



REPUBLIC OF KENYA



KENYA LAW
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**MAJK v FML (Civil Appeal E096 of 2022)
[2023] KEHC 200 (KLR) (Family) (20 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 200 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E096 OF 2022
MA ODERO, J
JANUARY 20, 2023**

BETWEEN

MAJK APPELLANT

AND

FML RESPONDENT

RULING

1. Before this court for determination is the notice of motion dated September 30, 2022 filed under certificate of urgency by which the Appellant/Applicant MAJK seeks the following orders:-
 - “(a) Spent.
 - (b) Spent
 - (c) That the Honourable court be pleased to issue an order of stay of execution of the judgment and orders/decrees emanating from the judgment dated September 27, 2022 in Milimani Chief Magistrate Court MCDC No 272 of 2019, MJK v FML pending the interpartes hearing and determination of the appeal.
 - (d) Spent
 - (e) That the Honourable court be pleased to issue interim orders of injunction and preservation to prevent the Respondent, his agents, assigns or any such person acting on his behalf or under his instructions, from evicting, interfering with the Applicant’s/Appellant’s quiet possession, stay and occupation of the property known as [Particulars Withheld] Villas No. xx erected on LR No xxxx/



xxxx (IR xxxx pending the interpartes hearing and determination of the instant appeal.

- (f) Any such other order/orders that this Honourable court may deem fit to grant.
2. The motion which was premised upon orders 40 rule 1 and 42, rule 6 and 51 of the Civil Procedure Rules, sections 1A, 1B, 3A of the Civil Procedure Act, articles 27, 48, 50, 159 and 165, 53 (e) of the Constitution of Kenya 2010, the inherent powers of the court and all enabling provisions of the law was supported by the Affidavit of even date sworn by the Applicant.
 3. The Respondent FML filed Grounds of opposition as well as a Replying Affidavit both dated October 26, 2022 in opposition to the application. The matter was canvassed by way of written submissions. The applicant filed the written submissions dated November 1, 2022. The Respondent through his Advocate Dr Thiankolu opted not to file any written submissions but instead relied entirely upon the Grounds of Opposition and Replying Affidavit.

Background

4. On September 27, 2022 Hon HM Nyaga Chief Magistrate delivered his judgment in respect of Civil Suit No 272 of 2019 which had been filed by the Appellant. In that judgment the learned trial court ruled that no valid marriage existed between the Applicant and the Respondent. The trial court found that the Plaintiff dated June 17, 2019 was devoid of merit and proceed to dismiss the same.
5. The Applicant was aggrieved by the decision of the trial court. The Applicant averred that the interim orders which she had secured to preserve the property known as [Particulars Withheld] Villas No. xx erected on LR No xxxx/xxxx (IR xxxx) (hereinafter the ‘suit property’) during the pendency of the divorce proceedings lapsed upon delivery of the judgment on September 27, 2022. That there was the real apprehension that the Applicant would be evicted from the home which she occupied with the Respondent until their union broke down which home she still occupies to date. That if the orders of stay are not granted the Applicant is likely to be rendered homeless.
6. As a result the applicant filed the memorandum of appeal dated September 30, 2022. Contemporaneously with that Memorandum of Appeal the Applicant filed the instant application seeking an order of stay in respect of the said judgment as well as preservatory orders in respect of the suit property.
7. As stated earlier the application was vehemently opposed by the Respondent who raised the following Grounds of Opposition to the same.

“ 1. The application is an abuse of the process of this Honourable court to the extent that:-

- a. The Appellant/Applicant has a similar application dated September 19, 2022 which seeks an identical or substantially similar relief, currently pending determination by the Court of Appeal.
- b. The Court of Appeal declined to certify as urgent the Applicant’s application alluded to a subparagraph (a) above, vide direction issued on September 22, 2022.



