



REPUBLIC OF KENYA



SK v NSK (Civil Appeal E071 of 2023) [2024] KEHC 993 (KLR) (9 February 2024) (Ruling)

Neutral citation: [2024] KEHC 993 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E071 OF 2023
JRA WANANDA, J
FEBRUARY 9, 2024**

BETWEEN

SK APPELLANT

AND

NSK RESPONDENT

RULING

1. The Application before Court is the Appellant’s Notice of Motion dated 3/05/2023 and filed on 4/05/2023. It seeks the following orders:
 - i. [.....] Spent
 - ii. [.....] Spent
 - iii. That this Honourable Court be pleased to stay execution of the orders made on 12th April 2023 and 23rd February 2023, respectively, in Eldoret Kadhi’s Court Matrimonial Cause No. E001 of 2003: NSK v SK until further orders of this Honourable Court.
 - iv. That this Honourable Court be pleased to stay the execution of the orders made herein on 12th April 2023 pending the hearing and determination of this Appeal.
 - v. That the costs of this Application be provided for.
2. The Application is filed through Messrs Kamau Kuria & Co. Advocates and is expressed to be brought under “Order 42 Rule 6 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the *Civil Procedure Act*. It is premised on the grounds stated on the face of the Application and is supported by the Affidavit sworn by the Appellant, SK.
3. In the Affidavit, the Appellant deponed that he is a Professor of Medical Education and Professional Development at [Particulars Withheld] University, that the Respondent is his wife who has never gone to school or taken up paid employment since he married her before a Kadhi in Kibera, that he was



formally a Christian but converted to Islam before the marriage, he met the Respondent for the first time in 1974 when he was working for the Ministry of Health at Moyale where the Respondent was born, that she is a member of the Boran community, after the marriage they got 2 children, a daughter born in 1998 and a son, that their friendship lapsed after he left Moyale and he only saw her next at Kenyatta National Hospital where they met and their friendship rekindled and ripened to marriage in 1986.

4. He deponed further that he has lodged this Appeal against the decision of the Kadhi Court in respect to the Ruling delivered on 12/04/2023 which incorporates another order made on 23/02/2023, that there was a Petition and a counter-Petition, the Respondent filed an Application dated 20/02/2023 before the Kadhi's Court but did not serve the Appellant with copies of the items referred to in her List of documents, that the Respondent did not have an Advocate at that time and only much later appointed the firm of R.M. Mutiso & Co. Advocates to act for her, that the Ruling was delivered on 12/04/2023 as opposed to 11/04/2023, and that he has applied for a copy thereof but has not been supplied with the same.
5. The Appellant deponed further that there are two High Court decisions – Malindi High Court Divorce Cause No. 5 of 2016: MSR v NAB [2017] eKLR and Marsabit High Court Matrimonial Cause No. 1 of 2018: AWA versus HDD [2018] eKLR – which held that a Kadhi's Court has jurisdiction to entertain disputes touching ownership of property by Muslim spouses, that according to Muslim law there is no presumption that marriage confers on a spouse rights over properties acquired by the other and that each spouse must prove his or her contribution, that no Court has jurisdiction to make final determinations on respective rights of parties through an interlocutory Ruling as was held in Court of Appeal Civil Appeal No. 144 of 1988: Jimba Credit Limited versus Githunguri, the order made on 12/04/2023 to the effect that the parties share rent equally is based on a determination that the Respondent is a co-owner of the properties which the Appellant alone acquired, as held in Republic versus Kadhi [1973] EA 153, the Kadhi has no power to order a spouse to live with the other against his/her choice and that this Court has power to preserve the subject matter of an intended appeal by staying execution of orders given by the lower Court.
6. The Appellant added that the Respondent's Application before the Kadhi was not supported by any documents as exhibits, that neither the Respondent's Petition before the Kadhi nor the Application dated 20/02/2023 gave Land Reference numbers of properties she claims interest in, that he filed both Answer to the Petition and a Replying Affidavit to the Petition in which he annexed a copy of a bank statement which shows that on 12/05/2021 the Respondent withdrew from a joint account a sum of Kshs 5,779,612/- which the Kadhi did not take into account, and that the effect of the said orders is to compel him to live with the Respondent. The Appellant then stated that he is at a loss as to how the Respondent drew up the Petition and the Application dated 20/02/2023 and prosecuted it as she is illiterate and did not have an Advocate and that the instant Application is of great urgency as he has been ordered to receive the Respondent who deserted him 2 years ago.

Respondent's Replying Affidavit

7. In opposing the Application, the Respondent swore the Replying Affidavit filed on 8/06/2023 through Messrs R.M. Mutiso & Co. Advocates. She deponed that the Appellant has not demonstrated any substantial loss that he is likely to suffer should the orders sought be refused as the orders made by the Kadhi were just interim orders pending the dissolution of marriage and were not final orders, that in any case, the money that was paid by the Appellant was meant for the benefit of the entire family and not just for the Respondent alone and especially towards the welfare of one of the issues of the marriage who has a medical condition which requires constant medical attention.



8. He added that the Appellant has not demonstrated any likelihood of the appeal being rendered nugatory should the stay orders be refused given that the orders granted are monetary in nature and are quantifiable and capable of being refunded in the unlikely event that the appeal succeeds, that he is financially capable of refunding any amount received from the rental income as she is a business lady who has supported the Appellant over the years through the sale of clothes and other different commodities, and that no security has been offered by the Appellant in satisfaction of the conditions for grant of the orders of stay as required by law.
9. She deponed further that the Application is an attempt to frustrate the Respondent so that she can give up on pursuing her right and the ongoing matrimonial Cause, that she stands to be prejudiced should the orders sought be granted taking into account the loss that she has already incurred and continues to occur on account of the Appellant's actions which necessitated the Matrimonial Cause the Appellant having chased her from their matrimonial bed and having denied her access to her share/benefits of the proceeds of rent, that the properties from which rent is collected are jointly owned while some are in her name but that she has been denied access thereto as the Appellant is in full control thereof. She then listed 7 properties and stated that she took out loan facilities to purchase some of the properties and assisted the Appellant to ease the burden by meeting all other family responsibilities of providing for food, clothing and school fees for the children, she cannot just be wished away and she is entitled to benefit from the fruits of her sweat.

Appellant's Further Affidavit

10. The Respondent swore the Further Affidavit filed on 17/07/2023. In summary, he deponed that the Respondent has sworn a false Affidavit which lays bare the fraud which the Respondent perpetrated against him before the Kadhi's Court and wants to repeat before this Court. He added that the Respondent's Affidavit is based on a misapprehension of both law and human nature, namely, that a person can fail to engage in gainful employment and acquire property rights in property acquired by the other, that this proposition was rejected by the House of Lords in various cases, and by the Kenyan Court of Appeal in the case of Kamore v Kamore [2000] and Icharia v Icharia [2007]. According to the Appellant, it is the heresy referred to which has informed the Respondent's action since 12/05/2021 when she withdrew Kshs 5,779,512/- from a joint account being proceeds of a policy that had been taken out by their daughter who died in Australia in 2020, that is the same heresy that the Respondent has based her claim for half the rent.
11. He deponed further that where a property is acquired with money provided by one spouse but conveyance made in joint names, the one who did not contribute the purchase holds the legal estate in trust for the one who provided the money, where one spouse contributes more than the other, the extent of ownership depends on the contribution made as in the case of Stack v Dowden, that since the Respondent has never made any contribution to the purchase price of the various properties claimed, she has no interest which the law can protect, as was held by the Court of Appeal of England in the case of Bull v Bull [1955] QB 232, the rights of a co-owner are determined by ones investment and it follows that where a spouse has not invested money she is not entitled to any rent yielded by a property purchased by the other.
12. The Appellant further stated that he married the Respondent under customary law and the marriage was converted into a Muslim one in 1992, that he started his career as a Clinical Officer in 1976 but moved to university teaching after he obtained a Bachelor's Degree in Canada and a Masters Degree from the United States America (USA), that he was a student at University in Canada between 1993 and 1996 and USA between 1998 to 1992, that the Respondent joined him in USA but she never worked as has been the case when she has lived in Kenya, he served as a post-doctoral graduate in USA



between 1996 and 2004, he was employed by Moi University in 1983 and worked until a month before when he retired after 30 years of service, that he was on salary during all his studies from 1980s, since he was employed he has had two sources of income, namely, salary and consultancies, that the Respondent did not contribute even a single cent towards acquisition of the properties, that during the marriage he alone bought other properties and had them registered in his name, that this suit concerns the properties which he has bought but caused to be registered in the Respondent's name, the Respondent has been a housewife and at the time that she married her she was already a mother of 2 children, the Respondent has not inherited any property from her parents, he brought up the Respondent's 2 children as her own and educated them and that both 2 children are daughters and married adults who are self-reliant.

13. The Respondent proceeded to give a long description of the identity and current status of the children and also a lengthy narrative and description of properties including an explanation on how they were acquired and the nature of developments thereon. He then stated that since he developed the houses, he alone has collected rent from those that are let out to tenants. He then observed that the Respondent has not described the alleged businesses she carries on or the alleged income the businesses yield.

Comments on Further Affidavit

14. At this point I must make a few comments. When I granted the Appellant leave to file a Further Affidavit, the logic was to give the Appellant an opportunity to briefly fill-in and clarify what had been raised in the Replying Affidavit. I therefore only expected, at most, a brief 1 or 2 paged-Affidavit. Instead, the Further Affidavit filed is a lengthy, voluminous and verbose narrative ranging up to 49 paragraphs. Together with the exhibits (most wholly unnecessary at this stage of an interlocutory Application), it runs up to a whopping 141 pages! It is even longer than the initial Supporting Affidavit. It is for all intents and purposes a duplication, repetition and fresh re-argument of the matters already sufficiently covered in the initial Supporting Affidavit. It also sounds more like final Submissions, rather than an Affidavit. I say so since it contains lengthy technical legal arguments of law complete with case law and authorities as well as quotes from such authorities.
15. Litigants and Counsels must appreciate that Courts have limited judicial time to dispense justice. To assist Courts, parties ought to therefore dwell more on brevity and articulation and not length and volume. It should be about quality, not quantity. I would have struck out and expunged the Further Affidavit from the record but in the interest of justice I will let it remain and proceed to consider it in my decision.

Hearing of the Application

16. The Application was canvassed by way of written submissions. Pursuant to directions given, the Appellant filed his Submissions on 17/07/2023 while the Respondent filed on 10/11/2023.

Appellant's Submissions

17. Counsel for the Appellant submitted that the order appealed against contravenes the right to liberty, that the Kadhi Court exceeded the jurisdiction of a Court in interlocutory proceedings, that the Court granted to the Respondent prayers which she did not seek and that the order is nebulous and illegal. He then recited the facts and history of the litigation.
18. Counsel then added that a Court in which an appeal has been lodged has jurisdiction to stay the execution of orders under Order 42 Rule 6 of the Civil Procedure Rules if the Appellant can demonstrate that he will suffer substantial loss if the relief is not granted. He cited the case of African



Safari Club vs Safe Rentals Ltd, Court of Appeal Civil Appeal No. 53 of 2010. He further submitted that the law governing properties acquired by spouses is the same irrespective of one's faith. He cited the case of Echaria v Echaria [2007] Vol. 1 KLR 469 and submitted that the Respondent has not given any evidence of financial contribution to the properties she is laying claim to, and that the Kadhi's Court acted on mere claim and speculation. On burden of proof, he cited Section 107 of the Evidence Act.

19. Further, Counsel submitted that the Petition before the Kadhi's Court is based on the legal hearsy that merely because the property is registered in the names of both spouses, then they own the property equally. He again cited the case of Stack v Dowden [2007] 2 ALL ER 929 and stated that although the name of the Respondent appears in the documents of title, she does not explain where she got the money to pay for them. He also cited the case of Muthembwa v Muthembwa [2002] 1 KLR 92 and also Karanja v Karanja and submitted that the right to rent is derived from ownership of property and even where a spouse has made a contribution, the rent payable to him or her would depend on the extent of contribution. He again cited the case of Bull v Bull 91955) 1QB 234.
20. Counsel submitted further that the Kadhi's Court exceeded jurisdiction of a Court in interlocutory proceedings, its jurisdiction is to preserve the subject of a suit, not to determine the issues finally the way it did. He cited the case of Jimba Credit Ltd vs Githunguri, Court of Appeal Civil Appeal No. 144 of 1988.
21. Counsel also referred to Order No. 4 of the Kadhi's Court decision directing the Appellant to immediately reinstate and give the Applicant unconditional access to the matrimonial home. According to Counsel, this amounts to compelling the Appellant to live with the Respondent and it violates the Appellant's right under Article 29 of the Constitution – the right to liberty. He cited the case of R vs Kadhi ex parte Nasreen [1973] EA.

Respondent's Submission

22. Counsel for the Respondent submitted that from the onset the fact that parties herein are husband and wife who have lived together for over thirty (30) years and have jointly worked towards acquiring the wealth that is now the subject of the Application, that some of the properties are jointly owned by the parties while some are in the sole names of the individual parties herein but the Appellant is the one in full control thereof, on account of the marriage disagreement, the Appellant kicked out the Respondent and has made it very difficult for the Respondent to access the matrimonial home and generally to survive hence the matrimonial cause instituted before the Kadhi, the Appellant is not deserving of the orders sought for non-compliance with Order 42 Rule 6 of the Civil procedure Rules as read together with Rule 87 of the Kadhi's Court (Procedure and Practice) Rules 2020.
23. Counsel added that the Appellant has not met any of the conditions outlined to warrant the grant of the orders, that the Appellant has not demonstrated what substantial loss he will suffer if the orders of stay of execution are not granted, that the Appellant participated in the proceedings before the Kadhi's Court and was represented by Counsel while the Respondent representing herself, that the Respondent later appointed Counsel to represent her, that the Appellant was duly informed of the dates the matter came up before the Kadhi but chose not to attend Court when the Application dated 20/2/2023 was canvassed on 12/4/2023, that in the instant Application the Appellant has not stated what loss/or prejudice he would suffer if the orders sought are denied, the Appellant has not demonstrated any loss that will result should the subordinate Court's orders be given effect, the Respondent is a co-owner of the properties whose rental income was ordered by the Court to be shared between the Appellant and the Respondent, nowhere in the Application has the Appellant alleged or availed evidence to the effect that the Respondent is irresponsible and cannot be trusted with finances or that she would waste resources.



