



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KIAGE & SICHALE, JJ. A)

CIVIL APPLICATION NO. NAL. 19 OF 2020

BETWEEN

SMK.....APPLICANT

AND

NWM.....RESPONDENT

*(Being an Application for Stay execution pending the lodging, hearing and determination of an intended Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (A. Ongeri, J.) dated and delivered on 24th January, 2020 in Matrimonial Cause No. 69 of 2018)*

RULING OF THE COURT

1. This motion on notice dated 3rd February 2020 is made under **Rule 5 (2)(b)** of this Court's Rules wherein the applicant seeks orders *inter alia*;

***“2) THAT this Honourable Court be pleased to order a Stay of Execution of the Judgment and Decree of the High Court of Kenya at Nairobi (LADY JUSTICE ASENATH ONGERI) delivered on 24th January 2020, pending the lodging, hearing and final determination of the Intended Appeal against the said Judgment and Decree.***

***3) THAT this Honourable Court be pleased to order a Stay of Execution of the Judgment and Decree of the High Court of Kenya at Nairobi (LADY JUSTICE ASENATH ONGERI) delivered on 24th January 2020, pending the hearing and determination of this Application inter-parties.***

***4) THAT this Honourable Court be pleased to issue such other directions and or Orders as the Court may deem just and expedient.***

***5) THAT the costs of this application be provided for.”***

2. The application was made on the grounds that the applicant is aggrieved by the trial Court's judgment in favour of the respondent, that declared among other things that: all the properties acquired by the applicant during the subsistence of the marriage, including the applicant's shares at the Nairobi Stock Exchange, but with the sole exception of the Athi River land, are matrimonial property, and that they are to be shared out equally between the applicant and the respondent; the respondent to be allocated the matrimonial home, Miotoni Common House No. x, situated on LR xxx/xxx, located in Karen, and that the same be transferred to her and that the applicant is to move out of the said matrimonial home within 60 days of the Court's judgment; the rental proceeds from the Kahawa Wendani block of flats is to be shared by the parties on a 50-50 basis with effect from the date the said flats were purchased; the land known as Ngong/Ngong/xxxxx-Upper Matasia to be shared by the parties on a 50-50 basis, and that the same be held by the applicant in trust for the respondent herein because the parties buried their son there; the shares at the Nairobi Stock Exchange be shared between the parties on a 50-50 basis; motor vehicle, KBK xxxQ, Toyota Prado, to remain with the respondent; motor vehicle, KAL xxxB to be transferred to the respondent and; if the parties do not agree with the mode of distribution stated by the Court within 60 days from the date of the judgment, all properties shall be sold and the net proceeds shall be shared out equally between the parties, in which event the proceeds of sale from Miotoni Woods, allegedly sold by the applicant, be shared between the parties on a 50-50 basis.

3. The application is supported by the applicant's affidavit sworn by him on 3rd February, 2020 where it was deposed that the learned Judge erred: in finding that the respondent contributed towards the acquisition of the properties that the applicant owns by giving him companionship and taking care of children, notwithstanding that the respondent stated in her pleadings and evidence before the trial Court that she was a nurse in full time employment working day and night shifts; in shifting the burden of proof of contribution from the respondent to the applicant; in her determination as which properties constituted the matrimonial property; in failing to find that the

respondent was currently a potato and bee-keeping farmer also owned properties which details she ought to have disclosed; failing to consider that the parties' marriage had already deteriorated back in the year 2000; in reaching an erroneous finding as to the proceeds made from one of the properties in question contrary to evidence adduced; in failing to find that the properties in question were registered in the applicant's name to be held in trust for the respondent and their children exclusive of any properties acquired after May 2012 as the parties were not in talking terms then. It was further averred that during the pendency of the **Divorce Cause No. 6 of 2015** and the **Matrimonial Cause No. 69 of 2018**, the parties had been living together in the matrimonial home in Karen.

4. It was also averred that following the trial court's judgment on 24th January 2020, the respondent has already started changing locks to the matrimonial home in Karen with the intention of preventing the applicant's access thereto and that in the event the appeal was to succeed, it would be rendered nugatory as the applicant would have already been rendered homeless; further that if the properties were to be sold for lack of reaching an agreement as to distribution, either the properties or proceeds would be irrecoverable.

5. Vide a replying affidavit sworn by herself, the respondent deposes *inter alia* that: the trial Judge rightfully found that she contributed to the acquisition and development of the matrimonial property and was entitled to a share; the substratum of the intended appeal is no longer in danger of being lost and the same is only eminent if the applicant defies the orders of the trial Court; that the division of the properties would not in any way render the intended appeal nugatory; that the applicant does not reside in the matrimonial home; that the applicant sold Miotoni Woods which formed part of the matrimonial property without her consent; that the marriage between the parties ceased in 2015 by virtue of **Divorce Cause No. 6 of 2015** and not in 2000 as alleged by the applicant and; that the mode of distribution as prescribed by the trial Court was proper and fair in law.

6. Aggrieved by the judgment and orders summarized above, the applicant has moved to this Court on appeal and in the meantime filed the instant application with the view of staying the execution of the aforementioned orders. It is instructive to note that on the applicant's application and for reasons given in Court at the hearing of the application, the Court granted interim orders of stay pending the determination of this application.

7. On the question of whether the intended appeal is arguable, Mr. K argued that the learned Judge erred in her finding that the respondent had contributed to the purchase of the applicant's motor vehicle which he bought in 1983 hence that she was entitled a half share of the matrimonial property despite the fact that it was conceded before the trial Court that a good portion of the money to buy the matrimonial property was from the sale of a motor vehicle bought in 1983 when the respondent was still a student at M School of Nursing before she started working. He maintained that the proceeds from the sale of the motor-vehicle was the main source of the matrimonial property as the same was what was invested and re-invested to acquire the said properties.

8. On the issue as to whether the intended appeal would be rendered nugatory if stay is not granted, Mr. Ka submitted that if the property is liquidated and shared out equally, there would be no chance of recovering the properties in the event that the intended appeal succeeds hence the appeal would be rendered nugatory.

9. Opposing the application, Ms. Njagi appearing for the respondent submitted that there was no arguable appeal as the applicant was urging to be awarded 100% of the matrimonial property yet the learned Judge determined a 50-50 mode of distribution based on the evidence before her. On the issue of the Nairobi stock exchange shares maintained that although the same was not pleaded, the respondent urged the trial Judge to consider all evidence before her.

10. On the nugatory aspect, Ms. Njagi submitted that even if the properties are liquidated, the applicants would be compensated in the event his intended appeal succeeds and therefore it would not be rendered nugatory if stay is not granted. She urged us to dismiss this application.

11. We have considered the pleadings and the submissions of both parties. It is settled that for an application under **Rule 5 (2) (b)** of the Court of Appeal Rules to succeed an applicant has to demonstrate firstly that the appeal or intended appeal is arguable, or in other words, that it is not capricious or frivolous. Secondly, that unless he/she is granted a stay of execution or injunction as the case may be, the appeal or intended appeal, if successful, will be rendered nugatory. See **Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others, Civil Application No. NAI. 31/2012**.

12. It is also settled that an applicant does not need to establish a multiplicity of arguable points as indeed one point suffices, and further that an arguable appeal is not necessarily one that will eventually succeed.

13. In our view, from what we can decipher from the material placed before us, there is no doubt whatsoever that the appeal is arguable, particularly on the mode of distribution of the matrimonial property. The first limb on arguability has therefore been demonstrated to the satisfaction of the Court.

14. It is trite that success of an application on this limb is to be determined according to the unique circumstances of each case. In considering whether the intended appeal would be rendered nugatory, this Court ought to weigh the claims of both sides. See: **Trust Bank Limited and Another v. Investech Bank Limited & 3 Others, Civil Application Nos. Nai. 258 and 315 of 1999** and **Oraro & Rachier Advocates v. Co-operative Bank of Kenya Ltd., Civil Application No. Nai. 358 of 1999**.

15. On one hand, the applicant says he is apprehensive that if the property is liquidated and the proceeds shared out equally, there would be no chance of recovering the properties in the event that the intended appeal succeeds hence the appeal would be rendered nugatory. On the other hand, the respondent argues that if the properties are liquidated, the applicants would be compensated in the event his intended appeal succeeds and therefore it would not be rendered nugatory if stay is not granted.

16. It is evident from the circumstances of this case that both parties allege to having put in years of monetary and non-monetary contribution into the acquisition and the development of the matrimonial properties.

Undoubtedly, most if not all of the immovable properties hold sentimental value to each party in different measure. In addition, it is evident that both parties claim a share to the properties hence a liquidation of the same would definitely interfere with the status quo and preservation of the subject matter; preservation of the suit property will therefore cause no prejudice to either party. We find that the applicant has established the nugatory aspect.

17. In view of the foregoing, we come to the conclusion that the applicant has demonstrated both limbs as required. We allow the application with an order that each party bears its own costs.

**Dated and delivered at Nairobi this 10th day of July, 2020.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**