



LKK v LWK (Civil Appeal E004 of 2025) [2025] KEHC 8216 (KLR) (Civ) (23 May 2025) (Ruling)

Neutral citation: [2025] KEHC 8216 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL E004 OF 2025
CJ KENDAGOR, J
MAY 23, 2025**

BETWEEN

LKK APPELLANT

AND

LWK RESPONDENT

RULING

1. The Applicant and the Respondent were married under the Kikuyu Customary laws. The marriage broke down and the Respondent petitioned for its dissolution. She sought several other orders, including maintenance at Kshs.200,000/= per month, alimony at Kshs.500,000/= per month, and other monthly family expenses. The lower Court delivered a judgment on 11th December, 2024 in which it dissolved the said marriage but declined the Respondent’s prayer for alimony and maintenance. It nonetheless, ordered the Applicant to pay Kshs.150,000/= monthly for shopping and upkeep of the home as well as continue paying for the domestic help and electricity bills. It also ordered him to pay for the medical insurance cover to secure medical attention for the issue with special needs.
2. The Applicant was dissatisfied with the Judgment of the lower Court and appealed to this Court vide a Memorandum of Appeal dated 9th January, 2025. He listed the following Grounds of Appeal;
 1. The Learned Trial Magistrate erred in law by granting Kshs.150,000/= to the Respondent for monthly shopping and maintenance plus an order for payment of medical cover among other things notwithstanding that she had dismissed her prayer for alimony or maintenance.
 2. The Learned Trial Magistrate erred in law and in fact by purporting to make orders ostensibly for the benefit of the parties’ adult daughter who was not a subject of the court proceedings and was not a party thereto.



3. The learned Trial Magistrate erred in law and in fact by whimsically awarding a figure of Kshs.150,000/= without any legal and factual basis whatsoever as the needs of the parties' adult daughter were not the subject of the trial and no evidence thereon had been adduced.
 4. The Learned Trial Magistrate exceeded her jurisdiction by proceeding to make an award of Kshs.150,000/= having already dismissed the Respondent's prayer for alimony.
 5. The Learned Trial Magistrate erred in law and in fact by making indefinite orders with no time limit which was highly irregular and illegal.
 6. The Learned Trial Magistrate erred in law and in fact by making contradictory orders after finding at page 17 of the judgment that the Respondent was 'well of means and capable of fending for herself.'
 7. The Learned Trial Magistrate erred in law and in fact by converting the Appellant into a beast of burden in total disregarding of *the Constitution* and the law which state that parties should be treated equally during and at the dissolution of marriage and none should be converted into a beast of burden for the other.
3. He asked the Court to allow the appeal, set aside the judgment and decree issued on 11th December, 2024, and substitute the same with a judgment and decree dismissing the Respondent's prayer for divorce and maintenance.
 4. Alongside the Appeal, the Applicant brought the instant application dated 9th January, 2025 in which he sought the following orders;
 1. Spent
 2. Spent
 3. That this Honourable Court be pleased to stay execution of the judgment and Decree issued by Honourable Everlyne S.A. Olwade in Divorce Cause No. 716 of 2017 pending hearing and determination of this Appeal.
 4. The costs of this application be provided for.
 5. The grounds of the Application are enlisted on the face of the application, and were supported by an affidavit dated 9th January, 2025 sworn by the Applicant. In the affidavit, the Applicant stated that he is not in a position to pay the amount ordered by the Court. He stated that he is still educating his children from his two families and he has loans to pay. He attached copies of proforma invoices and bank statements. He stated that the Respondent is a person of unknown means and that he is apprehensive that if the monthly Decretal sum is paid out, she will be unable to refund the same. He said he was willing to furnish such security as may be ordered by this Court.
 6. The Respondent filed a replying affidavit dated 28th January, 2025 and sworn by her. She stated that the Applicant did not demonstrate that the stay of execution should be granted. She stated that the Applicant will not suffer substantial loss because she is capable of refunding the Decretal sum in the unlikely event that the Applicant's appeal is successful. She stated that should the Court be inclined to order stay of execution, the same should be on condition that the Applicant should deposit the monthly Decretal sum in a joint interest-earning account in the names of their advocates by the 5th day of every month.
 7. The Application was canvassed by way of written submissions.



Applicant's Written Submissions

8. The Applicant submitted that the stay of execution should be granted in the circumstances. He argued that he has satisfied all the conditions required by law. He submitted that the intended appeal will be rendered nugatory unless orders of stay are granted. He submitted that, unless the stay is granted, he will suffer hardship as he is shouldering many family obligations and paying loans and the Respondent may commence proceedings against him. He argued that the Respondent is a person of unknown means and that she will be unable to refund the monthly Decretal sum that will have been paid out if his appeal succeeds. He contended that the Respondent did not demonstrate her financial capacity to repay any funds and that he brought the application without undue delay.

Respondent's Written Submissions

9. The Respondent submitted that stay of execution should not be granted. She argued that the Applicant has failed to demonstrate the three conditions required to secure the grant of stay. She submitted that he has not demonstrated what substantial loss he will suffer unless stay of execution is granted. She argued that the Applicant did not demonstrate that she is incapable of refunding the Decretal sum in the unlikely event that the Applicant's appeal is successful. She submitted that the Applicant's claims contradicted the findings of the lower Court which had found that she is of well means. She maintained that the Applicant has not met the threshold for grant of stay of execution pending appeal.

Issues for Determination

10. Having carefully considered the grounds enlisted the application, the parties' respective affidavits, and submissions, I find that there is one issue for determination;

Whether the Applicant has met the threshold for grant of stay of execution orders.

11. This is an application for stay of execution. The relevant provision applicable to the application is Order 42 Rule 6 1 & 2 of the Civil Procedure Rules. The Order provides as follows: -

“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.

12. Courts have set the conditions that an Applicant has to satisfy to get a stay of execution pending an appeal. In *Francis Muthusi Malombe & 7 others v Daniel Kaloki Malombe & 9 others* [2022] eKLR, the Court discussed the import of Order 42 Rule 6 (i) of the Civil Procedure Rule, and held as follows;

“ 35. I have already cited the provisions of Order 42 Rule 6 (i) of the Civil Procedure Rule above. It is clear from the cited Rule that in the 1st instance, the court appealed from may for “sufficient cause” order stay of execution. Granted that a stay of execution is discretionary matter, this court must be satisfied that the following conditions are met by the applicant: -

- (i) He/she must show a good cause.



- (ii) He/she must show that a substantial loss may result unless the stay is granted.
- (iii) He must show that there is no unreasonable delay in filing the application for stay.
- (iv) Such security as the court may order for due performance of such decree or order as may ultimately be binding on him.”

13. Similarly, the Court in *RWW Vs. EKW* [2019] eKLR addressed its mind to the question and purpose of stay of execution pending appeal when it observed as follows: -

“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.

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.”

14. Guided by the above authorities, it is a now well-established principle that an applicant for stay of execution must demonstrate that he is likely to suffer substantial loss should the prayer be rejected; that the application for stay has been made without unreasonable delay and that, security for due performance of the decree has been provided.
15. The parties made extensive submissions most of which focused on the merits of the appeal, but I do not want to comment on the same. That will be for the appeal determination. The main issue for determination is whether the Applicant will suffer a substantial loss unless the stay is granted.
16. I associate myself with the reasoning of the court in *Mutiso v Mutiso (Civil Appeal 60 of 2018)* [2022] KEHC 13688 (KLR), where the Court discussed on how to determine whether an applicant will suffer substantial loss in money decrees. The Court observed as follows;

“51. ... It is contended that the Respondent has not demonstrated her means and how she will be able to refund the same if released to her. It is now trite that stay can be granted even in monetary decrees since Order 42 rule 6 recognises that there may exist sufficient cause even in such decrees. Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes a crucial issue. The court cannot shut its eyes where it appears the possibility of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal is doubtful. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal to ensure that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”



17. The Court went further to state as follows;

“49. The law, however appreciates that it may not be possible for the applicant to know the respondent’s financial means. The law is therefore that all an applicant 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 is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. The property a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then, in those circumstances, where the applicant has reasonable grounds which grounds must be disclosed in the application that the Respondent will not be in a position to refund the decretal sum if the appeal succeeds, have shifted to the Respondent to show that he would be in a position to refund the decretal sum.”

18. In this case the Applicant averred that the Respondent would be incapable of refunding the decretal sum if paid to her. The Respondent in her replying affidavit responded to this allegation and stated that she is capable of refunding the Decretal sum in the event that the Applicant’s appeal is successful. The evidence on record does not reveal her source of income. She did not disclose the same in her affidavit. In light of the foregoing, I find that the Applicant has proved that substantial loss is likely to be occasioned to him if the whole of the decretal sum is released to the Respondent.

19. The next issue for consideration is the issue of security. The court in *Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* [2014] eKLR expressed itself on the purpose of security in the following terms;

“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 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.”

20. I also associate myself with the observations of the court in *Gianfranco Manenthi & Another vs Africa merchant Assurance Co. Ltd* [2019] eKLR, where it discussed the import of this condition. It observed as follows;

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the Lower Court for an order of stay must satisfy this condition on security.....Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a Court which has delivered the matter in his favour. This is therefore to provide a situation for the Court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree.



The Court would order for the release of the deposited decretal amount to the respondent in the appeal....”

21. In his supporting affidavit, the Applicant clearly stated that he was willing to furnish such security as this Honourable Court may order. On her part, the Respondent argued that should the Court be inclined to order stay of execution, the same should be on condition that the Applicant should deposit the monthly Decretal sum in a joint interest-earning account in the names of their advocates by the 5th day of every month.
22. The issue of security is discretionary and it is upon the Court to determine the same. Courts have held that the right of appeal must be balanced against an equally weighty right of the Plaintiff to enjoy the fruits of the judgment delivered in his favor. This was the reasoning of the Court in *Samvir Trustee Limited vs Guardian Bank Limited* [2007] eKLR, where it held as follows;

“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.”
23. Taking all relevant factors into account and in order not to render the intended appeal illusory while at the same time securing the interests of the Respondent, I grant a stay of execution of the decree herein pending the hearing and determination of this appeal, on condition that the Applicant deposits Kshs.50,000/= monthly in a joint interest earning account in the names of the advocates for the parties herein. The said conditions are to be complied with within 30 days from the date of this ruling, and shall remain in force until the appeal is determined.

Disposition

24. These are the final orders of the Court.
 - a. The Applicant’s application dated 9th January, 2025 is allowed.
 - b. Stay of execution of the judgment and Decree issued by Honourable Everlyne S.A. Olwade in Divorce Cause No. 716 of 2017 is hereby granted, pending hearing and determination of this Appeal.
 - c. The Applicant is hereby directed to deposit Kshs.50,000/= monthly in a joint interest earning account in the names of the advocates for the parties herein in Kenya Commercial Bank, Nairobi.
 - d. Order (c) above to be complied with within 30 days from the date of this ruling, and shall remain in force until the appeal is determined.
 - e. A default of Order (c) and/or (d) above by the Applicant shall automatically cause the Order of Stay of Execution of Judgment/Decree to lapse.
 - f. The Applicant shall file the record of appeal within 30 days.
 - g. There shall be no order as to costs.



25. It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS
ONLINE PLATFORM ON THIS 23RD DAY OF MAY, 2025.**

.....

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

