



IN THE COURT OF APPEAL

AT NYERI

(CORAM: WARSAME, KIAGE & KANTAL, J.J.A.)

CIVIL APPLICATION NO. 20 OF 2020

BETWEEN

ARH.....APPELLANT/APPLICANT

AND

MAA.....RESPONDENT

(Being an application for stay of execution of the Ruling of the High Court of Kenya

at Marsabit (Chitembwe, J.) delivered on 3rd February, 2020 in Matrimonial Cause No. 1 of 2017

RULING OF THE COURT

The applicant, **ARH**, married the respondent, **MAA**, under Islamic Law in 1981 but that marriage was dissolved in 2017 by a Kadhi Court in Marsabit. The respondent then filed an originating summons praying for a share of matrimonial property and in a Judgement delivered on 23rd July, 2018 it was ordered that the applicant take 70% of a Plot No. [...]situate in Marsabit town while 30% of the plot was to go to the respondent. There was no appeal against those orders.

There followed various applications one of which led to the High Court at Marsabit ordering that the said Plot No. [...] (“the plot”) be sold and proceeds of sale be shared by the parties in the stated ratio.

In another ruling the Court ordered that the plot be valued – the applicant filed a valuation where the value was given as Ksh.16,500,000 while the respondent’s valuation gave a figure of Ksh.16,000,000.

It would appear from the ruling of **Chitembwe, J.** given on 3rd February, 2020 that the applicant’s position, since the Judgment apportioning the plot, was that the plot be sold and proceeds shared but the respondent’s position resisted selling of the plot, she insisting that she keep 30% of the plot.

When, therefore, the respondent moved the court praying that she be allowed to keep the plot by paying 70% of the valuation to the applicant, the Judge ruled:

“Since the respondent has all along indicated that she is against the idea of having the property sold and that she would rather retain her 30% share than have the property sold, I do not find that the plaintiff/respondent is better placed to take over the property after paying the defendant/applicant’s 70% share. The issue as to who hold the majority shares is not the determining factor as to who should take over the property. What is important is the circumstances of the dispute and the rival positions of the two parties. Why should the Court order the property sold to a third party if one of the shareholders is willing to buy it?”

The Judge in the end upheld the higher valuation of Ksh.16,500,000 and ordered that the respondent pay Ksh.11,550,000 to the applicant and thereafter be registered as the owner of the same.

The applicant filed a Notice of Appeal lodged on 14th February, 2020 which was followed by a Notice of Motion now before us. It is said to be brought under rules 4 and 42 of the rules of this Court and all other enabling provisions of law. In grounds on the face of the Motion and in a supporting affidavit sworn by the applicant it is said *inter alia* that the applicant and the respondent did not acquire any property of their own during the marriage; that the plot was transferred to the applicant by his mother who was still alive but was sickly; that the plot was

subject to the interests of the applicant's mother and the applicant's current wife; that the respondent was in a hurry to execute the ruling and may dispose of the plot to 3rd parties; and that there were serious legal and cultural issues to be raised in the intended appeal.

For an applicant to succeed in this Court in an application for stay of execution pending appeal he must, firstly, demonstrate that the appeal, or intended appeal, is arguable which is the same as saying that it is not frivolous. If such an applicant succeed on the first said limb he must, in addition, show that the appeal would be rendered nugatory absent stay – See the case of **Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR** where those principles were discussed.

Is there an arguable appeal in this Motion?

It will be remembered that the Judgement delivered on 23rd July, 2018 where division of the plot was ordered was not appealed against. What followed were applications for valuation; that the plot be sold and proceeds shared and, finally, when the respondent resisted sale of the plot and was willing to keep it and pay the applicant 70% of the higher valuation, the Judge found the respondent's request reasonable. She had all along been opposed to sale of the plot asking to keep 30% of the same. She was in the end ready to pay off the applicant.

In the premises there is no arguable point in the intended appeal.

Having reached that conclusion, we need not consider the other limb – the nugatory aspect.

The Motion fails and is dismissed. In the circumstances where the parties were husband and wife let each meet their own costs.

Dated and delivered at Nairobi this 7th day of August, 2020.

M. WARSAME

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR