



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MURGOR & J. MOHAMMED, J.J.A.)

CIVIL APPLICATION NO. NAL. 10 OF 2020

BETWEEN

PMK.....APPLICANT

AND

CKM.....RESPONDENT

(An application for stay of execution arising from the Judgment of the High Court of Kenya at Nairobi (Ali- Aroni, J.) delivered on

28th November 2019

in

HC Matrimonial Cause No. 68 of 2015 (OS)

RULING OF THE COURT

This Notice of Motion dated 16th January 2020 is made under **section 3A** of the **Appellate Jurisdictions Act** and **rules 5 (2) (b)** of the **Court of Appeal Rules**, and has been brought for grant of; i) a stay of execution of the judgment of the High Court (Ali – Aroni, J.) delivered on 28th November 2019 pending the hearing and determination of the intended appeal; ii) a stay of further proceedings pursuant to the said judgment pending the hearing and determination of the intended appeal; iii) any further orders that this Court may deem just and fit to grant and iv) that costs be provided for.

The motion was brought on grounds that the intended appeal is arguable, and that if the orders are not granted, the applicant would suffer substantial loss. The application was supported by an affidavit sworn by the applicant. No written submissions were filed on the applicant’s behalf.

The respondent did not file a replying affidavit, but filed written submissions wherein it was submitted that the intended appeal is frivolous, since no cause of dissatisfaction with the High Court’s decision was disclosed; that it was merely instituted so as to allow the applicant continue to tamper with the matrimonial properties and deny the respondent her rights. On the nugatory aspect, it was submitted that the applicant would not suffer any loss as the parties had not separated from marriage by the time of purchase of the properties, and being matrimonial property both parties were duly entitled to it.

The background to the application is that the respondent instituted proceedings in a matrimonial cause on 10th December 2015, seeking to have various parcels of land and motor vehicles listed in the trial court’s judgment, (*the subject properties*) declared as matrimonial property, or in the alternative obtain orders to have the subject properties sold and the proceeds of sale shared equally between the parties. The applicant contested the suit and claimed that the subject properties were acquired after the parties had separated, and therefore they could not be considered as matrimonial property. The High Court in its determination found that the subject properties were matrimonial property, and for reasons that the parties had not separated or divorced, and remained married under the Laws of Kenya the question of disposal of their matrimonial property at this stage of the proceedings did not arise. The court further prohibited the alienation, disposal, sale, charging of or interference with any of the subject properties without consent of the parties or a court order.

In determining an application under **rule 5 (2) (b)** of this Court’s rules, it is well established that, two principles guide the Court. Firstly, an applicant is required to demonstrate that the appeal or intended appeal is arguable, or in other words, that it is not frivolous. Secondly, that unless he 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 the case of Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others, Civil Application No. NAI. 31/2012. We would also add that when determining applications under rule 5 (2) (b), the court exercises a distinct jurisdiction which exercise does not constitute an appeal from the trial judge's discretion to this Court. See Ruben & Others vs Nderitu & Another (1989) KLR 459.

The applicant has listed various grounds in support of his draft memorandum of appeal, but we remind ourselves that for the intended appeal to be considered to be arguable, "*All that is needed in law is that there be even one arguable point and that will suffice.*" See the case of Commissioner of Customs vs Anil Doshi, [2007] eKLR.

As to whether the appeal is arguable, one of the applicant's complaints is that the learned judge erred by failing to appreciate that the parties were not divorced and that the subject properties were not part of the matrimonial cause proceedings. It is clear from this complaint that the dispute between the parties is whether or not the subject properties were matrimonial properties. We consider this to be an arguable issue.

On whether the intended appeal would be rendered nugatory in the event it were to succeed, we think not. This is because the learned judge merely concluded that the subject properties were matrimonial property and prohibited any dealings with them until they were apportioned between the parties either by consent or by court order. In other words, since neither party could dispose of or deal with the subject properties meant that the intended appeal would not be rendered nugatory because they would continue to remain within the reach of both the parties and this Court pending the hearing and determination of the intended appeal. And in so far as the proceedings were concerned, since the court's order was specific to the subject properties, there was nothing to stay.

In sum the applicant has failed to satisfy the second limb and therefore the notice of motion dated 16th January 2020 is unmerited and is accordingly dismissed. The costs herein will abide by the intended appeal.

It is so ordered.

Dated and Delivered at Nairobi this 9th day of October, 2020.

M. KOOME

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JUDGE OF APPEAL

A.K.MURGOR

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR