REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL SUIT NO. 40 OF 2017 (O.S.)

IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY

AND

IN THE MATTER OF SECTION 17 OF THE MATRIMONIAL PROPERTY ACT (2014)

BETWEEN

S.K.K.....APPLICANT

VERSUS

S.K.K.....RESPONDENT

RULING

1. The applicant and the respondent were married. The marriage was dissolved on 25th May 2017. The applicant filed this cause for the division of matrimonial property. This court delivered a judgment on 16th May 2019 distributing the property. Of interest are Ngong/Ngong/[Particulars Withheld] and Sokimau LR /[Particulars Withheld]. It was found that the acquisition of the former was equally contributed to by the parties and in the latter property the applicant's contribution was 60% and the respondent's contribution was 40%. The two properties were to be valued, sold and the proceeds shared as indicated. The court gave some property to the applicant, some to the respondent and some were to be shared equally. In respect of the two properties, the applicant timeously filed an appeal to the Court of Appeal. The appeal is yet to be heard and determined.

2. The present application seeks the stay of execution of the judgment and orders of this court pending the hearing and determination of the appeal. The respondent opposed the application. One of the grounds was that the application was defective because there was no order of the court or consent before the applicant's new advocates came on record after the judgment.

3. As regards **Order 9 rule 9** of the **Civil Procedure Rules**, the record is clear that the applicant's earlier advocates consented to the new advocates taking over the case, and the court made an order on 20th June 2019 to have the new advocates come on record. The earlier advocates were present on that day. The order of change of advocates followed a formal application dated 28th May 2019.

4. The application for stay was made under **Order 42 rule 6** of the **Civil Procedure Rules**. The applicant has to demonstrate that the application was brought without unreasonable delay, she will suffer substantial loss if stay is not granted and that she has provided security for the due performance of such decree or order as may ultimately be binding on her **(Butt –v- Rent Restriction Tribunal [1982]KLR 417)**.

5. I have indicated in the foregoing that the application was brought without any delay. However, no security was offered.

6. Regarding whether or not the applicant will suffer substantial loss, all that she deponed was that she had a good appeal, and that no loss or prejudice will be occasioned to the respondent, if stay is granted. This court cannot discuss the merits of the appeal. That is for the Court of Appeal. The issue is not whether or not the respondent will suffer loss or prejudice, although that may be a relevant consideration. The application belongs to the applicant. She is the one required to demonstrate that she will suffer substantial loss if stay is not granted. It is not enough to state that she will suffer substantial loss, although no such statement was made in the supporting affidavit. She was required to place on record material and evidence from which the court can conclude that she will indeed suffer substantial loss, if stay is not granted. The loss in question has to be stated and substantiated.

7. In **Kenya Shell Limited–v- Kibiru & Another [1986] KLR 410,** it was held that substantial loss in its various forms, is the cornerstone for the jurisdiction to grant stay pending appeal. There has to be evidence that, if stay is not granted, the applicant will be placed in prejudicial difficulty that would compromise the ends of justice, and render the appeal nugatory.

8. It is also notable that, by granting stay, the respondent would not benefit from the fruits of the judgment. The applicant has therefore to show that, if stay is not granted, her loss or prejudice will be greater than the loss or prejudice of the respondent who will have been denied the fruits of the judgment **(Jumilla Attarwala & Another –v- Hussein Abdulaziz & Another [2015] eKLR).**

9. In **Silverston –v- Chesoni [2002] IKLR 867**, it was observed that the applicant must establish factors which show that the execution, if allowed to proceed, will create a state of affairs that will irreparably affect or negate the very essential core of the applicant were he to succeed on appeal.

10. In short, I find no merits in the application which I dismiss with costs.

DATED and **DELIVERED** at **NAIROBI** this **4TH NOVEMBER 2019.**

A.O. MUCHELULE

JUDGE