



REPUBLIC OF KENYA



FRK v FH (Matrimonial Cause 1 of 2019) [2023] KEHC 21656 (KLR) (25 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21656 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MATRIMONIAL CAUSE 1 OF 2019
SM GITHINJI, J
JULY 25, 2023**

BETWEEN

FRK APPLICANT

AND

FH RESPONDENT

RULING

1. For determination is the application by the Respondent/ Applicant dated March 8, 2023 seeking the following orders;
 1. Spent.
 2. Spent.
 3. That this Honourable Court be pleased to issue an Order for Stay of Execution of the Decree and Ruling of this Honourable Court dated October 8, 2021 and December 16, 2022 respectively in HCC Matrimonial Cause No 1 of 2019 pending the hearing and determination of this Appeal.
 4. That there be a Stay of further Court proceedings in HCC Matrimonial Cause No 1 of 2019 (Malindi) pending the hearing and determination of this Appeal.
 5. That costs of this application be provided for.
2. The application is supported by the affidavit of Festo Randu Kombe who deposed that he has since instructed his advocate to file an appeal at the Court of Appeal against the Decree and Ruling of this court issued on October 8, 2021 and December 16, 2022. He also deposed that if the Applicant/ Respondent proceeds with the execution of the Decree and Ruling, he stands to suffer irreparable loss and damage and unless a stay of execution is granted, the Appeal filed herein will be rendered nugatory.



According to him, the application has been brought without unreasonable delay and the Respondent will not suffer any prejudice if the orders sought herein are granted.

3. In Response, the Respondent filed a Replying Affidavit sworn on the 11th day of April, 2023. She contended that after delivery of the Judgment in this matter on August 5, 2021, the applicant filed an application seeking to review the judgment and decree of the court which application was dismissed on December 16, 2022 while her application seeking to evict the applicant from the properties was allowed. She also contended that the Respondent cannot therefore seek to stay the Judgment and decree as there is no appeal against the said decree and judgment.
4. She asserted that the application seeking to stay the Judgment and decree has been filed after inordinate delay of more than one and a half years from the date of the decree and no explanation for the delay has been given. She is of the contention that the applicant has not provided proof of what substantial loss he will suffer if the sought stay is not granted.
5. She contends that the conduct of the Applicant is against him as since the court decreed that the property situated on plot No 966 be sold and the proceed be shared equally, the applicant is collecting rent alone and she has been denied access. The applicant is in the process of selling the remaining properties that were awarded to her and that the Applicant is still occupying the house she was awarded and has since denied her access.

Analysis and Determination

6. I have considered the application for stay, grounds thereof, supporting affidavit and annexures thereto. I have also considered the Replying affidavit and submissions together with case law cited by both counsels.
7. In my view the main issue for determination is whether the applicant has demonstrated that the orders of stay of execution pending appeal sought, are merited.
8. I have entirely perused the record and takes note that indeed the applicant/ respondent filed an application dated October 13, 2021 seeking to have this court review the judgment that was delivered on August 5, 2021, which application was dismissed for want of merit. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6 of the [Civil Procedure Rules](#) which provides:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 orders set aside.”

No order for stay of execution shall be made under sub rule 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.



9. The purpose for stay of execution is to preserve the subject matter in dispute while balancing on the interests of the parties given the circumstances of the case. The Court of Appeal in *RWW v EKW* (2019) eKLR addressed itself on this as hereunder: -

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

10. In such an application, the applicant ought to satisfy the court that substantial loss may result unless the order is made, that the application has been made without inordinate delay and that the applicant has given such security as the court orders for the due performance of the decree or order as may ultimately be binding on him.

11. Having considered the events leading up to this application and the current orders that are being sought by the applicant, I note that there is no valid appeal that has been placed before this Court with an aim of persuading this court to grant an order for stay of execution pending the appeal. In any event, the notice of appeal lodged on March 6, 2023 was filed out of time noting that the judgment in this matter was delivered on August 5, 2021.

12. Ideally, a Notice of Appeal is not an appeal but just a formal notification of an intended appeal. In fact, under Rule 77(1) of the *Court of Appeal Rules* it is provided that an intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal. Clearly, a strict reading of this rule contemplates a situation where a Notice of Appeal may even be served before the same is lodged. Where such happens, I cannot see how such a Notice which has not even been lodged can by any stretch of imagination be equated to an appeal. Accordingly, the mere fact that a party has given a Notice of intention to appeal does not amount to an appeal for the purposes of an application as the current one.

13. In the end, the application dated March 8, 2023 is in want of merit and is hereby dismissed with costs to the Respondent.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 25TH DAY OF JULY, 2023.

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S.M. GITHINJI

JUDGE

