



**IN THE COURT OF APPEAL**

**AT NAIROBI**

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

**CIVIL APPLICATION NO. 120 OF 2020**

**BETWEEN**

**GNN.....APPLICANT**

**AND**

**LNN.....RESPONDENT**

*(An application for stay of execution of the judgment of the High Court of Kenya*

*at Nairobi (M. Kasango, J.) dated 28<sup>th</sup> April, 2020*

in

**HCCC No. 231 of 2016 (OS)**

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**RULING OF THE COURT**

Before us is a notice of motion application dated 14<sup>th</sup> May, 2020 in which the applicant prays for stay of execution of the judgment and decree of the High Court (**M. Kasango, J.**) delivered on 28<sup>th</sup> April, 2020.

By the said judgment, the High Court decreed that the Register of [particulars withheld] Enterprises Limited (*the company*) be rectified by the Registrar of Companies so as to reflect that the applicant and respondent were the sole directors of the company with one share each; the property LR. Kikuyu Township/xxx (*the suit property*) registered in the name of the company be sold at a public auction on a date to be set by the Deputy Registrar of the court and proceeds thereof shared in the ratio of 60/40% in favour of the respondent. Pending such sale, there shall be an independent Real Estate Agent to collect the rent over the suit property; the parties shall within 30 days agree on who shall collect the rent, failing which the Court will appoint such person; the parties shall within 30 days present their valuation reports of the suit property which will assist the court to set a reserve price for the same, failing which the court will set the reserve price. Finally, the court ordered compliance of the above directives within 30 days of the delivery of the impugned judgment.

The facts leading to the judgment aforesaid are that the appellant and respondent were husband and wife. They were divorced sometime in February 2006. The respondent subsequently and successfully filed a cause seeking the division of the matrimonial property. **Lenaola, J** (as he then was) heard the case and ordered the division of several of the matrimonial properties amongst the parties. However, he did not divide the property but directed that the same be divided between the parties in accordance with the Companies Act.

Subsequent thereto the respondent filed Civil Case in the High Court of Kenya at Nairobi whose judgment is the subject of these proceedings, praying that the court be pleased to declare her a valid legal director and shareholder of the company and that it declares that the applicant and herself were the only legal and valid shareholders of the company.

The respondent’s case was that the suit property was purchased with her direct and indirect contribution to the purchase price and that it was registered in the company’s name, “[particulars withheld]” which was the acronym formed from the names xxxx (N) and xxxx (N). She maintained that she was a shareholder and director of [particulars withheld]. As such she was entitled to a share of the suit property. The applicant on the other hand took the position that the respondent was not and had never been a director or shareholder of the company. Accordingly, she was not entitled to a share of the suit property.

Having heard the parties and their witnesses, Kasango, J. rendered herself as already set out at the beginning of this ruling.

Dissatisfied with the judgment, the applicant filed a notice of appeal and subsequently the instant application, which is brought under rule 5(2) (b) of the Court of Appeal rules and section 3A of the Appellate Jurisdiction Act. The applicant is apprehensive that the respondent will commence the execution of the decree any time now as the High Court had directed that the applicant complies with the decree within 30 days of the impugned judgment. Were that to happen, the intended appeal will be rendered nugatory. That the applicant has a right of appeal which can only be meaningfully realized if stay of execution is granted pending the said intended appeal. That the intended appeal is arguable and has high chances of success as demonstrated in the draft memorandum of appeal annexed to the affidavit in support therefore and that the respondent shall not suffer any prejudice if the orders sought are granted.

The application was supported by the applicant's affidavit as well as a supplementary affidavit in which he reiterated the grounds on the face of the application save that he had since been served with the decree indicating the respondent's keen intent of executing the same.

The application was opposed. In a replying affidavit sworn by the respondent, she deposed that she has been litigating with the respondent before courts for the past 20 years and litigation has to come to an end at some point. She believes that the application is yet another delaying tactic by the respondent intent on denying her the proceeds of her judgment. She deposed that if stay of execution is granted, she will continue to suffer injustice at the hands of the applicant. That the applicant was therefore not before Court in good faith. That in the event the intended appeal fails, which is highly likely, then the order of stay would have served the purpose of extending the applicant's disregard for court orders and the respondent's right to enjoy the fruits of her judgment. That it will therefore be in the interest of justice that the application be dismissed with costs.

The application was heard through written submissions. In his submissions the appellant relied on the cases of **Teachers Service Commission v Sarah Nyanchama Ratemo, Civil application No. 227 of 2013** and **Nairobi Women's Hospital v Purity Kemunto [2018] eKLR** to submit that he had an arguable appeal and that if orders sought were not granted, the intended appeal will be rendered nugatory. Whether or not the respondent is a director of the company is one of the issues that will be canvassed in the intended appeal. Another issue to be canvassed is whether it was property for the trial court to grant orders and reliefs not prayed for in the originating summons.

On the nugatory aspect, the applicant points out that if the appeal succeeds, the suit property will not be available as the High Court ordered that it be sold by public auction within 30 days and the proceeds thereof divided in the ratio of 60:40 in favour of the respondent. In the meantime, rent proceeds were ordered to be shared in the same ratio as well. That the said orders once implemented cannot be reversed as the purchaser will be a *bona fide* purchaser whose title cannot be challenged.

The respondent's submissions were a reiteration of what she had deposed to do in her replying affidavit save that she had not commenced the process of execution.

Having considered the application, the grounds in support thereof, the various affidavits, submissions by counsel and the law, we take cognizance of the fact that the jurisdiction of this Court under Rule 5(2) (b) is original, independent and discretionary. The discretion is however exercised judiciously and with reason; not on the craze of impulse or pity. In the case of **Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR** this Court stated *inter alia*:

**“That in dealing with Rule 5(2) (b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge's discretion to this Court.” The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”**

Upon satisfying the above principle, the applicant has the additional duty to demonstrate that should the appeal succeed, it would be rendered nugatory in the absence of an order of stay. (See: **Trust Bank Limited & Anor. v Investech Bank Limited & 3 Others, Civil Application Nai. 258 of 1999** (unreported)).

On whether the applicant has established an arguable appeal, we have considered the applicant's draft memorandum of appeal. He raises the issue whether the respondent was a director of the company and whether the respondent was instrumental in the acquisition of the property. The applicant has also raised the issue whether the trial court erred in granting orders not expressly prayed for. These are not idle issues. They are certainly not frivolous. They can only be determined at a full hearing of the appeal.

On the nugatory aspect, we take note that factors which can render an appeal nugatory are to be considered within the circumstances of each particular case and in doing so, the Court is bound to consider the conflicting claims of both sides. It is common ground that the impugned judgment directed that the suit property be sold within 30 days and the proceeds thereof be shared between the applicant and the respondent. The applicant thinks that should the sale proceed, the suit property will be sold to a *bona fide* purchaser whose title will not be impeachable even if he was to succeed in appeal. There is no doubt in our minds that there is an imminent risk of execution of the decree as a copy hereof has already been served on the applicant. We are satisfied that in the event the decree is executed and the suit properly sold, it will have been put beyond the reach of the applicant in the event that he eventually succeeds in his appeal. Similarly, rent shared out as directed by the court may not easily be recoverable from the respondent. No doubt therefore, the appeal would have been rendered nugatory.

The applicant further claims that he would suffer loss since the property was his sole source of income. In **Reliance Bank Ltd v Norlake Investments Ltd [2002] E.A. 227**, this Court while faced with almost similar facts stated:

**“To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined.”** (Emphasis ours).

In Mukuma v Abuoga [1988] KLR 645, this Court held *inter alia*:

**“The discretion of the Court of Appeal under Rule 5 (2) (b) of the Court of Appeal Rules is at large but the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render it nugatory.”**

We entertain no doubt that should the suit property be sold, the applicant shall definitely suffer substantial loss that is irreparable.

The upshot is that we are satisfied that the applicant has satisfied the twin principles for the grant of an order of execution of the decree pending the hearing and determination of the intended appeal. The application dated 14<sup>th</sup> May, 2020 is accordingly allowed. There shall therefore be a stay of execution of the judgment and decree of the High Court dated 28<sup>th</sup> April, 2020. However, the appellant is directed to file the intended appeal within the next forty-five (45) days from the date of this ruling failing which the stay hereby granted shall automatically lapse and the respondent shall be at liberty to execute the decree. Costs of the application shall abide the outcome of the intended appeal.

**Dated and delivered at Nairobi this 4<sup>th</sup> day of December, 2020.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb.**

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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**