



**VNN v JGT (Matrimonial Cause 21 of 2015)  
[2025] KEHC 1863 (KLR) (4 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1863 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
MATRIMONIAL CAUSE 21 OF 2015  
DKN MAGARE, J  
FEBRUARY 4, 2025**

**BETWEEN**

**VNN ..... APPLICANT**

**AND**

**JGT ..... RESPONDENT**

**RULING**

1. The matter is for ruling on an application dated 19.11.2024 for an injunction pending Appeal. The same is made under Order 40, Order 42, rule 6(1) and (6) of the Civil Procedure Rules. The Applicant sought the following orders:
  - a. Spent.
  - b. That the Honourable court be pleased to issue an order of temporary injunction restraining the Respondent, his agents, and/or servants from alienating, disposing and/or transferring the matrimonial home built on L.R. No. Nyeri/Endarasha/3578 and L.R. No. Nyeri/Endarasha/1340 or in any manner interfering with the property pending the interpartes hearing and determination of this application.
  - c. That the Honourable court be pleased to issue an order of temporary injunction restraining the Respondent, his agents, and/or servants from alienating, disposing and/or transferring the matrimonial home built on L.R. No. Nyeri/Endarasha/3578 and L.R. No. Nyeri/Endarasha/1340 or in any manner interfering with the property pending the interpartes hearing and determination of the intended appeal.
  - d. That costs be provided for.
2. The Respondent filed grounds of opposition stating that the application is bad in law, frivolous, and gross abuse of the court process. The matter was argued orally before me. The Applicant stated they will



suffer irreparable loss if the application is not allowed. She prayed that the court dispenses with a need for security. The Respondent stated that there is nothing to stay in a dismissal order. The Respondent stated that without security, the application is a nonstarter.

### **Analysis**

3. The Applicant filed a Notice of Appeal against the decision given on 26.09.2024. Therefore, this gives the court jurisdiction to grant orders related to the challenged appeal. The court hearing the matter or a court appealed to has the power to grant a stay of execution pursuant order 42 Rule 6(4) of the Civil Procedure Rules. The gamut governing stay or I junction pending appeal is provided under Order 42 Rule 6, which provides as doth: -

“6.

- (1) 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 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) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (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) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (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.”

4. There is, however, a contrast between stay pending appeal and injunction pending appeal. In a regulatory framework under the Civil Procedure Rules, the court appealed against has no direct power to grant an injunction pending appeal. It appears to be vested in the court appealed to, in this case, under Rule 5(2)b of the Court of Appeal Rules, 2022, which provides as follows:

(b) In any civil proceedings where a notice of appeal has been lodged in accordance with rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.

5. The power to grant an injunction pending appeal is vested in the High Court carrying out its appellate jurisdiction. However, courts sometimes invoke the inherent powers of the court. This must, however, be done judiciously. The inherent power to grant an injunction pending appeal in exceptional cases. In *Julius Musili Kyunga v Kenya Commercial Bank Limited & another* [2012] eKLR the court held that:

“(8) This court had opportunity to consider the issue of the principles for the grant of injunction pending appeal in a ruling on Preliminary Objection in *Mombasa HCCC 235 of 2010 D.J. Lowe & Co. Ltd v Credit Agricole Indosuez & 3 others* of 20th February 2012 where I said as follows:

“Although Order 42 rule 6 of the Civil Procedure Rules does not expressly provide for application for injunction pending appeal the same is, in accordance with the authorities, part of the body of common law, doctrines of Equity and procedure and practice of Courts of Justice in England as incorporated in Kenya by virtue of section 3 (1) of the *Judicature Act*, Cap. 8 Laws of Kenya, and in the absence of express procedure rules, the inherent jurisdiction of the Court under Section 3A of the *Civil Procedure Act* provides a basis for applications for injunction pending appeal in accordance with principles set out in relevant case law authorities. Indeed, the Court of Appeal of Kenya has adopted the principles in *Erinford Properties* in many cases notably the *Bhutt v Rent Restriction Tribunal CACA No 6 of 1979* and *Madhupaper International Ltd v Paddy Kerr* (1985) KLR 840. The Court of Appeal Rules do however provide for injunction pending appeal under Rule 5 (2) (b) of the Rules.”

6. In other words, the object of the injunction pending appeal is to preserve the subject matter of the Appeal. This is decidedly a positive order briefly denying a successful party the fruits of the judgment until the appeal is heard. The order thus ensures that if the Appellant succeeds, the appeal will not be rendered nugatory. The duty to show that one deserves an injunction is on a party seeking the same. It is not enough to allege loss; there has to be cogent evidence to support that effect.

7. It is important to recall Order 42 Rule 6(6), which was hitherto mentioned, but worth repeating provides as follows:

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.

8. It is my finding that there is no right for an injunction pending an appeal in the court appealed from. This is because of the difficulty of meeting the standard of a prima facie case in a court that has just found a claim unmerited. A prima facie case was addressed in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, where the Court of Appeal noted that: -
  4. A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.
9. This test can rarely be met in the court appealed from. This is the wisdom of seeking orders of this nature in the court appealed to, which can determine whether, prima facie, there is an arguable appeal before it. This is not to say that the test cannot be met, but it is a herculean task.
10. An application for a stay must be predicated on the existence of an appeal. The power to grant an injunction pending appeal is predicated on the High Court carrying out its appellate jurisdiction. However, in exceptional cases, the High Court has inherent power to grant an injunction pending an appeal to the Court of Appeal.
11. What does it mean for an appeal to be rendered nugatory? There must be a likelihood of the subject matter disappearing. The properties that were said to be affected were owned by the Respondent, who was not shown to be in the process of selling them.
12. The subject matter of the appeal is not one piece of property but the properties of the Respondent for which the court declared not to belong as a joint estate. The Evidence does not appear. The subject matter must be the subject matter of the appeal. This will be, for example, where a party is declared an owner and an eviction order is issued. An injunction can be issued to preserve the subject matter and status quo ante. It does not apply where an order is creating a new status.
13. The appeal arises from a dismissal of a claim for the matrimonial property. The Applicant still proceeds on the premises that the property is still matrimonial property. The appeal is from a judgment on merit. Having determined merit, the next question is whether the Appellant has satisfied the criteria for grant of injunctive orders as part of the exceptional circumstances. It is true that the Applicant sought not a stay of execution but a temporary injunction. This is supported by the decision of the Court of Appeal in *Re Estate of Harish Chandra Hindocha (Deceased)* [2021] eKLR, where the court stated: -

There is also a prayer for an injunction which is not barred by the sheer presence of a negative order.
14. An injunction will ordinarily not be issued when the same court has dismissed the suit. The guiding principles for granting the temporary injunction pending appeal are well settled. The Court of Appeal, in the case of *Patricia Njeri & 3 Others vs. National Museum of Kenya* [2004] eKLR, enunciated the following considerations for the grant of temporary injunction pending appeal;
  - a. An order of injunction pending appeal is discretionary and will be exercised against an Applicant whose appeal is frivolous.
  - b. The discretion should be refused where it would inflict greater hardship than it would avoid.
  - c. The Applicant must show that to refuse the injunction would render the appeal nugatory.



- d. The court should also be guided by the principles in *Giella vs. Cassman Brown* [1973] EA 358.”
15. While addressing the question of injunctive orders, the Court of Appeal for the former Eastern Africa had this to posit in the locus classicus case of *Giella v Cassman Brown & Company Limited* (1973) E A 358:
- Firstly, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”
16. The test for temporary injunction was well enunciated in the old English case of *American Cyanamid Co. v. Ethicon Limited* (1975) AC 135, involving a patent for words "a polyhydroxy acetic ester, the court set out the elements for injunction as doth:
- i. There must be a serious/fair issue to be tried.
  - ii. Damages are not an adequate remedy.
  - iii. The balance of convenience lies in favour of granting or refusing the application.
17. The court has already dismissed the suit. A question of prima facie appeal has not been demonstrated. To find a prima facie case, there must be an appeal that is not frivolous. However, given that the application was filed in the same court, it is unnecessary to deal with this limb. A prima facie case or appeal is one in which a court can see a case capable of argument in the superior court. It is not enough to make averments that are academic. There must be evidence that the speculated loss is actual or likely to happen.
18. The question in this court is whether a court on whom the materials in this application are presented that there is a process capable of showing a prima facie case. Nothing showed that the appeal's subject matter would be rendered nugatory. I have perused the supporting affidavit and cannot find any ground warrant issuance of the orders sought.
19. The consequence and ramifications of not finding prima facie evidence of an appeal and a subject matter is that there is no need to consider damages and balance of convenience. In any case, there was a duty to show that there would be an irreparable loss. There was none demonstrated. The Applicant has not shown that they are willing to provide security. Without security, the court has no power to grant the orders sought.
20. The upshot of the foregoing is that the application lacks merit and is accordingly dismissed.
21. The next issue is cost. Costs are governed by Section 27 of the *Civil Procedure Act*, which provides as follows:
- (1) Subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any



action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

- (2) The court or judge may give interest on costs at any rate not exceeding fourteen percent per annum, and such interest shall be added to the costs and shall be recoverable as such.

22. The application is thus dismissed with no order as to costs.

### **Determination**

23. The upshot of the foregoing is that I make the following orders: -

- a. The Application dated 19.11.2024 lacks merit and is consequently dismissed.
- b. Being a matrimonial dispute, each party will bear their own costs.
- c. The file is closed.

**DELIVERED, DATED, AND SIGNED AT NYERI ON THIS 4<sup>TH</sup> DAY OF FEBRUARY, 2025.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of: -

Mrs. Nyachio for the Plaintiff/Applicant

Ms. Maina for the Defendant/Respondent

Court Assistant – Jedidah

Page 4 of 4 M. D. KIZITO, J.