24. Counsel submitted further that on account of the care and management exhibited by the Respondent the family/union was able to acquire the properties the subject of these proceedings and therefore entitled to benefit from the rental proceeds, granting the orders sought by the Appellant will result to rendering the Respondent homeless and cashless which will lead to serious prejudice and miscarriage of justice, that the grant of the orders sought will not only cause hardship to the Respondent but will lead to the disintegration of the special unit of the family, the Respondent is the one who takes care of the issues of marriage and if denied access to the home and finance, the children will also be barred from their home which move this Court has to frown at, grant of the orders sought will actually result to serious loss on the part of the Respondent as opposed to the Appellant as he has not made any effort to demonstrate why he thinks he deserves the order sought and what loss he is likely to suffer should the same be denied, the Appellant will suffer no loss should the orders sought be declined, it will be in the interest of justice to refuse the Application so that both parties are on the same level during the litigation in the Petition pending before the Kadhi Court, this court ought to take cognizance of the emotional trauma the Respondent is already subjected to on account of the selfishness of the Appellant, the issues which the Appellant/Applicant has raised in the instant Application are issues which ought to be canvassed in the appeal and not in the instant application and that the law is very clear on what the Court's decision is to be anchored upon when determining an application such as the instant one.
25. Counsel added that on account of the Respondent's contribution to the family, the orders issued by the Kadhi ought to be sustained. He cited the case of Karanja vs. Karanja and submitted that a woman's contribution towards acquisition of a property can be direct or indirect where she meets household and other expenses including education of their children which the husband would otherwise have to pay, that the Respondent has demonstrated how she contributed to the acquisition of the properties, she cannot be wished away after as having not contributed anything after more than 30 years of marriage, she has demonstrated that some properties were jointly owned hence the reason why she requested that the rent proceeds be shared equally, the Respondent will be prejudiced if the orders sought are granted as she also has a stake in the properties and deserves a share of the proceeds pending the dissolution of the marriage, that the Respondent has also demonstrated that one of the issues of marriage has a medical condition which requires constant medical attention every now and then hence the reason why she prays that the orders sought for stay of execution are not discharged so as to prevent a miscarriage of justice from being occasioned as an innocent child must not suffer on account of the differences that their parents are facing.
26. Counsel then referred to the Appellant's statement that he married the Respondent when she had already sired 2 children out of wedlock and accepted the two children whole heartedly as his children and even educated them. Counsel submitted that the Appellant cannot now distance himself from his parental responsibilities especially the one who has a medical condition hence the Respondent's position that the orders of the Kadhi on rent proceeds be maintained to cater for the medical needs of the issue. He added that the Respondent has also demonstrated that no prejudice will be occasioned if the rent proceeds are shared since she is capable of refunding the amount that will have been paid by the Appellant if the appeal is successful, that the Respondent has demonstrated that she is a business lady who has been doing business throughout the years and has been able to make immense contribution in her marriage, that in as far as the parties sharing their matrimonial home is concerned the Respondent is no longer living with the Appellant under the same roof as the Appellant has become very hostile and the environment is no longer conducive for the two of them to live together hence the Respondent has no problem living separately with the Appellant as long as her belongings are not interfered with pending the dissolution of the marriage, that although the Appellant has alleged that the Kadhi's orders are illegal, nowhere in the application has he demonstrated the illegality but that in any event, the



legality and/or illegality would not be an issue to be considered in an application such as the instant one but on appeal and that the Appellant has not demonstrated any likelihood of the appeal being rendered nugatory should the stay orders be refused.

27. Counsel also submitted that the Appellant has not offered any security as required by law to warrant the grant of the orders sought, that it is thus clear that the Appellant has done little to satisfy the Court under this limb and as such the Application must fail, that the conditions set by law are not for decorative purposes but a party who wishes to invoke the court's discretion must meet all the conditions.

Analysis and Determination

28. I have considered the Application, Affidavits, Submissions and authorities filed and I find that the issue that arises remain for determination to be the following “whether an order of stay of execution pending appeal should issue”.
29. Despite the issue herein being as straightforward as stated, the parties, particularly, the Appellant have deviated from this simple issue and submitted widely on extraneous matters that are irrelevant at this stage in an Application of this nature. The Appellant has faulted the Kadhi's Court of exceeding its jurisdiction by delving into substantive matters at an interlocutory stage and making final determinations at an interlocutory stage. However, looking at the Appellant's Affidavits and Submissions, it is clear that his legal team too fell into the same error by exhaustively submitting on matters that are to be determined by the Kadhi's Court after full trial. This being an interlocutory Application, the Court will obviously be exceeding its mandate were it to accede to the Appellant's invitation and thereby delve into wholly extraneous matters outside its mandate.
30. Coming back to the issue before the Court, the principles guiding grant of stay of execution pending Appeal are well settled. In this respect, Order 42 Rule 6(2) of the Civil Procedure Rules 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.”

31. From the foregoing, it is clear that an applicant for stay of execution pending appeal must satisfy the above conditions, namely, (a) that he will suffer substantial loss unless the order is granted, (b) the Application has been made without unreasonable delay, and (c) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given (see the decision of Hon. Justice F. Gikonyo in *Antoine Ndiaye v African Virtual University* [2015] eKLR).

32. As to what encompasses “substantial loss”, Hon. Justice F. Gikonyo, again, and although he was dealing with an Application for stay of a money decree, made the following still remarks, still relevant and applicable herein, in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR:

“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.”

