



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: TUNOI, O’KUBASU & GITHINJI, JJ.A.)

CIVIL APPLICATION NAI 212 OF 2004 (UR. 105/2005)

BETWEEN

F.R.S. APPLICANT

AND

J.D.C.S..... RESPONDENT

(An application for stay of execution pending an appeal in an intended
appeal from the judgment and decree of the High Court of Kenya at

Nairobi (Waweru J) dated 4

th

day of June, 2004

in

H.C.C.C. NO. 76 OF 2003 (O.S.)

RULING OF THE COURT

This is an application by *F.R.S.*, hereinafter referred to as the applicant, under **Rule 5(2) (b)** of the Rules of this Court for an order that there be a stay of execution of the judgment and decree of the High Court of Kenya at Nairobi (*Waweru J*) delivered on 4th June, 2004 pending the hearing and determination of an already lodged appeal, to wit, *Civil Appeal No. 157 of 2004*.

The applicant and the respondent were husband and wife respectively. The respondent wife brought an Originating Summons under **Sections 12 and 17** of the Married Women’s Property Act 1882 of England seeking various orders, inter alia, a declaration that the respondent is entitled to at least an equal share of the title in the matrimonial home situated in, Nairobi, being [particulars withheld] which was allegedly acquired, developed and improved through the joint efforts of both the respondent and the applicant

during the currency of the marriage; a declaration that the respondent is entitled to the very least an equal share either in kind or cash of the net proceeds of the sale of the property; an order that the said property be valued and sold and the net proceeds be divided and a declaration that the [particulars withheld] registered in the joint names of the parties may be sold at the respondent's option and the proceeds split equally.

The suit was lodged after the marriage solemnized between the parties was dissolved by a decree of divorce pronounced in *Nairobi High Court Divorce Cause No. 18 of 2000*. The decree nisi had not been made absolute when the suit was filed. In the superior court, the parties chose to rely entirely upon their respective affidavits and they themselves did not testify or call witnesses.

According to the learned trial judge, following facts did not seem controverted:

1. The parties were married on 4th August, 1990 in Scotland.
2. There are 2 issues of this marriage, namely HS born on 3rd March, 1995 and LS born on 14th September, 1997.
3. In the divorce cause the issues of maintenance for the wife and the children are still outstanding.
4. The parties' matrimonial home is on land parcel [particulars withheld] which is a sub-division of [particulars withheld] bought by RS **MANUFACTURING LIMITED** in 1984. This is a private company in which the applicant owns 80% of the shares. The respondent holds no shares in the company.
5. The said company was incorporated in 1976. It still owns [particulars withheld].
6. The matrimonial home was built in the years 1991 and 1992.
7. The respondent and the children live in the matrimonial home. The applicant lives in another house in one of the other subdivisions of the original parcel.
8. The respondent is a medical doctor with a private practice at Karen. She has been such apparently throughout the marriage.
9. The applicant runs and manages the aforesaid company and has done so throughout the marriage. He also writes for local newspapers on economic issues.

In his considered judgment the learned judge declared that the respondent is entitled to such shares of the applicant equivalent to 12% of the total value of the assets of the company. He further directed that a valuation of the assets of the company be carried out and the applicant to pay to the respondent a sum equivalent to 12% of its assets.

The applicant being dissatisfied with the decision of the learned Judge promptly lodged an appeal to this Court. The memorandum of appeal has preferred no less than nine grounds of appeal.

Before we can exercise our unfettered discretion in favour of the applicant, he has to satisfy the Court that the intended appeal is an arguable one, that is, that it is not a frivolous appeal and that if the execution of the judgment of the superior court is not stayed the appeal, if it ultimately succeeds, will be rendered nugatory.

We have considered the rival submissions of both counsel and also studied the issues raised in the grounds of appeal incorporated in the memorandum of appeal annexed to this Motion. Suffice it to say, at the outset, that the appeal raises several weighty issues of law which are undoubtedly arguable. However, we will refrain from expressing any firm views on any of the issues raised in the grounds of appeal since that belongs to the realm of the court hearing the appeal.

The applicant contends that if the execution of the decree is not stayed and the valuation of the assets of the company is carried out and divided in accordance with the Court's order it will adversely and irreparably affect the operations of the company which is not a party to the proceedings. Further, the applicant fears that the respondent may not be in a position to repay the proceeds of the subdivision.

Mr. Gross, for the respondent, avers that a stay order at this stage would serve no purpose for the reason that valuation of the assets by itself would not in any way prejudice the applicant or interfere with or adversely affect the operations of the company. Moreover, such a valuation would in fact assist the court in the determination of the dispute. Again, Mr. Gross submitted that on the contrary a stay of execution would instead prejudice the respondent and the children of the marriage. He stated that the assets of the company have been valued at about Shs.50,000,000/= and a cross – appeal is being mooted.

As this Court said in ***RELIANCE BANK LTD V NORLAKE INVESTMENT LTD [2002] 1 EA 227 at page 232 paragraph (b)*** what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. We are informed by Mr. Gross from the bar that there is no immediate need to carry out execution of the decree in view of other issues pending determination by the superior court, and; also the fact that he has been instructed to file a notice of a cross – appeal. Mr. Gross further told the Court that as the respondent is in occupation of the matrimonial house and the children's fees having been settled the question of selling or disposing of any property by the respondent does not arise. In the circumstances, we would think that this is an exceptional case whereby both parties would benefit if a status quo obtaining as on the date of the motion is maintained.

We order that there be a stay of execution of the decree as at 30th August, 2004 pending the hearing and determination of the appeal. Costs of the application shall be in the appeal.

DATED and DELIVERED in NAIROBI this 18th day of November, 2005.

P. K. TUNOI

.....

JUDGE OF APPEAL

E. O. O'KUBASU

.....

JUDGE OF APPEAL

E. M. GITHINJI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR