



IN THE COURT OF APPEAL

AT NYERI

(CORAM: NAMBUYE, ASIKE-MAKHANDIA & KANTAL, J.J.A.)

CIVIL APPLICATION NO. 37 OF 2020

BETWEEN

PETER MASULA KILLINGO.....APPLICANT

AND

GRACE NABIKI MASULA.....RESPONDENT

(Being an application for stay of execution pending the hearing and determination of an intended appeal from the Judgment of the High Court of Kenya at Meru (Mabeya, J.) dated 14th April, 2020

in

H.C.C.C. No. 15 of 2018 (O.S.)

RULING OF THE COURT

In a Judgment delivered on 14th April, 2020 by the High Court of Kenya at Meru (**Mabeya, J.**) it was decreed that the respondent (**Grace Nabiki Masula**) was entitled to 50% of the properties known as **Nyaki/Mulanthankari/450** and **Kitharene Adjudication Section Nos. 1411** and **1567**; that the properties be valued and the applicant, **Peter Masula Killingo** pay to the respondent 50% of the value of the properties in default execution to issue.

In the Motion dated 13th May, 2020 brought under various provisions of law the applicant prays in the main that we order a stay of execution of the said Judgment. In grounds in support of the Motion and in an affidavit of the applicant sworn at Meru on 13th May, 2020 it is said that the applicant will suffer irreparably as the respondent's evidence did not prove that she contributed to the acquisition of matrimonial property; that the trial court erred in ordering sharing of a property at 50% which property was acquired by the applicant through inheritance; that the respondent wanted to enter the properties for purposes of valuation as ordered by the High Court.

The principles that govern an application of this nature are well known. For an applicant to succeed he must, firstly, show that the appeal, or intended appeal, as the case may be, is arguable, which is to say that it is not frivolous. Such an applicant must, in addition, demonstrate that the appeal would be rendered nugatory absent stay – See the case of **Stanley Kangethe Kinyanjui v Tony Ketter & Others [2103] eKLR** where those principles were well summarized.

We have considered the Motion and the submissions filed by the parties.

We have also perused a draft Memorandum of Appeal annexed to the Motion.

It is intended to be argued on appeal that the Judge was wrong to hold that property acquired by the applicant through inheritance was part of matrimonial property. The applicant also takes as a ground of appeal whether the Judge was right to order that the parties to the marriage were bound to share matrimonial property at 50% each. We find these to be arguable points and this Court has held that an arguable point is not one that must succeed.

On the nugatory aspect we note that the respondent has valued the properties and valuation reports have been issued. The respondent is thus in the process of execution. The respondent may enter the properties and dispose of them beyond the reach of the applicant. That would render the intended appeal nugatory.

We allow the Motion and stay execution of the Judgment of the High Court sitting at Meru dated 14th April, 2020. Costs of the Motion will abide the appeal.

Dated and delivered at Nairobi this 5th day of March, 2021.

R.N. NAMBUYE

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR