



**FN v PKM (Civil Case 21 of 2019) [2022] KEHC 14504 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14504 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL CASE 21 OF 2019  
TW CHERERE, J  
OCTOBER 27, 2022**

**BETWEEN**

**FN ..... PLAINTIFF**

**AND**

**PKM ..... DEFENDANT**

**RULING**

1. By a judgment dated May 19, 2022, this court made the following orders:
  1. A declaration is hereby issued that LR No Nkuene/Taita/ xx5 and LR No Nkuene/Taita/ xx8 and improvements thereon form part of Matrimonial Property
  2. LR Nkuene/Mikumbune/xx1 is not matrimonial property
  3. Both parties made an equal contribution to the acquisition of LR No Nkuene/Taita/ xx5 and LR No Nkuene/Taita/ xx8
  4. LR No Nkuene/Taita/ xx5 and LR No Nkuene/Taita/ xx8 shall be valued at the cost to be paid equally by both parties to determine their value
  5. Mention on June 28, 2022 to receive the valuation report and for further orders
  6. Each party shall bear its own costs of this suit
2. By a notice of motion dated and filed on July 4, 2022, defendant/applicant seeks orders for:
  1. Stay of execution of judgment of this court dated May 19, 2022 pending the hearing and determination of an intended appeal
3. The notice of motion is premised on grounds among others that the applicant is aggrieved by the judgment and intends to file an appeal that has a high chance of success.



4. The application is also supported by applicant's affidavit filed on July 4, 2022 in which he reiterates the grounds on the face of the application. In addition, applicant avers that respondent did not contribute to the developments on LR No Nkuene/Taita/ xx5 and LR No Nkuene/Taita/ xx8 from where he collects rental income.
5. In opposing the application, respondent's by an affidavit sworn and filed on September 21, 2022 in which he avers that this application is meant to delay the her from enjoying the fruits of the judgment.

### **Analysis and Determination**

6. I have considered the application in light of affidavits on record the issue for determination is whether there ought to be stay of execution of this court's judgment pending the hearing and determination of the appeal
7. Concerning stay of execution, Order 42 (6) of the [Civil Procedure Rules](#) provides:
  - (2) 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
    - b. That the application has been made without unreasonable delay; and
    - c. 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.
8. Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money. In *ABN Amro Bank NV v Le Monde Foods Ltd* Civil Application No Nairobi 15 of 2002 held that:

“Each party bears a specific burden regarding proof of substantial loss in a case such as before us. ....So all an applicant in the position of the bank (appellant) can reasonably be expected to do is to swear, upon reasonable grounds, that the respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, the legal burden still remains on the applicant but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on.”
9. Applicant avers that he is likely to loose the rental income he has been collecting from the suit properties. Whereas applicant's averments are true, respondent on the other hand has a right to enjoy the fruits of the judgment, and the applicant a right to have his appeal heard on merit.
10. In order to preserve the assets, it is hereby ordered that:
  1. Upon distribution of LR No Nkuene/Taita/ xx5 and LR No Nkuene/Taita/ xx8, the parties shall neither sell, charge, dispose off or in any adverse manner deal with their respective portions until the hearing and determination of the intended appeal and/or until any and or further orders of this court
  2. Costs shall abide the outcome of the intended appeal



**DATED IN MERU THIS 27<sup>TH</sup> DAY OF OCTOBER 2022**

**T.W. CHERERE**

**JUDGE**

Appearances

Court Assistant - Kinoti

For the Plaintiff/Respondent -Ms.Mukaburu for Kiogora Arithi & Co Advocates

For the Defendant/Applicant -Ms. Gikundi for Charles Kariuki & Kiome Advocates

