

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

HCCC NO.19 OF 2011 (O.S)

AGK PLAINTIFF/RESPONDENT

VRS

MK DEFENDANT/APPLICANT

RULING

The application dated 24/8/2015 seeks orders staying execution pending the hearing and determination of the intended appeal. It is supported by the applicant's affidavit sworn on 24/8/2015. The respondent filed a replying affidavit sworn on 31st August, 2015 opposing the application.

Mr. Ole Kina, counsel for the applicant relied on the application. Counsel submitted that the applicant applied for proceedings after the judgment was delivered. The current application has been made expeditiously. There is an appeal pending. The applicant will suffer substantial loss. He is ready to provide security and abide by any conditions imposed by the court. There is rent generated by the property in dispute in court or in an interest earning account of both advocates. The essence of the application is to preserve the property. If the orders are not granted, the applicant will lose the control of his single asset this being the matrimonial property. There are business premises located within the premises. The respondent has threatened to evict the tenants.

Mr. Shujaa, counsel for the respondent opposed the application and relied on the replying affidavit. Counsel contends that no substantial loss will be suffered. There are three properties. Each party was allocated his/her property. The applicant is in possession of all the properties and has not accounted for the rent he has received. No execution has started. There is no evidence of threats to evict the tenants. There is no evidence that if the appeal succeeds, the respondent cannot return the property.

The appeal relates to a judgment of this court which distributed the properties between the two parties. It is clear that each party was given his/her property. The applicant contends that he will suffer substantial loss and lose the control of the matrimonial property. The parties were couples. It is evident that the applicant does not dispute the fact that the respondent is entitled to part of the matrimonial property. The only substantial loss that can be suffered is if the respondent decides to sell the property allocated to her. This property forms part of the matrimonial home. Apart from that aspect, there is no loss likely to be suffered. The court can restrain the respondent from selling the property allocated to her pending the determination of the appeal. The property allocated to the applicant is not far from the one allocated to the respondent. He will be able to monitor what is happening on the matrimonial property. There is no court order barring him from accessing the property.

The judgment was delivered on 9/7/2015. The application was filed on 24/8/2015. It was filed without unreasonable delay. Apart from the issue of disposal of the property in dispute, I do find that there is no substantial loss likely to be suffered by the applicant. The applicant's right to pursue his appeal has to be balanced with the respondent's right to enjoy the benefit of the judgment. I do find that there is no merit on the application. I take cognizance of the fact that the suit property is not registered and can be disposed of by a simple sale agreement. I do order that the respondent herein take over the property allocated to her but should not sell the property specifically described in the judgment as item one (1) pending the hearing and determination of the appeal.

In the end, the application dated 24/8/2015 lacks merit and is dismissed with no orders as to costs. The respondent is hereby restrained from selling the property allocated to her pending the determination

of the appeal.

Dated, delivered and signed at Malindi this 13th day of October, 2015.

SAID J. CHITEMBWE

JUDGE