



CNG v KKN (Civil Suit 14 of 2018) [2025] KEHC 8311 (KLR) (Family) (13 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8311 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL SUIT 14 OF 2018
PM NYAUNDI, J
JUNE 13, 2025

BETWEEN

CNG APPLICANT

AND

KKN RESPONDENT

RULING

1. Before this court is a Notice of Motion dated 19th December 2024. Vide the said Motion, the Applicant seeks the following orders:
 1. Spent.
 2. Spent.
 3. That this Honourable court be pleased to issue an order of stay of execution by the Respondent of the orders issued in the Judgment of the Hon. Justice Patricia Nyaundi dated 21.11.2024 in Family Division Civil Suit No. 14 of 2018 pending the determination of the preferred appeal.
 4. Spent.
 5. That the costs of this application be provided for.
2. The application was supported by the affidavit of the applicant who stated that judgement was delivered on 21st November 2024 in favour of the Respondent and being dissatisfied with the Court’s decision preferred an appeal against the said decision vide Notice of Appeal dated 9th December 2024.
3. She argues that the Respondent filed a suit against her. She instructed the firm of M/S Wandugi & Company Advocates who came on record but did not actively participate in the suit hence judgment was entered against her. While delivering its judgment, the court did not take into consideration the



land mark ruling of the division of matrimonial property in Civil Appeal No. 128 of 2014 where the court stated that each spouse must prove contribution and that 50:50 share is not automatic.

4. That if stay of execution is not granted substantial loss may result to herself will unfairly be deprived of her hard earned properties. She added that the application has been brought without any delay and that the application should be granted in the interest of justice and fairness.
5. The Respondent in opposing the Application filed a Replying affidavit sworn on 10th February 2025. He deponed that the application is frivolous, vexatious, bad in law, a non-starter and an abuse of this Honourable Court process. That the Honourable court considered evidence of his contribution before delivering the judgment. That orders for stay are meant to delay execution of the judgment so that the Applicant can continue to solely benefit from rental income generated from the property they co-own together.
6. Parties did not file written submissions.

Analysis and Determination

7. The Court has considered the Application and the affidavits thereto. The only issue for determination is whether the Application is merited to grant an order of stay of execution pending appeal.
8. The background to the matter is that the matter proceeded by way of viva voce evidence. The Petitioner testified as the sole witness, he was cross examined by Counsel for the applicant herein and then proceeded to close his case. It is at this juncture that the Petitioner raised objection with the replying affidavit which it transpires was sworn by Counsel of the Respondent. The affidavit was struck out on the basis that it was incompetent as the Counsel had purported to depone on issues that are in contention. The applicant herself was not present in Court.
9. Parties were invited to file written submissions. The applicant herein failed to file submissions, her advocate was present at the delivery of judgment and applied for leave to appeal and asked for typed copy of proceedings and judgment. The same was granted.
10. The Applicant now presents this application for stay pending the finalization of the intended appeal. The law applicable for Stay of Execution pending Appeal is provided for under Order 42 rule 6(2) of the Civil Procedure Rules, 2010 thus:
 - (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 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.



- (3) Notwithstanding anything contained in sub rule (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.
9. In *Butt vs. Rent Restriction Tribunal* [1979], the Court of Appeal in determining whether to grant or refuse stay of execution pending stated that:
- i. The power of the Court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an Appeal.
 - ii. The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an Appeal may not be rendered nugatory should the Appeal Court reverse the judge's discretion.
 - iii. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.
 - iv. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.
11. The purpose of granting orders of stay of execution is to preserve the subject matter in a dispute while balancing the rights of the parties. The Court also will not be concerned with merits of the appeal.
12. The power of the Court to grant stay of execution of the judgement pending appeal is a discretionary. The discretion should however be exercised judiciously. The Court of Appeal in *RWW vs. EKW* (2019) stated: -
- “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.”
13. As is evident the Court in exercising its discretion is bound to balance the interests of the parties. In considering this application I am unable to sidestep the manner in which the applicant conducted her defence in the trial court. There must be something to be said of a party who treats court processes casually and once a judgment is delivered rouses themselves from their misguided inertia and seeks to dislodge a decision. The applicant has a constitutional right to appeal but that right is tempered by the respondent's right to a quick finalisation of the matter.
14. This is a case where the applicant needs to be incentivised to act promptly, I will therefore only give a stay that allows the applicant to lodge this application before the Court of Appeal which is in control of its diary and can therefore, if it considers the applicant deserving of a stay, do so in line with the Courts diary.
15. In the end, therefore I make the following orders;



- i. Stay of execution of the judgment dated 21st November 2024 be and is hereby issued to allow the applicant to lodge the application for stay of execution in the Court of Appeal within 14 days, failure to do so the stay of execution will lapse.
- ii. Each party to bear its own costs.

It is so ordered.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 13TH DAY OF JUNE, 2025.

P. M. NYAUNDI

HIGH COURT JUDGE

In the presence of:

Ms. Kimaru for Applicant

Mwenda Morris Gitonga for Respondent

Fardosa Court Assistant