33. Further, in the Court of Appeal case of *Butt v Rent Restriction Tribunal* [1982] KLR 417, the following guidelines were given:

“The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. 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 that appeal court reverse the judge’s discretion. 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. 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.”

34. The Appellant submits that he is aggrieved by the Kadhi’s Court’s orders, which he argues, violates his right to liberty insofar as it compels him to stay with the Respondent in his home and also compels him to share rent from his properties with the Respondent at 50:50 proportion until the hearing and determination of the suit. On her part, the Respondent argues that she will be rendered homeless should the Kadhi Court’s orders be stayed as the Appellant had forced her out of their matrimonial home.

35. On the issue of staying together, I note that the Respondent’s Counsel in his Submissions submitted as follows:

“that in as far as the parties sharing their matrimonial home is concerned the Respondent is no longer living with the Appellant under the same roof as the Appellant has become very hostile and the environment is no longer conducive for the two of them to live together hence the Respondent has no problem living separately with the Appellant as long as her belongings are not interfered with pending the dissolution of the marriage”

36. I, too, do not believe that it would be prudent to force the parties, while in the middle of the protracted divorce and matrimonial litigation, to live together under one roof. Considering the apparent hostility between the parties, compelling them to live together will be to create a dangerous environment which may lead to unimaginable negative consequences. In any event, the Appellant concedes that she has been living away from the matrimonial home because of such hostility even though she states that she never left voluntarily but was forced out by the Appellant. It may not really matter how she left the matrimonial home at this stage, what is relevant is that she has been living separately and surviving on her own. I would not therefore change that status quo and would rather let it prevail until this Appeal is heard and determined.



37. In the case of HGE v SM [2020] eKLR, which was on almost all fours as the instant one, Musyoka J held as follows:

“ 14. The court is called upon to look at the interests of both parties. From the records annexed in the application, it is clear that the parties herein are to dispute as to the existence of a marriage relationship between them. The same is subject to appeal. It should also be noted that the respondent in her pleadings stated that she was thrown out of her home in the year 2018, that she has been putting up with her relatives. The application and the pleadings reveal a strain in their relationship, and the fact that the respondent is not staying in the matrimonial home. Despite stating that she will be rendered homeless, the respondent has not shown how she has been coping since 2018. The appellant, on his part, states that the execution of the decree will violate his rights if the stay is not granted. If the appeal succeeds and the marriage held to be a nullity, then it will be impossible for the appellant to be reimbursed for the time he will have stayed with the respondent. It would be in the interest of justice for the order of stay sought to be granted on the basis that the appellant has demonstrated that he will suffer substantial loss if the same is not granted.”

38. Similarly, in the case of R J W v F M W [2014] eKLR, Kimaru J (as he then was) while handling a matter with similar issues, held as follows:

“The proceedings in this cause are matrimonial. From the nature of the proceedings already conducted, it is apparent that it has the hallmark of being an acrimonious dispute. Matters are not helped by the fact that the matrimonial dispute appears to be somewhat intertwined with a commercial dispute touching on a limited liability company in which both the Petitioner and the Respondent are Directors. The ruling that is a subject of this application is in regard to the order made by G.B.M. Kariuki J, requiring the Petitioner to grant access and possession to a house within Lolldaiga Ranch known as Leopard House to the Respondent. The Petitioner is opposed to the Respondent being granted such possession pending the hearing and determination in the divorce proceedings, firstly, on the ground that taking into consideration the past conduct of the Respondent in attempting to poison him, and secondly, in interfering with the management of the company, such possession would create unmanageable tension between the two of them. On her part, it is the Respondent case that, as the wife of the Petitioner she had nowhere else to live, and further that the Petitioner had failed to pay her maintenance. The Respondent told the court that she was not in employment and was currently staying at a friend’s house in Nairobi having been evicted from an apartment she was living in due to failure by the Petitioner to pay the rent and her upkeep. She urged the court not to grant an order staying the execution of the ruling whose result was that she was restored to her matrimonial home. On his part, it was the Petitioner’s case that the Respondent had never resided in the matrimonial home since 2005 when they separated as witnessed by the deed of separation.

