



**MN v CMM (Matrimonial Cause E002 of 2024)  
[2025] KEHC 8233 (KLR) (12 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8233 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
MATRIMONIAL CAUSE E002 OF 2024  
RN NYAKUNDI, J  
JUNE 12, 2025**

**IN THE MATTER OF SECTION 17 OF THE MATRIMONIAL PROPERTY ACT 2013  
AND  
IN THE MATTER OF MATRIMONIAL PROPERTY CAUSE NO E002 OF 2024**

**BETWEEN**

**MN ..... APPLICANT**

**AND**

**CMM ..... RESPONDENT**

**RULING**

1. What is pending before me for determination is a Notice of Motion Application dated 25<sup>th</sup> April 2025 premised under sections 1A, 1B, 3A and 63(E) of the Civil Procedure Act, Order 40 Rule 1, Order 42 Rule 6 and Order 51, Rule 1 of the Civil Procedure Rules 2010 in which the Applicant is seeking the following orders;
  - a. Spent
  - b. Pending the hearing and determination of this application interpartes, an order be and is hereby issued staying execution of the entire, decree and its consequential effect.
  - c. Pending the hearing and determination of the intended appeal, an order do issue to preserve the status quo of the suit property and restrain the respondent from disposing of, alienating, encumbering or otherwise diminishing the value of the property in question and staying in the entire judgement.
  - d. The requirement for security under order 42 Rule 6 be waived, as the subject matter is matrimonial property and the applicant is in a vulnerable financial position



- e. Costs of this application do abide the outcome of the intended appeal.
  - f. This court do make any other order that it may deem fit and just to grant in the circumstances.
2. The Application is based on the Grounds on the face of it among others:
- a. That the High Court in its impugned judgement failed to sufficiently consider the Applicant's direct and/or indirect contribution to the acquisition of the matrimonial property, contrary to the principles of the *Matrimonial Property Act* and Article 45(3) of *the Constitution* of Kenya 2010.
  - b. That the Applicant's intended Appeal is arguable with good chances of success as demonstrated in the draft Memorandum of Appeal filed herewith.
  - c. That should execution proceed as decreed by the Court, the Applicant risk losing huge portions of matrimonial property in dispute. Such loss would render the intended appeal nugatory and cause her irreparable harm.
  - d. That a significant portion of the matrimonial property awarded to the Respondent maybe alienated or disposed of before the final determination of the Applicant's Appeal, creating a situation of irreversible prejudice.
  - e. That the Respondent has already disposed of two properties, being Eldoret Municipality Block X/XXXX and Eldoret Municipality Block X/XXX and the Applicant is apprehensive that the Respondent may dispose of more properties before the determination of the intended Appeal making the litigation onerous to the Applicant since there will be new third parties involved.
  - f. That it is in the interest of justice, fairness and equity for this Honourable Court to intervene by granting a stay of execution to preserve the subject matter and maintain the status quo pending the outcome of the appeal.
  - g. That the court enjoys unfettered discretion to grant stay of execution pending appeal
  - h. That this application has been brought without undue delay.
3. The Application is supported by the Annexed Affidavit dated 25<sup>th</sup> April 2025 sworn by MN, the Applicant herein which averments echo the grounds of the Application.
4. The application is opposed by the Respondent vide a Replying Affidavit dated 30<sup>th</sup> April 2025 sworn by the said CMM in which he avers as follows;
- a. That I am the Respondent herein fully conversant with the facts of this case hence competent and legally authorized to swear this affidavit.
  - b. That the contents of the applicant's application dated 25<sup>th</sup> April 2025 have been read out and explained to me by my Advocate on record and having duly understood its import and purport, I wish to respond thereto as follows.
  - c. That the application is not urgent, is incompetent, an afterthought, misadvised, misconceived, bad in law, baseless, frivolous, and scandalous and does not entitle the applicant to the reliefs sought.
  - d. That I believe that there has been inordinate and inexcusable delay in bringing the instant application the same having been instituted on 25<sup>th</sup> April 2025 after the judgment was rendered by this court on 11<sup>th</sup> April 2025.



- e. That the aforesaid delay has not been explained by the applicant to sway this court into exercising its discretion in her favour.
- f. That the application is an abuse of this Honourable court's process and is only filed with the intention of stifling, sabotaging or delaying execution of the decree issued by this Honourable court.
- g. That the applicant has approached this Honourable court with unclean hands and is guilty of material non-disclosure thus is undeserving of the discretionary orders sought and this Honourable court has a duty to zealously guard against wanton abuse of its processes.
- h. That this instant application has already been overtaken by events given that were land reference Nos. Eldoret Municipality Block 2 l(King'ong'o)XXXX, Eldoret Municipality Block 2 l(Kinq'ong'o)l XXX and Trans Nzoia/Kipsoen/XXXX have been sold before the order of status quo was issued by this Honourable court on 28th April 2025.
- i. That the Applicant has not substantiated the loss he stands to suffer should his application be disallowed given that I am not a man of straw incapable of reasonably compensating the applicant by way of damages.
- j. That the applicant has not claimed anywhere that I cannot be able to compensate her incase the stay is not granted and the appeal succeeds after property is sold.
- k. That the sale of properties awarded to me will not leave the applicant without a remedy.
- l. That further to the above, the applicant has also not stated that costs would not be adequate compensation for the alleged substantial loss.
- m. That I am legally advised by my advocates on record which advise I verily believe to be true that the judgment in force was rendered after both the applicant and I was heard on merit.
- n. That contrary to the illusion created by the applicant stay orders are not as a matter of right but discretionary in nature hence grantable only to deserving litigants.
- o. That the applicant has not provided anything to sway this court into exercising the said discretion in her favour.
- p. That further to the above, the insinuation created by the applicant that her appeal will succeed is not a ground for grant of the orders she seeks since the appeal may go either way.
- q. That contrary to the allegations made by the applicant, I indeed stand to suffer great prejudice should the application be allowed since I have not been able to utilize my properties that I acquired with sweat and blood and justice delayed is justice denied.
- r. That I have been informed by my advocates on record, which information I verily believe to be sound that the applicant has indeed not met the principles that govern the issuance of orders of stay pending appeal as envisaged by Order 42 Rule 6 to wit;
- s. The prejudice she is likely to suffer should stay be denied and if damages is a sufficient remedy.
- t. Her willingness to furnish security for the due performance of the decree and/ or abide by any conditions as may be made by this Honourable court.
- u. That in the foregoing, the instant application does not have the best interest of justice at heart hence the same ought to be dismissed with costs to me.



- v. That the application before court has been brought as a gimmick by the applicant to delay justice at my expense.
  - w. That even if the appeal may succeed, I will definitely be found deserving of several parcels comprising of matrimonial properties.
  - x. That since justice delayed is justice denied, I pray that this honorable court dismisses the instant application with costs
  - y. That litigation must come to an end.
  - z. That I have been informed by my advocate on record which information I verify believe to be true that this Honourable court has the unfettered discretion to disallow the instant application in the best interest of justice which discretion I hereby urge it to so to exercise.
  - aa. That no prejudice will be suffered by the applicant should the orders sought herein be disallowed as she was heard on merit and was awarded several properties including matrimonial homes where she resides at the moment and uses for business purposes.
  - ab. That the applicant is not entitled to the orders sought herein and the said application should be dismissed with costs since the application is untenable in law is aimed at taking me in circles for ulterior motives.
  - ac. That I am swearing this affidavit in strong opposition of the application now before court.
5. The Applicant filed a response in form of a Replying Affidavit dated May 8<sup>th</sup> 2025 to the respondent's replying Affidavit dated 30<sup>th</sup> April 2025 whose averments echo the further written submissions as summarized below.

### **Applicant's Written Submissions**

6. The Applicant filed her written submissions dated 6<sup>th</sup> May 2025 in which the Learned counsel submitted that the Applicant has satisfied the requirements for grant of a stay of execution pending Appeal as outlined under Order 42 Rule 6 of the Civil Procedure Rules 2010 and specifically noted that the Applicant had demonstrated the following;
- a. Substantial loss would occur if the stay is denied.
  - b. The Application was made without undue delay
  - c. The provision of security is subject to judicial discretion due to the Applicant's financial hardships
  - d. The balance of convenience strongly favour the granting of a stay; and
  - e. Preserving status quo protects both parties and upholds constitutional principles of justice and equity.
7. The applicant filed further written submissions on stay of execution dated 8<sup>th</sup> May 2025. The Applicant's learned Counsel Mrs. Beatrice Ngethe Wairimu listed 5 issues for determination which can be summarized as follows;
- a. Whether the Applicant's application was filed in a timely manner and in good faith.
  - b. Whether the parties subject to cautions can lawfully be sold or disposed of before the cautions are lifted.



- c. Whether the sale agreements can be used as the sole evidence for a sale of land and the admissibility of unstamped sale agreements.
- d. Whether the Respondent's claim of not being "a man of straw" raises sufficient doubt regarding his financial capability to compensate the Applicant upon the success of the Appeal.
- e. Whether the Respondent's actions, including selling properties in contravention of the orders for status quo, warrant the granting of the stay orders

#### **Whether the Applicant's Application was filed in a timely manner and in good faith**

8. The learned counsel submitted that the Applicant filed the present application following the Judgement delivered on 11<sup>th</sup> April 2025 and she engaged new counsel and sought certified copies of the judgement before filing to ensure procedural compliance as a demonstration that the application was filed without inordinate delay as required by law and judicial principles. Reliance was put in the case of Eric Macharia Kiguoya Vs Jubilee Insurance Company of Kenya Limited (Civil Appeal No. 182 of 2025 where the court held that delay must be justifiable and reasonable based on the facts of the case. Learned counsel thus submitted that the Applicant acted diligently and within a reasonable timeframe, thus entitling her to relief.

#### **Whether properties subject to cautions can lawfully be sold or disposed off**

9. The learned counsel submitted that the Respondent has attached sale agreements for two properties Eldoret Municipality Block XX (King'ong'o) XXXX and Eldoret Municipality Block XX (King'ong'o) XXXX which are both subjects to cautions, preventing their sale or transfer until such cautions are lawfully lifted. She stated that section 71 of the [Land Registration Act](#) provides that once a caution has been entered into the register, no dealings in the land may proceed without the caution being lifted and made reference to the case of Kimani Vs Njeri & 3 Others (ELC Case 10 of 2022) [2023] KEELC 17771. She finally submitted that the Respondent's reliance on Sale Agreements involving cautioned properties is illegal and an attempt to circumvent the provision of section 71 of the [Land Registration Act](#) and his actions subvert the purposes of the law, which seeks to protect the interests of all the parties with claims over the property.

#### **Whether Sale Agreements can be used as the sole evidence for a Sale Agreement of Land and the Admissibility of unstamped Sale Agreements.**

10. The Learned Counsel submitted that it is trite law that a Sale Agreement, while an important document in any transaction cannot independently constitute conclusive proof of a valid sale of land and proof of such a transaction requires additional elements including:
  - a. A duly executed and signed transfer document, lodged with the Registrar of lands as required under sections 38 and 44 of the [Land Registration Act](#) 2012.
  - b. Certified evidence that the sale proceeds were paid in full, such as bank account statements or other credible financial records.
11. The learned counsel submitted that in the absence of these critical components, the legality and validity of the alleged sale are called into question, and the Sale Agreement alone cannot suffice as evidence of ownership transfer. Reference was made to section 19 of the [Stamp Duty Act](#) and the case of Kimani Vs Langata Realty Limited; Kimani & Another (Defendant) [2023] KEELC XXXX755.



12. She further submitted that section 45 of the [Land Registration Act](#) underscores that transfer and proof of ownership can only be effected through lodgment of duly executed transfer forms with the land registry. She also stated that in the present case, the Respondent has not provided evidence of such compliance and without this, the transactions alleged by the Respondent amount to mere assertions unsupported by law. It was the learned counsel's final submission that reliance on the unstamped sale agreements, without clear proof of payment such as certified account statements undermines the credibility of the Respondent's claim and bare sale agreements, especially unstamped ones do not constitute sufficient proof of the alleged sales or transfer of ownership.

#### **Whether the Respondent's conduct raises questions of Financial capability ("Man of Straw")**

13. The Learned Counsel submitted that the Respondent claims that he is not a "man of straw" implying that he has sufficient financial resources, yet he has failed to provide credible evidence of his financial standing. She further noted that in paradox, the Respondent's actions are those of a drowning man who clutches at a straw meaning as per the Cambridge Dictionary insinuates someone who is in a very difficult situation and makes a desperate attempt at saving himself and that the Respondent's haste to dispose of the properties and lack of transparency raises questions about his current financial stability and his ability to compensate the Applicant should the Appeal succeed.

#### **Whether the Respondent's Actions warrant the Granting of Stay Orders**

14. The Applicant's learned counsel submitted that the Respondent has blatantly acted in contravention of the orders issued by Hon. P.O. Kiage on 22<sup>nd</sup> November 2022 which directed the parties to maintain status quo and that the Respondent's sale of two properties, being Eldoret Municipality Block X/XXXX and Block X/XXX illustrates his disregard for the court's authority amplifying the urgency of an order to stay further execution. Reliance was made in the case of Wanyama (Suing on behalf of the Estate of Henry Wanyama Khaemba (Deceased) Vs Mulaya & 2 Others [2023] KEELC 22006) where the court emphasized the importance of preserving the status quo during litigation to protect the rights of all parties, pending the final determination of disputed issues. It was the learned counsel's final submission on this issue that in consideration to the Respondent's conduct of disposing of portions of matrimonial property despite court orders, it is imperative that the court intervenes to preserve the remaining properties.

#### **Respondent's Written Submissions**

15. The Respondent filed written submissions dated 8<sup>th</sup> May 2025. The Respondent was represented by learned Counsel Mr. Kagunza who listed 2 issues for determination as follows;
- a. Whether the applicant has met the threshold for grant of stay orders pending appeal?
  - b. Whether the application has been overtaken by events
16. The Learned Counsel submitted that for the applicant to be granted stay pending Appeal, Order 42. Rule 6 of the Civil Procedure Rules (2010) provides that the applicant has to demonstrate:
- a. That substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay.
  - b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding has been given by the applicant.
  - c. The intended appeal is arguable and if stay is not granted the same will be rendered nugatory.



17. The learned counsel submitted that in the case of Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others (2013) eKLR, the court observed that for an applicant to succeed in an application for stay pending appeal, the applicant must demonstrate that his intended appeal or appeal, as the case may be, is arguable, in addition, he must demonstrate that the appeal would be rendered nugatory if stay is not granted and the appeal eventually succeeds.

**Whether the intended appeal is arguable and if stay is not granted the same will be rendered nugatory.**

18. The learned counsel moreover submitted that the applicant has not demonstrated that the intended appeal raises arguable issues and that the applicant's appeal has no merit and/ or probability of success, the same is frivolous and vexatious and we urge this Honourable court to find so. Furthermore, it was the counsel's submission that on the nugatory aspect, the applicant argues that the respondent intends to dispose of the matrimonial properties and that sale of the properties will destroy the substratum of the appeal and will render the same nugatory. Reference was made in Stanley Kangethe Kinyanjui vs. Tony Ketter & Others (2013) eKLR the court held that "in considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances." In the same judgment the court defined nugatory as follows:
- a. The term 'nugatory' has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
  - b. Whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.
  - c. Where it is alleged by the applicant that the appeal will be rendered nugatory on account of the respondent's impecuniosity, the onus shifts to the latter to rebut by evidence the claim."
19. The learned counsel also submitted that what the applicant seeks to stay is the sale of the of the matrimonial properties and it be should be noted that the respondent has no intention of interfering with properties that were awarded to the applicant. He further stated that following the judgement of this Honorable court of 11<sup>th</sup> April 2025, the Honourable court distributed the matrimonial properties to the applicant and the respondent. He further submitted that even if the appeal may succeed, the respondent will be found deserving of several properties forming part of the matrimonial properties and even if the respondent is found to deserve less than he was awarded by this court on appeal, the applicant can reasonably be compensated by an award of damages. It was his closing submission on this issue that the applicant has not satisfied the principle that the appeal will be rendered nugatory if the order sought is not granted, should his appeal succeed.

**Whether substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay.**

20. It was the learned counsel's submission that even if the property is sold, the applicant will not be left without a remedy and that the applicant has not pleaded and/or claimed that the respondent is a man of straw who cannot be able to compensate her in case the stay is not granted and the appeal succeeds after the property is sold. Moreover, it was submitted that the applicant has not shown that it stands to suffer irreparable harm and/ or substantial loss if the execution is allowed to proceed.
21. The Learned counsel furthermore submitted that the general rule is that the court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances and that the intended



appeal has also been filed after inordinate delay which delay has not been satisfactorily explained and thus the application should be dismissed with costs.

#### **Whether the applicant has offered such security for the due performance of the decree hereto**

22. The Learned Counsel submitted on this issue that they urge this Honourable court not to deny the respondent being successful litigant in this, matter the fruits of litigation and that the right of appeal must be balanced against an equally weighty right of the respondent to enjoy the fruits of the judgment delivered in his favour.
23. The learned counsel submitted that the applicant in this instant application prays that the requirement for security under order 42 Rule 6 of the Civil Procedure Rules 2010, be waived, as the subject matter is matrimonial property and the applicant is in a vulnerable financial position. He noted that to this regard, it follows that the applicant has not and is not willing to offer any meaningful security which shows that the instant application has been made by a party who wants to have her cake and eat at the same time. He also submitted that it is not in dispute that costs have been incurred by the respondent have thereby compounding the Respondent substantial loss incurred.

#### **Whether the application has been overtaken by events**

24. The learned counsel submitted that this instant application has already been overtaken by events given that land reference No's. Eldoret Municipality Block XX(Kinq'onq'o)XXXX, Eldoret Municipality Block XX(Kinq'ong'o)1XXX and Trans Nzoia/Kipsoen/XXXX have been sold before the order of status quo was issued by this Honourable court on 28th April 2025. He also stated that the decree hereto has been substantially executed thus granting of stay with regard to the partially executed part of the decree wont serve any purpose and the Honourable court will be issuing orders in vain and/ or for academic purpose.
25. It was the learned counsel's final submission that it is therefore only fair just and equitable in light of the foregoing submissions that the application be dismissed with costs since it is not merited and made reference to the case of WK v JGK (Civil Application E042 of 2024) [2025] KECA 592 (KLR) 14 March 2025.

#### **Analysis and Determination**

26. Having carefully considered the competing arguments advanced by both parties, together with the supporting affidavit evidence and legal authorities cited, this court proceeds to examine whether the applicant has satisfied the statutory prerequisites for the grant of a stay of execution pending appeal. The determination hinges on the application of established legal principles governing such applications, particularly the mandatory conditions under Order 42 Rule 6 of the Civil Procedure Rules, viewed against the unique circumstances of this matrimonial property dispute.
27. Grant of stay of execution pending appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules, the relevant part of which states as follows:
  - “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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) ...
- (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) ...
- (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.”

28. For an application seeking a stay of execution of a decree or order pending appeal to succeed, the applicant must demonstrate compliance with the requisite conditions stipulated under Order 42 Rule 6(2). These essential requirements include: firstly, establishing that the applicant would suffer substantial loss in the absence of the requested order; secondly, demonstrating that the application has been filed without undue delay; and thirdly, providing adequate security as directed by the court to guarantee performance of any decree or order that may ultimately bind the applicant. This position was affirmed in the case of Antoine Ndiaye vs. African Virtual University [2015] eKLR.
29. The Court of Appeal in *Butt vs. Rent Restriction Tribunal* [1979] established the principles that guide courts when determining applications for stay of execution pending appeal. The court emphasized that while the authority to grant or deny such applications lies within the court's discretion, this discretion must be exercised in a manner that does not frustrate the appellate process. The court further articulated that the fundamental principle governing such decisions is that, absent any compelling countervailing factors, a stay should ordinarily be granted to ensure that any potential success on appeal is not rendered meaningless by the execution of the original order. Additionally, the court held that a judge should not decline to grant a stay on the basis that alternative remedies might be available to the applicant upon conclusion of the proceedings, provided there exist valid grounds for granting the stay.
30. The court, in *RWW vs. EKW* [2019] eKLR, addressed its mind to 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.”

31. Against this legal backdrop, the facts before this court reveal a matrimonial property dispute where the applicant seeks to stay execution of a decree dated 11<sup>th</sup> April 2025 pending her intended appeal. The application, filed on 25<sup>th</sup> April 2025, seeks to preserve matrimonial properties from further disposal by the respondent, who has allegedly already sold two properties (Eldoret Municipality Block 9/XXXX and Block 5/XXX) in apparent contravention of earlier status quo orders. The respondent contends that the application lacks merit, has been filed with inordinate delay, and has been overtaken by events given that certain properties have already been disposed of before the interim status quo order was issued on 28<sup>th</sup> April 2025. Central to the dispute is whether the applicant can demonstrate substantial loss, timely filing, and willingness to provide security, while the respondent maintains his right as a successful litigant to enjoy the fruits of his judgment without unwarranted interference.
32. In making a proper finding, the court must then examine whether the applicant has satisfied the mandatory conditions prescribed under Order 42 Rule 6(2) of the Civil Procedure Rules. These conditions operate cumulatively, not alternatively, meaning failure to establish any single requirement would be in disadvantage to the Applicant. I will therefore proceed to examine each limb sequentially while remaining cognizant of the overarching discretionary nature of the relief sought.
33. The first and perhaps most critical requirement is whether the applicant stands to suffer substantial loss should the stay be denied. In *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR, the court emphasized that substantial loss transcends mere financial inconvenience, stating that:

“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.”
34. The applicant contends that the continued disposal of matrimonial properties would render her intended appeal nugatory, particularly given that property is unique and cannot be replaced by monetary compensation. She points to the respondent's admitted disposal of two properties as evidence of his intention to systematically alienate the matrimonial estate before the appeal can be determined. The applicant's counsel has further argued that the respondent's haste in disposing of properties, despite existing cautions on some of them, demonstrates a deliberate attempt to defeat her appellate rights.
35. The respondent, conversely, argues that the applicant has failed to demonstrate any substantial loss, maintaining that he is not "a man of straw" and is capable of compensating her should the appeal succeed. He contends that the properties were lawfully sold and that the applicant retains adequate remedies through damages. The respondent further argues that the applicant has been awarded several properties in her own right and therefore cannot claim to face destitution.



