



REPUBLIC OF KENYA



**Kaumbuthu v Imitira (Originating Summons E001 of 2022)
[2025] KEHC 2744 (KLR) (7 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2744 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
ORIGINATING SUMMONS E001 OF 2022**

A MSHILA, J

MARCH 7, 2025

BETWEEN

GLORY KAGWIRIA KAUMBUTHU PLAINTIFF

AND

JOEL KINYUA IMITIRA DEFENDANT

RULING

1. Before court are two applications by way of Notice of Motion.
2. The first application dated August 27, 2024 is brought under Rule 3 of the High Court Practice and Procedure Rules of the *Judicature Act* Cap 8 Laws of Kenya and Order 42 Rule 6 of the Civil Procedure Rules. The Defendant/Applicant sought for orders:-
 - a. Spent
 - b. Spent
 - c. That there do issue an ex-parte order for stay of execution of the orders passed herein pending the hearing of this application inter-partes or until further orders of this Honourable Court.
 - d. That there do issue an order of stay of the orders passed herein pending the hearing and determination of the intended appeal against the Ruling of this Honourable Court made on 26th July, 2024 or until further orders by the Honourable Court.
3. The Application is premised on the grounds that the Applicant has lodged an appeal against the ruling delivered on 26th July, 2024 as such the order for stay sought ought to be granted as the Applicant stands to suffer substantial loss, be rendered destitute as well as breach existing contractual obligations.
4. Joel Kinyua Imitira swore his affidavit in support of his application. He deposed that being dissatisfied with the ruling delivered on 26/7/2024, he filed a Notice of Appeal. That the application seeks stay



orders as the respondent wants to execute. He contended that he has a right to enjoy his rental income and that execution will occasion an injustice as the rental income from LR Ruiru/Kiu Block 1/742 goes towards servicing a loan advanced for the development of LR 57/701 (Clay Works) as such the bank has a lien on the rental income. He stated that he wholly depends on the rental income for his livelihood as such if the orders are executed he will breach his obligation in the deed of assignment, lose his source of livelihood and that he will be unable to pay school fees for his children and his dependants. He contended that the Kshs. 8.5 Million received by the Respondent from the sale of LR 21/1760 has not been encumbered by this Court which was said to be an injustice on his part. Kaiser Apartment registered in the name of the Respondent were also said to raise Kshs.90,000/= per month and the same have been excluded from the application leading to the impugned ruling. He averred that the ruling has imposed unfair conditions on the properties registered in his names while allowing the Respondent to enjoy income from her properties.

5. Glory Kagwiria Kaumbuthu the Applicant/Respondent herein filed her replying affidavit dated 22nd October, 2024 where she averred that the Applicant has declined to comply with the orders of the court as such cannot seek for more orders from this court. The court was urged to not consider the personal loans allegedly being paid by the Applicant. She averred that she has produced evidence showing her contribution towards the development of LR Ruiru/Kiu Block 1/742 and LR 57/701 as such also has constitutional right to enjoy the rental income from properties jointly acquired. She contended that the alleged loans can be serviced from the joint account. The Applicant was said to be in active employment as such the court should as such has approached court with unclean hands. The Respondent averred that she is a clerk at KCB bank and not a senior manager as alleged by the Applicant. The Respondent was hurt that the Applicant pays school fees for many of his relatives while she languishes in poverty. She contended that the Applicant received proceeds from the sale of LR 21/1760 for the development of LR 57/701.
6. The second Application is dated 9th October, 2024, and is brought under Sections 3 & 3A, 28 and 38 of the *Civil Procedure Act*, Order 22 rule 18 of the Civil Procedure Rules and all other enabling provisions of the law. The Applicant sought for orders;-
 - a. Spent
 - b. Spent
 - c. That in compliance with the orders of the court issued on 6/8/2024 by this court, the court to order as follows;-
 - i. That Ebony Estates Limited be appointed to collect all rental monies from rental properties from the following properties;
 - a. LR 57/701 (Clay) 5 storey building 24 units
 - b. LR/Kiu/Block 1/742 4 storey building of 32 units
 - ii) That a joint interest earning account be opened at the Kingdom Bank and the Deputy Registrar be authorized to execute the bank opening forms should the Respondent decline/refuse or neglect to do so three days after request.
7. The application is based on the grounds that the Respondent has refused to obey the orders in the Ruling delivered on 26/7/2024. The Applicant served the Respondent with three proposed management agents with the matter being mentioned before the Deputy Registrar 3 times but the Respondent has refused to comply as such the Applicant seeks the court's assistance in enforcing the order.



8. Glory Kagwiria Kaumbuthu swore her affidavit in support of the application. She deposed that the Respondent has refused to obey the orders issued on 26/7/2024. She deposed that she has served the Respondent with three proposed management agents and that the matter has been mentioned before the Deputy Registrar 3 times but the Respondent has refused to comply. She stated that she is seeking the court's assistance in enforcing the order as she is suffering from financial difficulties. She sought the court to help her nominate a property agent to collect monies from the rental properties and open a joint interest earning account. That the Respondent should show cause why his salary should not be attached.
9. Joel Kinyua Imitira filed his replying affidavit. He deposed that he was dissatisfied with the Ruling delivered on 26/7/2024 where each party was required to nominate a property agent to collect monies from the rental properties to be deposited in a joint interest earning account. That he filed an application for stay of execution as the Applicant has commenced execution of the said orders and has also sought that Ebony Limited be appointed to collect rent from the suit properties and the same to be deposited at a joint account to be opened at Kingdom Bank. He averred that he has produced overwhelming evidence as to his sole contribution to the purchase and development of LR Ruiru/Kiu Block 1/742 and LR 57/701 (Clay works) where he is the registered owner of the rental properties. He averred that he used loans and solely incurred the costs of developing the property as such has been collecting rent from 2015 to date and the Applicant has never shared the rental income. He contended that he pays all the rental income from LR Ruiru/Kiu Block 1/742 directly to Equity Bank to offset the secured amount as such he has not defied the order of the court as there is nothing to deposit in the joint interest earning account. He stated that the bank takes priority over any claim. The same position was said to apply to LR 57/701 (Clay Works). He insisted that he does not work for the United Nations as such depends wholly on the rental income for his livelihood. He averred that the Applicant owns LR 21/1760 which she sold for Kshs.8.5 Million and that she did not share the proceeds which information she did not disclose in the Originating Summons. The Applicant was said to have bought 2 apartments at Kaiser-Garden as well as properties in Laikipia all registered in her names which properties the court has not encumbered. The court was accused of not applying the same standard in the properties owned by the parties as the Ruling allows the Applicant to deal with her properties as she wishes but has encumbered his properties as such he approached the Court of Appeal and prays to stay the orders to preserve appeal.
10. The applications were canvassed by way of written submissions.

Respondent's/applicant's Submissions

11. The respondent submits that he solely developed the suit properties with no contribution from the applicant and that having retired from public service manages his two rental properties and has no other sources of income. He denied that he is currently employed. Further, he submitted that if the orders are executed he will be in breach of his obligations in the deed of assignment and will have no livelihood thereby being rendered destitute. The applicant was said to have received over Kshs. 8.5 Million from the sale of LR 21/1760 which the court has not encumbered as it has done the respondent's properties. The applicant was also accused of leaving out Kaiser-garden apartments and that she is selfishly coming for the respondent's properties. The respondent submits that the court has not applied the same standard in the properties owned by the parties.
12. Subsequently, the respondent submits that if the orders sought are not granted he will suffer substantial loss if he succeeds in his appeal. The defendant submits that he is opposed to depositing the rental income in a joint earning account as he has proved that he is the sole legal owner as such prays for stay so as to preserve the property. The court was urged to grant the orders without the defendant furnishing



security as this is a matrimonial cause. The defendant denied defying court orders as the rental income is paid directly to Equity Bank to offset the loan advanced to it as evidenced in the deed of assignment as such there is nothing to deposit in a joint interest earning account. In any case, the chargee was said to take priority in a charged property as such any default will lead to the chargee exercising its statutory power of sale leading to loss that cannot be compensated by way of damages. Reliance was placed in the case of *SRW v SW Civil Suit No.62 OF 2006(OS)*. The rental income was said to be paying off the loan as such does not form matrimonial property. The court was urged to disallow the applicant's application as the same will render the appeal nugatory.