.....

Has the Petitioner established that he would suffer substantial loss if the order issued by G.B.M. Kariuki J, is not stayed? In my considered view, the purpose of any application seeking the stay of execution of any order or decree is to preserve the status quo then prevailing pending the hearing and determination of appeal. This is because, otherwise, it would render the intended appeal nugatory and academic. In the present application,



the Respondent is currently resident out of the [particulars withheld] Ranch. From the affidavits of both the Petitioner and the Respondent, it is clear that in the Ranch is the house which the Respondent refers to as the matrimonial home and also the business enterprise known as [particulars withheld] Hills Limited. As stated earlier in this ruling, the Respondent has lodged a claim touching on the management of the said business enterprise. The case is still pending hearing in this court. This court was persuaded by the argument put forward by the Petitioner that the issue of the return of the Respondent to the Ranch to occupy a premise there in was not only a matrimonial issue, but an issue touching on the management of the company that is subject to court proceedings. For that reason, this court holds that the Petitioner established that he would suffer substantial loss if the Respondent is allowed back into the ranch pursuant to the said ruling of the court.”

39. Since in this instant case, the Respondent has stated her willingness to continue living away from the matrimonial home and therefore separately from the Appellant, I will lift this aspect of the Kadhi’s Court and allow that status quo to continue prevailing.
40. On the issue of rent collection, at this stage, the issue of whether the properties should be shared or how they should be shared and also what contributions were made by each party to the acquisition and development thereof are matters still waiting determination. What I have discerned from the evidence adduced is that some properties are in the sole name of the Appellant, some in the sole name of the Respondent and still some under their joint names. Although each party has submitted strongly on the issue of contributions, at this stage that is yet to be determined. For this reason, this Court cannot at this stage purport to favour one party over the other on the issue of rent collection. At this stage, both the Kadhi’s Court and this Court’s duty is to balance the interests of both parties and in doing so, ensure preservation of the subject matter.
41. Faced with a similar scenario, the Court of Appeal in the case of GJO v RSA (Civil Application E246 of 2021) [2022] KECA 421 (KLR) (4 March 2022) (Ruling), stated as follows:

“The applicant has for many years been receiving rent from one of the properties and utilising it without accounting to the respondent. If the judgment of the trial court is stayed, this would mean that the applicant will continue benefitting from the rent to the respondent’s detriment. He is also in occupation of one of the premises and the situation he has created is heavily yet unjustly in his favour. In Oraro & Rachier Advocates vs Co-operative Bank of Kenya Limited [2000] eKLR this Court emphasised the need for the court to balance both sides when dealing with situations like the one before us ...”
42. In the circumstances and applying the above principles, I find the Kadhi Court’s interim order to share the rental income at 50:50 between the parties, pending hearing and determination of the matter, to be quite fair. I therefore decline to stay the said order pending the hearing and determination of this Appeal.
43. Regarding security for costs, since I have declined to stay the Kadhi Court’s interim order that the parties share rental income at 50:50, the issue of security for costs does not arise.
44. I may, in passing, comment that the orders made by the Kadhi’s Court insofar as they refer to various properties, may need to be more particularly described by expressly mentioning the Land Reference numbers and other relevant details. This might assist in removing ambiguities in respect to the identity of the properties referred to. However, those are matters to be canvassed during hearing of the Appeal and I will say no more about them herein.



Final Orders

45. In the end, the Application partially succeeds and I make the following orders:

- i. In respect of the Orders made in Principal Kadhi's Court Matrimonial Cause No. E001 of 2023, only the order No. 4 of the Orders made on 22/02/2023 to the effect that the Appellant reinstates the Respondent back to the Matrimonial house is stayed pending the hearing and determination of this Appeal.
- ii. Costs shall be in the Cause.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 9TH DAY OF FEBRUARY 2024

.....

WANANDA J. R. ANURO

JUDGE

