



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

MISC. MATRIMONIAL CAUSE NO. 3 OF 2014

LWK.....APPLICANT

V E R S U S

GMM.....RESPONDENT

RULING

1. The application pending before court is dated 30/10/2018 seeking stay of execution of the judgment of this court dated 28/9/2018 pending hearing and determination of their appeal lodged in the Court of Appeal.
2. The application is based on the grounds that Judgment was delivered on 28/9/18 in favour of the respondent. That the court ordered Land Parcel No. Mutira/Kaguyu/[...]-[...], [...] and [...] shall be shared equally between the parties since they are nine plots each party will take four (4) plots and the last one be sub-divided into two and each party to take a portion. That the court ordered land parcel No. Inoi/Kariko be shared equally between the parties. That motor vehicle No. [particulars withheld] W was bought after the parties separated.
3. The respondent was aggrieved and dissatisfied with the judgment and filed notice of appeal dated 11/10/18. That should the judgment be executed the respondent (sic) would stand to suffer substantial loss. That it is in the interest of justice to allow the application herein.
4. The application is supported by the affidavit of the applicant sworn on 30/10/18 where he depones that he would suffer substantial loss and damage as he would lose half of the properties he owns and the applicant/respondent(sic) is a person of straw and would not be able to institute (sic) them should the appeal succeed. That should the judgement be executed he would suffer substantial loss and prejudice. That he offers the properties which are subject to this case which court has declared as his share as security as the court would direct.
5. The applicant filed grounds of objection stating that the application is untenable in law and an abuse of court process for being out rightly vexations and argumentative. That this court is 'functus officio' having determined the issues herein substantively. That the application and the affidavit of the applicant are incompetent and void ab initio, both calling in substance and substration.
6. The parties made oral submissions and for the applicant it was submitted that the applicant would suffer substantial loss as the property will be alienated. The applicant is a person of straw who will not be able to reimburse. That the averment is not controverted. That it is in the interest of justice to preserve the subject matter. That the applicant has offered security.
7. For the respondent it is submitted that the application is made with ulterior motive. The law on matrimonial property is clear. That the applicant has not demonstrated the substantial loss he is likely to suffer.
8. I have considered the application. There are two issues arising. That is:-
  - a) Failure to attach the decree.
  - b) Stay of execution pending appeal.

Failure to attach the decree:-

The respondent submits that the application is incompetent. The applicant did not attach the decree he wishes to challenge on appeal. A perusal of the record shows that the decree has been extracted. Though the respondent has submitted that the application is incompetent, she has not stated what prejudice or injustice she has suffered. Under **Article 159 (2)(d) of the Constitution**, "**Justice shall be administered without undue regard to procedural technicalities.**" The **Civil Procedure Act** on the other hand under **Section 1A & 1B** has mandated the courts to give effect to the overriding objectives which are to facilitate the just expeditious, proportionate and affordable resolution of the

Civil disputes governed by the Act. With these provisions there is no room for the court to determine matters on procedural technicalities and especially where the party has failed to show what prejudice or injustice he may suffer. Since the decree is on record, failure to attach it to the application is not fatal.

## **2. Stay of execution pending appeal.**

The court exercises discretion to order stay of execution on application by a party as the fact of filing an appeal does not operate as a stay of execution. There are principles governing the granting of stay of execution. These are provided under **Order 42 rule 6(1) (2) (a) & (b)**. It provides:-

**“6(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 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.”**

The applicant needs to satisfy the court on the following conditions before he can be granted the stay orders of stay of execution.

### **a) Substantial loss occurring**

The onus of proving that substantial loss would occur unless stay is issued rests upon and must be discharged accordingly by the applicant. It is not enough to merely state that loss will be suffered, the applicant ought to show the substantial loss that it will suffer in the event the orders sought are not granted.

9. The respondent had filed a case against the applicant seeking declaration of matrimonial properties and their subsequent division. The court in its judgment held that **Land Parcels Nos. Mutira/Kaguyu/[particulars withheld]-[particulars withheld], [particulars withheld], [particulars withheld], [particulars withheld] and Inoi/Kariko/[particulars withheld]** should be shared equally between the parties. That motor vehicle [particulars withheld] W was bought after the parties separated and are the applicant’s property.

10. In the present application, the applicant claims that if judgment is executed, he will lose half of his properties and the respondent is a person of straw. That if the judgment is executed, it will render his appeal nugatory. What constitutes substantial loss has been addressed in various decisions of the High Court and the Court of Appeal.

In **Charles Wahome Gethi v Angela Wairimu Gethi [2008] Eklr**

The Court of Appeal held the following view on the issue of substantial loss;

**The applicant does not claim that the respondent intends to sell the portion of land in dispute and that it will not be in existence by the time the appeal is determined..... In the circumstances of this case, the applicant would suffer substantial loss rendering the appeal, if successful nugatory only if the suit land is disposed of before the appeal is determined. The applicant does not claim that the suit land would be disposed of. The applicant has not in our view, established that unless stay is granted, he will suffer substantial loss and that the appeal, if successful would be rendered nugatory.**

11. In this case all what the respondent has attempted is to have the properties transferred to herself.

In **James Wangalwa & Another V Agnes Naliaka Cheseto [2012] eKLR**

The Court held;

**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 CPR. This is so because execution is a lawful process.**

**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 would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni [2002] 1KLR 867*, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules,**

respectively, emphasized the centrality of substantial loss thus:

*“...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.”*

12. The fact that the respondent is likely to transfer the properties to herself does not in itself mean the applicant will suffer substantial loss. It is erroneous for the applicant to state that the respondent would not be able to re-imburse as this is not a money decree. If the applicant transfers land to herself in execution of the decree, land is immovable property which can always be traced and recovered.

**b) Requisite security**

The applicant has offered his properties which are subject to this case and which the court has declared as his share as security. He is also willing to give further security for costs as the court may direct. Security is ordered where court has exercised discretion to order stay of execution. It is sufficient for applicant to state that he is willing to provide security.

**c) Was there undue delay?**

The applicant being aggrieved with the judgment of the trial court delivered on 28/09/2018 proceeded to file notice of appeal on 11/10/2018 and an application for stay of execution on 30/10/2018. The appellant filed the application within one month. There was no inordinate delay in filing the application.

13. The applicant despite bringing the application within reasonable time, has not demonstrated that he will suffer substantial loss. He does not claim that the respondent intends to dispose off the parcels of land if the Court does not grant the orders sought. The issue of substantial loss is key when dealing with an application for stay of execution and must be proved. The applicant has failed to prove that he will suffer substantial loss. The application is without merits and is declined.

Costs to the respondent.

**Dated at Kerugoya this 6<sup>th</sup> June 2019.**

**L. W.GITARI**

**JUDGE**