36. This court finds merit in the applicant's position. The nature of matrimonial property is inherently unique, often carrying sentimental and historical value that cannot be quantified in monetary terms. Unlike commercial assets that can be readily replaced through monetary compensation, matrimonial properties represent irreplaceable family heritage and emotional investment accumulated over years of marriage. The systematic disposal of such properties creates an irreversible situation where a successful appeal would yield only pyrrhic victory. Furthermore, the respondent's acknowledged disposal of properties during the pendency of these proceedings demonstrates a real and continuing threat to the remaining matrimonial estate. The court is particularly mindful that once matrimonial property passes to third parties, recovery becomes practically impossible regardless of the appeal's outcome, thereby effectively nullifying the applicant's appellate rights. In these circumstances, the potential for substantial and irreparable loss is clearly established.
37. The second limb requires that the application be made without unreasonable delay. The respondent contends that the fourteen-day period between the delivery of judgment on 11<sup>th</sup> April 2025 and the filing of the application on 25<sup>th</sup> April 2025 constitutes inordinate and inexcusable delay. The applicant explains this delay as being necessitated by the need to engage new counsel and obtain certified copies of the judgment to ensure procedural compliance.
38. In *Eric Macharia Kiguoya vs. Jubilee Insurance Company of Kenya Limited* (Civil Appeal No. 182 of 2025) as cited by counsel, the court held that delay must be assessed based on reasonableness and justification in the particular circumstances of each case. The court finds that a fourteen-day period, in the context of matrimonial proceedings where parties often require time to engage counsel and obtain necessary documentation, cannot be characterized as unreasonable. The applicant's explanation for the delay is credible and demonstrates diligence rather than dilatory conduct.
39. The third requirement concerns the provision of security for due performance of the decree. The applicant seeks waiver of this requirement, citing her vulnerable financial position and the matrimonial nature of the subject matter. The respondent opposes this, arguing that the applicant's unwillingness to provide security demonstrates that the application is frivolous and designed to frustrate execution.
40. The authorities establish that the requirement for security serves to protect the successful litigant's interests while preventing the abuse of the appellate process. However, courts have recognized that in matrimonial causes, rigid application of this requirement may work injustice. In *RWW vs. EKW* [2019] eKLR, the court observed that "in the circumstances of this cause and it being a matrimonial cause, the court can grant stay of execution of its orders without demanding that the Applicant furnish the Court with security for the due performance of the orders."
41. Given the matrimonial nature of these proceedings and the applicant's demonstrated financial constraints, this court exercises its discretion to waive the security requirement. The unique nature of matrimonial property disputes, where parties' financial capabilities are often interdependent and where one party may be economically disadvantaged, justifies this approach. Moreover, the risk of abuse is mitigated by the court's finding that the application has substantive merit.
42. The court must ultimately balance the competing interests of both parties. The respondent, as a successful litigant, is entitled to enjoy the fruits of his judgment. However, this right is not absolute and must be weighed against the applicant's legitimate right to pursue her appeal without the subject matter being dissipated. The respondent's conduct in disposing of properties despite court orders maintaining status quo tilts the balance in favor of preserving the remaining assets pending the appeal's determination.



43. The court is satisfied that the applicant has demonstrated substantial loss that would result from continued execution of the remaining portions of the decree, that the application was filed without unreasonable delay, and that the circumstances justify waiving the security requirement. While it is acknowledged that certain properties have already been disposed of and cannot be subject to a stay order, this does not diminish the need to preserve the remaining matrimonial assets from further dissipation. The validity or propriety of the completed sales, if contested, is a matter that can be pursued through appropriate proceedings in the proper forum and does not fall within the purview of this application. The interests of justice favor preserving the status quo with respect to the undisposed properties to ensure that the appeal, if successful, is not rendered an empty victory as to the remaining estate.
44. In the result, this court makes the following orders:
- a. The application dated 25<sup>th</sup> April 2025 is hereby allowed.
  - b. Execution of the decree dated 11<sup>th</sup> April 2025 is hereby stayed with respect to all remaining undisposed matrimonial properties pending the hearing and determination of the applicant's intended appeal.
  - c. The respondent is hereby restrained from disposing of, alienating, encumbering, or otherwise diminishing the value of any remaining matrimonial property awarded to him under the said decree that has not yet been disposed of, pending determination of the appeal
  - d. The requirement for security under Order 42 Rule 6 of the Civil Procedure Rules is hereby waived.
  - e. The costs of this application shall abide the outcome of the intended appeal.
45. It is so ordered.

**DATED AND DELIVERED VIA CTS ELDORET THIS 12<sup>TH</sup> DAY OF JUNE 2025**

.....

**R. NYAKUNDI**

**JUDGE**

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