



**PAP v JAO (Originating Summons E014 of 2021)
[2024] KEHC 11564 (KLR) (Family) (14 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 11564 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

ORIGINATING SUMMONS E014 OF 2021

SN RIECHI, J

AUGUST 14, 2024

**IN THE MATTER OF MATRIMONIAL PROPERTY
ACT 2013 AND CONSTITUTION OF KENYA 2010**

BETWEEN

PAP APPLICANT

AND

JAO RESPONDENT

RULING

1. The parties herein have filed two applications;
The defendant JAO filed the application dated 16th March 2024 seeking orders;
 - i. There be a stay of execution of the Decree issued herein on 20th February 2024 pending hearing and determination of this application.
 - ii. There be a stay of execution of the decree issued herein on 20th February 2024 pending the hearing and determination of the intended appeal.
2. The 2nd application dated 26th March 2024 filed by the plaintiff PAP in which she seeks orders;
 - i. That this Honourable Court be pleased to review, clarify, rectify and correct the determination on page 12 of the Judgement the of the court decision on 20th February, 2024 as amended by correcting the name of the Applicants parcel of land listed as [Particulars Withheld] to read [Particulars Withheld] so as to tally with the one reflected in the certificate of official search.
 - ii. That this Honourable Court be pleased to review, clarify, rectify and correct the determination on page 12 of the decree given under the seal of this Honourable Court on 13th March, 2024



and it be amended by correcting the name of the Applicant's parcel of land that has been listed as [Particulars Withheld] to read [Particulars Withheld] so as to tally with the one reflected in the certificate of official search.

- iii. That the corrections be effected pursuant to prayers (2) and (3) above be hereby ordered to take effect from the date of the said judgment which is 20th February, 2024.
3. The respondent did not file a response to the application. The application is unopposed. The rectification relates to typographical errors of property. Same is allowed.
4. In the application dated 16th March 2023. The applicant therein is seeking stay of execution of Decree issued on 20th February 2024. The applicant briefly deponed that the defendant is aggrieved by the entire judgement and Decree delivered on 20th February 2024. The applicant stated that he has since filed a Notice of Appeal and he believes he has an arguable appeal. The applicant averred further that he will suffer substantial loss unless a stay of execution of Decree is issues since the title may be transferred and dealt with adversely
5. The applicant averred that the subject matter of dispute is largely real estate properties which are fixed assets rather than monetary decree and therefore no need for security.
6. The respondent PAP opposed the application through a replying affidavit dated 15th April 2024. She briefly stated that the applicant has failed to demonstrate and or establish laid out grounds for grant of a stay pending execution.
7. By consent of parties the application was canvassed by way of written submission. The parties filed their respective submissions and I have analyzed and considered the submission and case law in support.
8. The main issue for determination is whether this court should grant stay of execution of the decree issued on 20th February 2024 pending appeal.
9. Grant of stay of execution pending appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules, the relevant part of which states as follows:
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - (2) No order for stay of execution shall be made under subrule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.



- (3) ...
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) ...
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”
10. An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely
- (a) that substantial loss may result to the applicant unless the order is made,
 - (b) that the application has been made without unreasonable delay, and
 - (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
11. In *Butt vs. Rent Restriction Tribunal* [1979], the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.
12. In the case of *Mukoma – Vs – Abuoga* [1988] KLR the Court of Appeal in referring to the exercise by the Superior court of their discretion in granting stay of execution under Order 42 Civil Procedure Rules 52 (b) of the Court of Appeal Rules respectively, emphasized the centrality of substantial loss as follows –
- “ the issue of substantial loss is the corner stone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”.
13. Therefore, the courts should aim at preventing substantial loss to either party and should also guard against rendering the appeal nugatory. In *Kenya Commercial Bank – Vs – Benjoh Amalgamated Ltd & Another Nairobi and Application No 50 of 2001* (KLR) the Court of Appeal held that -
- “ the onus of satisfying us on the second condition that unless stay is granted the intended appeal would be rendered nugatory is also upon the applicant..... We remind ourselves that each case depends on its own facts.....”
14. The applicant stated that he has an arguable appeal with high chance of success and he will suffer substantial loss unless a stay of execution of the Decree since title may be transferred and dealt with adversely. This in my view the applicant has not demonstrated how he will suffer substantial loss if stay of execution is not granted. I therefore decline to grant stay of execution.



15. The Respondent has raised the issue that no security has been offered. However, courts have severally held that the question of security is discretionary and each court will decide based on the facts of the specific case. This is a case involving family members. In my view, it is not necessary to demand that security be deposited and condition for stay.

16. In the result, I find no merit in the application dated 16th March 2024 which is hereby dismissed.

DELIVERED AT NAIROBI THIS 14TH DAY OF AUGUST, 2024

S. N. RIECHI

JUDGE

