



REPUBLIC OF KENYA
IN THE HIGH COURT AT KENYA AT NAIROBI
MILIMANI LAW COURTS
JUDICIAL SEPARATION CAUSE NO. 96 OF 2015

B A O.....PETITIONER

VERSUS

P O O.....RESPONDENT

R N M.....CO-RESPONDENT

RULING

1. The Respondents by an application dated the 29th of August 2016 brought under Order 51 Rul1 of the Civil Procedure Rules, 2010 and Sections 1A, 1B, 3 A of the Civil Procedure Act Cap 21 seeks the following orders;

- i. That there be a temporary stay of the proceedings of the Court pending the hearing and determination of the Appeal against the Ruling of the Court delivered on the 22nd of July 2016.
- ii. That the costs of the application be provided for.

2. The application is supported by 8 grounds on the face of the application and the affidavit of Mr. Wanjala Bush. The dependent is the advocate on record for the Respondent. He avers as follows; that respondent raised a preliminary objection as to the Court's jurisdiction to hear and determine issues relating to the apportionment of matrimonial property or shares in a suit relating to judicial separation. That the respondent also raised an objection as to the Court's jurisdiction to hear and determine the issue of maintenance as sought by the petitioner as such issues lies with the Magistrates courts. That these are fundamental issues that will determine the manner in which the hearing of the petition will be conducted and the questions to be raised during the hearing of the petition. That the court dismissed the preliminary objection. That it is important that the issues raised in the preliminary objection be finally determined to enable the matter proceed in just and fair manner. That in the interest of justice and in saving judicial the suit be stayed pending the hearing and determination of the appeal against the Ruling delivered on the 22nd of July 2016. That the substance of the Appeal is substantial and directly related to those that are in issue in the suit and that no prejudice will be occasioned to the petitioner if the orders are issued.

3. The application was opposed. The petitioner filed a replying affidavit dated the 14th of November 2016. In her affidavits she narrates the orders she is seeking in her petition as follows;

- i. That the said R N M be ordered to vacate the petitioner's matrimonial home being I.R. No. [Particulars withheld] in Karen, off May East Road – Nairobi with immediate effect.

ii. That this Honourable Court be pleased to order the respondent to be restrained from restricting the applicant's access and/or evicting, and/or interfering with her quiet occupation of the matrimonial home known as Title Number I.R. No. [Particulars withheld] in Karen, off May East Road – Nairobi.

iii. That the respondent be restrained from selling/transferring/disposing and/or otherwise interfering with ownership/possession of the following properties pending the hearing and determination of this suit.

a. I.R No. [particulars withheld] in Karen, off May East Road-Nairobi (matrimonial home)

b. L.R [particulars withheld] No. 4 area 0.0085, Mombasa Road.

c. L.R. No. [particulars withheld] Ngong/Ngong-Nkoroi Kajiado County (family farm)

d. L.R No. [particulars withheld] Angurai, Busia County (Family Rural Home)

e. L.R. No. [particulars withheld], Malaba, Busia District (undeveloped)

f. L.R N. [particulars withheld] and [particulars withheld], Malaba-Busia (undeveloped)

g. L.R No. [particulars withheld] & [particulars withheld] (8 acres) at South Teso/Osuret, Machakus, Busia (undeveloped).

h. 2 undeveloped plots in Malaba town council, Tororo District-Uganda)

i. L.R No. [Particulars withheld],[particulars withheld], [particulars withheld] South Teso/Osuret, Malaba, Busia.

j. Plot No. [particulars withheld] Kileleshwa

iv. That this honourable court be pleased to declare that 50% of the properties listed herein above with the improvements and the buildings thereon were acquired, improved, developed and maintained by the parties jointly and that the same is held by the respondent in trust for the petitioner.

v. That the respondent be ordered to prove alimony/maintenance and/or secured provision for the petitioner.

vi. That the respondent be condemned to bear the costs of this cause.

vii. Any further or other relief that this honourable court may deem just and fit to grant to the petitioner in circumstances.

4. She has asked this court to dismiss the preliminary objection stating that the court has the inherent jurisdiction to hear and determine the matter. That she has been advised by her lawyer that she can apply for declaratory orders of rights to matrimonial property under Section 17 of the Matrimonial Property Act 2013. That she has not sought an apportionment of the matrimonial property. That the respondent through his Answer to petition and Cross- Petition filed on the 24th of November 2015 has admitted the jurisdiction of the court. That the application is an afterthought meant to delay the matter further causing her a lot of anguish whilst the Respondent continues to enjoy their matrimonial home and properties to her exclusion. That the respondent has not met the threshold of required to grant a stay orders and that the application should be dismissed.

5. The application for stay of the proceedings was argued in court on the 9th February 2017. Mr. Wanjala

for the respondent submitted that the respondent filed a notice of appeal on the 4th of August and the respondent is asking the court to exercise his discretionary powers and grant the stay. He reiterated what is deponed in the respondent's affidavit and submitted further that both parties had agreed to separate and the only question pending is that of matrimonial property and yet the court cannot listen to the issue of matrimonial property unless there is a divorce. That the latter is the question they intend to take to the Court of Appeal and it will be prejudicial if the hearing proceeds before the hearing is heard. That no prejudice will be caused as there is a prohibitory order by the court. Miss Theuri for the Petitioner sought to have the Preliminary Objection dismissed restating that what the petitioner seeks a declaratory orders that the applicant has not demonstrated any details of substantial loss if the matter proceeds to hearing and that there is no merit in the application. She relied on the case of **Machira vs. East African Standard (No. 2) (2002) 2 KLR 63.**

6. I have considered the Preliminary Objection, the affidavits and the oral arguments. The applicant seeks a stay of the proceeding pending the hearing and determination of the appeal. The application is brought under Order 51 Rule 1 which merely provides for the procedure to be followed in filing an application in court. The legal principles in staying proceedings have been set out as follows;

a) The decision whether or not to grants a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice.

b) The sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted.

c) In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order.

d) In considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously. (see In the matter of Global Tours and Travel Ltd Winding up cause No. 43 of 200)

7. After considering the submissions and the above principles; my view upon weighing the pros and cons in this case is that the respondents will not any suffer substantial loss and that the appeal will not be rendered nugatory. The respondents have only filed a notice of appeal nothing else. This matter has been in court since 2015 the applicant is out of the matrimonial home and is merely seeking declaratory orders. There is need to expedient the hearing of the matter. The respondents do have a right of appeal but that right must weighed against the petitioners rights. The court's ruling clearly stated that the petitioner has sought declaratory orders in a judicial separation for which this court has jurisdiction to hear. I find no merit in the application and dismiss it with costs to the petitioner. Parties to proceed to take a date for hearing at the registry. It is so ordered.

Dated, signed and delivered this 19th day of July 2017.

R. E. OUGO

JUDGE

In the presence of;

Miss Theuri For Petitioner

Absent For the Respondents

Mr. Ben Court Clerk