prove that

she will suffer loss. The applicant says she has been at the matrimonial home, namely title number Loitokitok/Rombo “x”/xx since 1970 and in the event stay of execution is not granted, she stands to risk becoming homeless at her advanced age. She further advances this assertion by stating that the matrimonial homes are in the respondent’s names and the properties allocated to her do not consist of residential properties.

The starting point in my view is well crystalized principles that parties are bound by their pleadings. In deciding whether or not a particular property is residential or commercial the burden of proof rested on the applicant/plaintiff in the main matrimonial causes claim. Though I am not sitting on appeal in my own judgment the critical findings of facts made on the matter was based on the evidence of the applicant/plaintiff.

I have in mind as well the clearly discernible material as regards the applicants inventory of assets which the court went into great constraints to appropriately grant the declarations on the marital estate. In deciding on the apportionment on sharing the material property, the court acted on highlights and facts adduced as evidence at the trial on acquisition of the property, their respective combinations and the property which had changed ownership.

In deciding whether or not to grant stay on grounds that the applicant will suffer substantial loss complained of, there is no sufficient evidence that the respondent would dispose off the property in question so as to destroy the subject matter of the appeal.

The risk of injustice in this phrase of the proceedings can only arise where an order of the impugned judgment was capable of immediate execution in the event a stay order is not granted.

The next step is to balance the rights of the parties; on the appeal and judgment held by the applicant and the respondent respectively. Nobody comes to court with superior rights: the applicants’ rights are not greater or lesser than the respondent’s rights, so the court should not prefer one over the other. Granting stay of execution connotes that the status quo is preserved and the applicant and respondent will remain in the same position before judgment. The respondent’s rights to the fruits of her judgment will be postponed but it will be on just terms and secured by provisions of security which is sufficient to guarantee performance of the decree which will be binding on the applicant.

To expand on the above, I will quote the case of Absalom Doya vs. Tarbo Transporters (2013) eKLR that:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that case deserves. This is in recognition that both parties have rights; the appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefit under the decree. The court in balancing the 2 competing rights focuses on their reconciliation which is not a question of discrimination.”

In the present application, the respondent has stated that the subject matter is land which is in the name of the respondent. The applicant is of the view that the land which was allocated to the respondent in the judgment stands risk of being rendered homeless as the respondent may start the process of execution. Execution is a legal process as the respondent is entitled to the fruits of his judgment as it was espoused in the case of James Wangalwa and another versus Agnes Naliaka Cheseto(2012) eKLR.

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process.”

Applying the above principles in considering the risk of injustice to the plaintiff on the defendant in the event stay is denied or granted to either of them. I take cognizance of the nature of the dispute before the trial involving registered properties in the names of the respondent. The truth of the matter is that the plaintiff/applicant is entitled to the fruits of judgement as rendered by the court in tracking legislative rights over the properties examined for her benefits. That being so no evidence has been provided to this court which serves the aspect of titles in accordance to the titles or requiring anything to be done empowering the plaintiff/applicants with ownership rights rests with the parties in complying with the orders of the court.

Thirdly, the court must take into consideration the provision of security for the due performance of the decree as provided under Order 42 Rule 6(c) of the Civil Procedure Rules, 2010. On this principle, the applicants have not mentioned nor proved their readiness to deposit security for performance.

In light of the above and applying the principles in the cited cases I am satisfied that the applicant has failed to satisfy the court that if this court does not grant stay of execution she will suffer irreparable harm and her appeal will be rendered nugatory.

Accordingly the application for stay of execution is dismissed with no orders as to costs.

Dated, Signed and delivered in open court at Kajiado this 18th day of February, 2019.

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R. NYAKUNDI

JUDGE

Representation:

Mr. Ontiti for the applicant

Mr. Wandaka for the respondent

Mr. Ndungu for the applicant