Appllicant's/respondent Submissions

13. The applicant herein submits that no appeal operates as an automatic stay of execution. That no sufficient cause has been demonstrated to warrant grant of stay orders. It was submitted that the intended appeal cannot serve as a shield for misconduct. Reliance was placed in the case of *MN v TAN & another [2015] eKLR*. The respondent was said to be in contempt of the court orders directing him to nominate a property agent and to open a joint interest-earning account. The applicant submits that the respondent is violating her constitutional right to equal enjoyment of the matrimonial property the court having declared LR 20857/188 as being jointly held matrimonial property. The respondent was accused of approaching the court with unclean hands while expecting the court to exercise discretion in his favour. Reliance was placed in the case of *JMR v RNM [2022] eKLR*.
14. In regard to substantial loss, the respondent was said to have failed to substantiate his claim as he failed to produce financial documentation to support his assertions of financial distress. Reliance was placed in the case of *Machira t/a Machira & Co. Advocates v East African Standard (No. 2) (2002) KLR 63*. It was submitted that the respondent is not solely dependent on the rental income as he is employed by the United Nations. The Applicant was said to be the one suffering substantial loss as she has been excluded from accessing income generated from the matrimonial properties where she made significant financial contribution.
15. The court was urged to find that the balance of convenience tilts in favour of the Applicant as the Respondent continues to enjoy the full benefit of the rental income while the Applicant endures financial hardship. Reliance was placed in the case of *Absalom Dova v Tarbo Transporters [2013] eKLR*. Lastly, the court was urged to hold the respondent in contempt of court.

Issues For Determination

16. Having considered both applications and their respective responses, the issues arising for determination are:-
 - a. Whether the Respondent is deserving of the order for stay pending appeal as sought
 - b. Whether the Court can enforce the orders granted in te ruling dated 26th July, 2024

Analysis & Determination

17. The relevant law governing stay of execution is provided under Order 42 Rule 6 of the Civil Procedure Rules which stipulates that:-
 - “ 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 orders set aside.

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 1st 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.

18. Subsequently, under Order 42 Rule 6(2) of the Civil Procedure Rules, an Applicant seeking for an order for stay should satisfy to the court that:

- a. Substantial loss may result to him/her unless the order is made;
- b. That the application has been made without unreasonable delay; and
- c. The Applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

19. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR substantial loss was explained as:-

“No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

20. The Respondent contends that he stands to suffer substantial loss if the order for stay is not granted and if he succeeds in the appeal. On the other hand, the Applicant contends that the Respondent has not proved substantial loss as he has not produced any evidence of financial distress. Further, the Applicant contended that she is the one who is suffering because she has been excluded from enjoying the rental income while she contributed towards the development of the matrimonial properties.

21. This Court having perused the record notes that the Respondent has not demonstrated the substantial loss that he stands to suffer if the order for stay is not granted. This court further notes that execution is not a ground for stay as the Applicant therein has to demonstrate the harm that he will suffer if the same is not granted. The Respondent merely claiming that the rental income goes towards offsetting his loan and that he will be rendered destitute does not fully demonstrate substantial loss.



22. With regard to inordinate delay this court notes that the application for stay was filed on 27th August, 2024 while the impugned ruling was delivered on 26th July, 2024 as such this court is satisfied that there has been no inordinate delay in bringing the instant application.
23. Further, on security, its purpose was explained in the case of *Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* [2014] eKLR where the court stated:-
- “The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.
24. Having perused the court record this court has noted that the Respondent/ Applicant has not offered any form of security to warrant the grant of the stay orders sought.
25. Be that as it may, the right of appeal must be balanced against the rights of the successful litigant to enjoy the fruits of the judgment delivered in his/her favour.
26. The case of *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR the court stated:-
- “The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”
27. Similarly, in *RWW v EKW* [2019] eKLR, the court considered the purpose of a stay of execution order pending appeal, in the following words:-
- “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.”
28. In the upshot, therefore, taking into consideration all the above factors and to avoid the appeal from being rendered nugatory this court will allow the application for stay of execution on condition that he deposits into court Kenya Shillings One Million (Kshs. 1,000,000/-) as security for due performance of the impugned Order within 30 days hereof;



29. With regard to the prayer by the Applicant/Respondent to enforce its orders issued on 26th July, 2024 by having the Deputy Registrar executing the documents as sought in her application dated 9th October, 2024, this court finds that the same to be premature at this stage given that the matter is still at its initial stage.

Finding & Determination

30. For the forgoing reasons this Court makes the following findings and determinations;
- i. The application dated August 27, 2024 for stay of execution is hereby allowed on condition the Applicant deposits into court the sum of Kenya Shillings One Million (Kshs.1,000,000/-) within Thirty (30) days from the date hereof;
 - ii. The Application dated October 9, 2024 is found to be premature and it is hereby disallowed.
 - iii. Each party shall bear their own costs of the respective applications.
 - iv. Mention on May 12, 2025 before the Deputy Registrar for compliance and directions
- Orders Accordingly

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 7TH DAY OF MARCH, 2025.

A. MSHILA

JUDGE

In the presence of

Sanja – Court Assistant

Odinga - For the Applicant

N/A - For the Respondent