- c. The Court of Appeal dismissed a similar application by the applicant dated February 10, 2022 which sought an identical or substantially similar relief, vide a Ruling delivered on August 19, 2022.
- d. The Court of Appeal dismissed a similar informal application, which sought an identical or substantially similar relief vide an order issued on April 19, 2022.
- e. This Honourable court (Justice Maureen Odero) declined to certify the application as urgent on October 3, 2022 and directed that the same be mentioned for directions on November 3, 2022.
- f. This Honourable court has no jurisdiction to-
 - i. Entertain an application that the court of Appeal has dismissed on three separate occasions.
 - ii. Entertain an appeal (outright or disguised) against the decision made by Justice Maureen Odero on October 3, 2022.
 - iii. Entertain a review (outright or disguised) of the decision made by Justice Maureen Odero on October 3, 2022 in the absence of a cogent, clearly demonstrable and material change of circumstance.
- g. It seeks to secure the Applicant's continued enjoyment for the sixth year of interlocutory orders relating to the Respondent's private property despite the outcome of Milimani Commercial Courts Divorce Cause No 272 of 2019, yet the trial court found that there is no marriage between the parties.
- h. The interlocutory orders that the Applicant has been enjoying for five years, which the Application seeks to extend under the pretext that the applicant is pursuing the appeal were pegged on-
 - a. The outcome of the divorce cause and
 - b. The determination by the trial court of the specific question of whether there is a valid marriage between the parties.
- i. The trial court determined the specific question alluded to in subparagraph (g) above and held the the Respondent is in a monogamous marriage with a third party and could not thus enter into a valid marriage with the Applicant.
- j. The legal implications of the trial court's decision are that-
 - a. The applicant did not deserve in the first place, the interlocutory orders that she has been enjoying, through deliberate dilatory tactics, for five years (even though various courts issued those orders in good faith and as a matter of standard judicial practice, to preserve suit properties) and
 - b. The Applicants appeal is not arguable to the extent that interlocutory orders that the Application seeks to extend under the guise of pursuing the appeal were predicated on the



possibility of the existence of a valid marriage between her and the Respondent.

2. The Applicant's deliberate dilatory tactics of unfairly prolonging her enjoyment of interlocutory orders at the trial court, for five years, militate against the exercise of this Honourable courts, discretion in favour of the Applicant.
3. The dismissal of the divorce cause (on the ground that there is no marriage between the parties due to lack of capacity on the part of the Respondent) is analogous to a negative order that is not amenable to stay of execution pending the hearing and determination of an appeal.
4. The Applicant has access to a generous housing mortgage by virtue of her status as a Member of Parliament and is thus capable of securing alternative first-class accommodation for herself pending the hearing and determination of the appeal.
5. The applicant has engaged in ligation by ambush by-
 - a. Failing to serve the order/Directions issued by Justice Maureen Odero on October 3, 2022.
 - b. Failing to serve the order/directions issued by Justice Riechi on October 25, 2022.
 - c. Belatedly serving the application on October 17, 2022 fourteen days after the order/directions issued by Justice Maureen Odero on October 3, 2022.
 - d. Failing to serve the mention and hearing notices or otherwise to disclose to the Applicant that the Application was scheduled for mention and hearing on October 27, 2022 and November 3, 2022; and
 - e. As a result of (a) to (c) above, leading the Respondent to belatedly discover the mention and hearing dates through the e-filing platform.
6. The Applicant does not ex-facie disclose any or any reasonable ground for the grant of the relief(s) that it seeks."

Analysis and Determination

8. I have carefully considered the application before this court and the Replies filed thereto. The only issue for determination is whether the prayer for stay ought to be granted.
9. Order 42 rule 6 (2) of the *Civil Procedure Rules* provides for guiding principles that one must satisfy before the court can grant a stay of execution, it provides as follows:-

“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.”



10. It is appreciated that stay of execution is a discretionary power however the court in setting out the guidelines for granting a stay, stated in the case of *Butt v Restriction Tribunal* [1979] eKLR that:-

- “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements.”

11. In the case of *Loice Khachendi Onyango v Alex Inyangu & another* [2017] eKLR the court stated as follows on the question of stay pending appeal:-

“The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. In determining whether sufficient cause has been shown, the Court should be guided by the three pre-requisites provided under Order 42 Rule 6 of the *Civil Procedure Rules*. Firstly, the Application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicant unless stay of execution is granted; and thirdly 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.....”

12. The impugned judgment was delivered on September 27, 2022. This application for stay was filed on September 30, 2022 barely three (3) days after delivery of the said judgment. Accordingly, I find that this application was brought in a timely manner.

13. This court must be careful not to pronounce itself on the pending appeal. The merits or otherwise of that appeal will be determined in the Court of Appeal. The only duty this court has is to determine whether an order of stay of execution ought to be made.

14. The applicant is aggrieved mainly by the finding of trial court that no valid marriage existed between herself and the respondent. In this regard the learned trial magistrate stated as follows:-

“Having settled that the customary union between the parties in dispute herein is not a marriage and neither can it be presumed as such under the Laws of Kenya, the consequence is that the prayers sought specifically for the declaration of the existence of a marriage and the dissolution of the same between the parties herein must fail.

Specifically a decree of divorce cannot issue in respect of an invalid marriage by law. Any attempt to issue the same would be essentially upholding an invalidity. Simply put, the court cannot aid an illegality...”



15. By this judgment the trial court dismissed the applicants suit. The court therefore made a ‘negative order’. There were no orders made capable of execution by any party. Where such a negative order has been made then there exists no order capable of being stayed.

16. In *Western College of Arts and Applied Sciences v Oranga & others* [1976-80] I KLR the Court of Appeal for Eastern Africa held as follows:-

“But what is there to be executed under the judgment, the subject of the intended appeal”.
The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In *Wilson v Church*, the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case, the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High court judgment for this court, in an application for stay, it is so ordered.” (Own emphasis)

17. Similarly in the present case there were no orders made directing any party to do or to refrain from doing any act. All that the court did was to dismiss the suit filed by the Applicant. It is common ground that on February 1, 2019 the Magistrates court issued interim orders allowing the Applicant exclusive occupation of the suit property. The Applicant has been enjoying those interim orders for the past three (3) years. The temporary orders which had been granted in February 2019 were to remain in force pending the hearing and determination of the main suit. The suit having now been determined the interim orders were automatically discharged.

18. In *Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union (Kenya)* [2015] eKLR the Court of Appeal (Kantai, JA) held as follows:-

“An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with. See, for this general proposition the holding of the Court of Appeal of Uganda in *Mugenyi & Co Advocates v National Insurance Corporation* (Civil Appeal No 13 of 1984) where it was stated: -

“.....an order for stay of execution must be intended to serve a purpose
.....” (Emphasis supplied)

19. Further, in the more recent case of *Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 others* [2016] eKLR, the Court of Appeal expounded on stay of execution stating:-

“16. In *Kanwal Sarjit Singh Dhiman vs Keshavji Juvraj Shah* [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on December 18, 2006. The order of December 18, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which



is incapable of execution save in respect of costs only (see *Western College of Arts & Applied Sciences vs. Oranga & others* [1976] KLR 63 at page 66 paragraph C).” (own emphasis)

20. The same reasoning was applied in the case of *Raymond M Omboga v Austine Pyan Maranga* (*supra*) that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the court had to say on the matter:-

“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise...” (own emphasis)

21. The finding of the learned trial magistrate that no marriage existed between the parties is not an order capable of execution. Neither the Applicant nor the Respondent were directed to do or refrain from doing any act as a consequence of the order dismissing the suit. There is therefore nothing to stay.
22. Secondly, the Applicant had sought for interim orders of injunction to prevent her eviction from the suit property. The Respondent pointed out that this very prayer had been denied by the Court of Appeal in Civil Application No. E068 of 2022, which emanated from Nairobi ELC Case No. 6393 of 2021. A copy of the decision of the Court of Appeal has been annexed to the Replying Affidavit (Annexure ‘FML-2’).
23. In her notice of motion application dated February 10, 2022 (before the court of appeal) the applicant prayed for a temporary injunction restraining the Respondent by himself, his agents, servants or otherwise howsoever from evicting, removing or in any other way interfering with the Applicants occupation of all that property comprising of [Particulars Withheld] Villa No xxxx/xxxx (IR No xxxx) pending the hearing and other determination of the intended appeal.
24. The above is exactly the same order that the Applicant now seeks vide prayer (e) of the present application.
25. In dismissing the Applicants prayer for a temporary injunction the Court of Appeal in the Ruling dated August 19, 2022 stated as follows:-

“As the Appellant [the Applicant herein] has to establish both the arguability and nugatory aspects, the applicant has therefore failed to establish the two limbs for consideration in an application under rule 5(2) (b) of the Court of Appeal Rules. The upshot is that the application [for stay] dated February 10, 2022 is without merit and is hereby dismissed with costs.”

26. In view of the fact that there exist a Court of Appeal decision on the question of a temporary injunction, this court has no authority to revisit the issue. The High Court cannot review and/or set aside a decision made by the Court of Appeal. This matter is now ‘Res judicata’ and it was devious of the Applicant to raise the same issue before this court knowing fully well that the Court of Appeal had already delivered a ruling on the same.



27. Finally and in conclusion, I find that the application dated September 30, 2022 is devoid of merit. The same is hereby dismissed in its entirety. Each party to bear its own costs.

DATED IN NAIROBI THIS 20TH DAY OF JANUARY, 2023.

.....

MAUREEN A. ODERO

JUDGE

