



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M KARIUKI, J. MOHAMMED, & OTIENO-ODEK J.J.A)

CIVIL APPLICATION NO. NAI. 75 of 2015 (UR 64/2014)

BETWEEN

MATATA OYONDI NYAKEYA..... APPLICANT

AND

JOYCE BOCHERE NYAKERA..... RESPONDENT

(Being an application for stay of execution pending the hearing and determination of an intended appeal from the Judgment and Decree of Justice H. Kalpana Rawal dated 11th March 2011

in

Nairobi High Court Civil Case No. 81 of 2003

RULING OF THE COURT

1. Before us is a Notice of Motion dated 13th March 2015 lodged pursuant to **Rules 5(2)(b)** of the Rules of this Court seeking, *inter alia*, stay of execution of the judgment dated 11th March 2012 of the trial court pending the hearing and determination of an intended appeal and an order; that the respondent be restrained from evicting the applicant from the property known as **LR No. 209/359/7 Woodlands Avenue** in Nairobi pending the hearing and determination of the instant application.
2. The grounds in support as stated on the face of the application and supporting affidavit deposed by the applicant are that the applicant is willing to file the intended appeal but has been frustrated by lack of certified copies of proceedings; that the intended appeal is highly arguable; that the trial court erred in its apportionment of shares to the parties in the matrimonial properties in dispute; that the apportionment was done against the weight of evidence on record due to misdirection and wrong exercise of discretion by the trial court; that the judge failed to establish the ownership of **LR No. 1870/V/228/F5** and was plainly wrong in proceeding to order for the sharing of the said property without ascertaining its ownership; the judge erred in making a finding that suit property LR No. 1870/V/228/F5 was acquired through proceeds of rent from the matrimonial properties and further erred in ordering for the sharing of the rents subjecting the appellant to double jeopardy; the judge erred in ordering the applicant to account for rents during subsistence of marriage when the applicant was not under any obligation to account in any respective share of

rent during marriage; that the judge failed to take into account that the respondent during the subsistence of the marriage had sold a matrimonial property in the USA and appropriated the funds to herself and she was duty bound to render an account and or tender half share of the sale proceeds to the applicant.

3. The respondent filed a replying affidavit dated 5th June 2015 deposing that there was a pending application for execution before the trial court and the same had since been determined where the trial court ordered the parties to agree on a common valuer for the properties otherwise the court would appoint if the parties failed to agree; that there is no arguable appeal in this matter and the intended appeal shall not be rendered nugatory if stay is not granted; that the trial court considered the rebuttable presumption of equal shares in jointly owned property and ruled that the same was rebutted by evidence showing that the respondent's contribution towards acquisition of the disputed properties was higher and thus apportioned shares in the properties in accordance with each spouse's contribution; that the applicant did not rebut the respondent's evidence given during trial; that the applicant has not demonstrated how the trial court erred in exercising her discretion or how the court misdirected itself; that the principle of double jeopardy does not arise as the trial court after evaluating the evidence and establishing that **LR No. 1870/V/228/F5** apartment 5 along Waiyaki Way was purchased by proceeds from the rent of Woodlands and Kyuna properties proceeded to order that the applicant account for the rents of the two properties after the purchase date to the period that the applicant failed to share the rent proceeds yet the properties were jointly owned; that under matrimonial law, ownership of matrimonial properties vests in the spouses according to the contribution of either spouse towards its acquisition; that the trial court ascertained the shares of the parties based on the evidence on record; that the instant application was an afterthought.
4. At the hearing of the application, learned counsel Mr. P. N. Kerongo appeared for the applicant while learned counsel Miss Njenga appeared for the respondent.
5. Counsel for the applicant urged that the intended appeal was arguable and had a high chance of success; a draft memorandum of appeal had been filed and the core argument is that the High Court erred in distributing matrimonial properties that were not acquired during subsistence of marriage; that the Waiyaki Way property was not acquired during marriage and the court erred in distributing the same as if it were part of the matrimonial properties; the applicant contends that he was a tenant at the Waiyaki Way property and no title documents were shown to enable the trial court determine ownership of the property; that the Woodlands property was exclusively purchased by the applicant and trial court erred in its distribution. Counsel submitted that the intended appeal shall be rendered nugatory if stay was not granted; that the respondent had applied to the trial court to vest the properties in her; it was submitted that the respondent intends to evict the applicant from the Woodlands house and by such eviction, the respondent will be registered owner of the properties and move out of the reach of the jurisdiction of this Court. Counsel for the respondent cite the case of **Peter Njuguna Nojorege -v- Zipporah Wangui Njuguna Civil Application No. NAI 91 of 2013** to support of the principle that in determining whether an intended appeal shall be rendered nugatory, the circumstances of each particular case must be considered and the expense and length of time it may take to reverse or recover what has changed hands pending the appeal. (See also **Standard Bank Limited -v- G. N. Kagia t/a Kagia & Co. Advocates, Civil Application No. NAI 193 of 2003**).
6. The respondent opposed the instant application urging that the applicant had not satisfied the twin principles that the intended appeal is arguable and the appeal shall be rendered nugatory if stay was not granted. It was submitted that the intended appeal was not arguable; that the trial judge applied her mind to the facts of the case and properly evaluated the evidence on record; that the court correctly found that the respondent had made a larger contribution towards the purchase of the matrimonial properties in dispute; that the evidence on record is that the Woodland property and Waiyaki Way properties were acquired from proceeds of rent from the Kyuna property; the respondent submitted that the applicant had not shown the trial court erred in the exercise of her discretion; that there is no proof that the intended appeal shall be rendered nugatory if stay is not

- granted; that the trial court referred the parties for valuation of the properties and there is no basis for the applicant to fear that he shall be evicted from the Woodlands property; that there has been inordinate delay in bringing the instant application; that the impugned judgment was delivered in March 2011 and the present application was lodged in March 2013 after two year hiatus and delay.
7. In reply, Learned counsel Mr. Kerongo urged that whether the Waiyaki Way and Woodland properties were purchased by proceeds from rent, the court cannot shift the burden of proof and this is what the trial court did and shifted the burden to the applicant; that there has been no delay in bringing the present application and the notice of appeal was filed on time.
 8. We have considered submissions by both counsel and the list of authorities filed by the respondent. This being an application under **Rule 5 (2) (b)** of the rules of this Court, we must be satisfied of the twin guiding principles that the intended appeal is arguable; it is not frivolous and that unless a stay or injunction is granted, the appeal or the intended appeal, if successful, would be rendered nugatory – see **Githunguri vs. Jimba Credit Corporation Ltd. (No. 2) (1988) KLR 838; J.K. Industries Ltd. vs. Kenya Commercial Bank Ltd. [1982 – 88] 1 KAR 1088 and Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited – Civil Application No. 98 of 2002 (unreported).**
 9. A notice of appeal and draft memorandum of appeal is on record. Whereas the applicant contends that the intended appeal is arguable, the respondents assert that it is not arguable. In an application for stay of execution, it suffices that a single arguable point is identified and the arguable ground of appeal is not one that must succeed but one that is arguable.
 10. The first issue for our determination is whether the intended appeal is arguable. The applicant asserts that the learned trial judge erred in the apportionment of shares in the matrimonial properties; that the judge failed to establish the ownership of LR No. 1870/V/228/F5 ; that the judge erred in making a finding that property LR No. 1870/V/228/F5 was acquired through proceeds of rent from the Kyuna matrimonial property; that the judge erred in ordering the applicant to account for rent collected during subsistence of the marriage when the applicant was not under any obligation to account for the same. The respondent contends that the trial judge did not err and the court properly considered and evaluated the evidence on record. The submissions by both parties show that it is arguable and debatable whether the trial court erred. At this stage we are not required to evaluate the merits of the intended grounds of appeal but to determine if there is a prima facie arguable ground. Having considered the intended grounds of appeal, we are satisfied that the intended appeal is arguable. Accordingly, the applicant has satisfied the first limb on arguability in an application for stay of execution.
 11. On the nugatory aspects, it is the applicant’s submission that the respondent intends to evict him from the Woodlands property and this shall render the intended appeal nugatory; that the respondent intends to have the disputed matrimonial properties vested upon her and get out of the reach of the jurisdiction of this Court.
 12. In **Equity Bank Limited -vs- West Link MBO Limited- Civil Application No. 78 of 2011,** it was expressed that an injunctive order is designed to empower this Court to entertain interlocutory applications for preservation of the subject matter of the pending appeal in order to ensure the just and effective determination of appeal. Justice Musinga JA in **Equity Bank Limited -vs- West Link MBO Limited (supra)** expressed himself as follows:

“Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without it being derived from the Constitution or Statute.”
 13. There is no evidence disclosed by the instant application that the respondent intends to get out of the reach of the jurisdiction of this Court; and even if she did get out, the properties in issue are

real properties that cannot be carted away and taken out of the jurisdiction of this Court; land and physical houses cannot be taken out of the court's jurisdiction. Further, the applicant can adequately be compensated in damages if he suffers loss if the matrimonial properties were unfairly distributed. We are not satisfied that the intended appeal shall be rendered nugatory if stay is not granted. We find that this application has no merit. It is hereby dismissed with costs.

Dated and delivered at Nairobi this 1st day of July, 2016

G.B.M. KARIUKI

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR