



**AWK v AWK (Matrimonial Cause 12 of 2018)  
[2024] KEHC 3318 (KLR) (13 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3318 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MATRIMONIAL CAUSE 12 OF 2018  
SM MOHOCHI, J  
MARCH 13, 2024  
(IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT 2013)**

**BETWEEN**

**AWK ..... APPLICANT**

**AND**

**AWK ..... RESPONDENT**

**RULING**

1. The proceedings before Court stem out of a Notice of Motion Application dated 23<sup>rd</sup> November, 2023 brought under Order 42 Rule 6 of the Civil Procedure Rules and under Sections 1, 1A, and 3A of the Civil Procedure Act. In it, AWK, the Respondent (herein the Applicant), seeks the following orders that;
  - a. Spent
  - b. Spent
  - c. That there be a stay of execution of the Judgment and decree herein pending the hearing and determination of the intended Appeal in relation thereto
  - d. That the costs of this Application in the cause.
2. The application was supported by the affidavit of AWK who stated that judgement was delivered on 10<sup>th</sup> November, 2023 in favour of the Applicant (herein the Respondent) and being dissatisfied with the Court’s decision preferred an appeal against the said decision vide Notice of Appeal filed on 21<sup>st</sup> November, 2023.
3. She is apprehensive that the Respondent may proceed to execute at any time. That if stay of execution is not granted substantial loss may result to herself and her family who are in occupation and use of



- the suit property. That is execution is carried out it will render the Appeal nugatory occasioning her prejudice. She added that she was willing to abide by the conditions set by Court as to security.
4. The Respondent in opposing the Application filed a Replying affidavit sworn and filed on 4<sup>th</sup> of December, 2023. He deponed that he was entitled to immediate realization of the fruits of his judgement as a successful litigant. That orders for stay will work hardship on him because the Respondent shall continue to enjoy the fruits of their joint labour.
  5. He added that there will be no prejudice visited upon the Applicant if a valuer carries out valuation of the suit property and the Applicant deposits half of the valuation figure in his account or with the Court as she pursues her appeal. That in the alternative, if the Court is so inclined to grant stay the Court does appoint a licensed estate agent to collect monthly rental income on the suit land and be deposited in a joint interest earning account in the name of the parties' lawyers.
  6. The Applicant filed a further Affidavit on 13<sup>th</sup> December, 2013 that the suit property is the matrimonial home and she has lived there throughout. That she is 74 years old, retired with nowhere else to go. That if half of the value of the property is deposited in the Respondent's account, she has no way of recovering the amount if the Appeal is allowed as the Respondent has no source of income.
  7. She added that she stands to suffer prejudice since the matrimonial home stands on the suit property and does not give any income. He added further that she constructed two houses for her sons who stay there when they come and two other structures from which she collects rent to sustain her. That all the developments were done when the Respondent was away having separated back in 1991. She stated that she stands to suffer substantial loss as she has no other source of income.
  8. She added that through the Respondent's admission that the two had been separated for over 30 years, during that time she was struggling to make ends meet with the children while he wasted his money to benefit where he has not contributed. That it would be unfair to her and her children.
  9. The application was canvassed by way of written submissions.

### **Submissions**

10. The Applicant in her submission dated and filed on 20<sup>th</sup> December, 2023 submitted that she has met the threshold of grant of an order of stay as contemplated under Order 42 Rule (6) of the Civil Procedure Rules and as observed in Antoine vs African Virtual University (2015) eKLR. She submitted that she stood to suffer as she will lose her home and has nowhere else to call home. That the Application was made without unreasonable delay. She is ready and willing to abide by the conditions of security that the Court may impose save for been lenient as she is a housewife at 75 with no income and nowhere to stay.
11. The Respondent on the other hand filed his submission on 6<sup>th</sup> January, 2024 and submitted that the Applicant has not demonstrated that she stands to suffer if stay is not granted that a mere statement does not suffice as substantial loss and relied on the decisions in Everlyn Jebitok v Henry Kiplangat Muge & 2 Others (2011) eKLR and Kenya Tanzania Uganda Leasing Limited vs Mukenya Ndunda & Another (2013) eKLR.
12. That on the issue of security, the Applicant has not demonstrated with proof that if called upon she will have funds to deposit security as she stated in her affidavit that she was not a woman of means



## Analysis and Determination

13. The Court has considered the Application, the affidavits thereto and the submissions on record and the only issue for determination is whether the Application is merited to grant an order of stay of execution pending appeal.
14. 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 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) Notwithstanding anything contained in subrule (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.”
15. 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.
16. 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



17. 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.”

#### Undue Delay

18. The Court finds that the Application was made without undue delay since the Judgment was delivered on 10<sup>th</sup> November, 2023 while the Application was filed on 23<sup>rd</sup> November, 2023.

#### Substantial loss.

19. The value of the property is not yet ascertained; the Applicant has submitted that she stood to be evicted from her home with nowhere to go. That at 75 years of age it would be difficult to start afresh or get alternative accommodation.
20. The Respondent has admitted that the parties had not been staying together for some time and he has been living away but was entitled to the “immediate realization of the fruits of his judgement”. The Court is of the opinion that if the Applicant proceeds to execute to get half of what he is entitled to, there is a risk that the Applicant’s right to the property enshrined under Section 12 of the *Matrimonial Property Act* will be compromised.
21. The Court is thus satisfied that the Applicant shall suffer substantial loss within the meaning of Order 42 Rule 6 (2) of *the Rules* if she were to be evicted during the pendency of the appeal

#### Security

22. This being an application to stay judgment where the claim was unliquidated, the amount to be deposited as security is not specified, the terms of security are therefore left to the discretion of the Court. The Applicant has submitted that she has nowhere else to go and if the Respondent commences execution she stands to be evicted. By its judgment dated 10<sup>th</sup> November, 2023, the Court found that the parties are entitled to share in the property equally with either party having the option to buy out the other in monetary terms.
23. The Respondent has proposed the property be valued and the Applicant deposits half the amount in his account or in Court or alternatively the rental income be deposited in an interest earning joint account.
24. The Applicant is required to offer security for the due performance of the decree and not to punish the judgment debtor. See: *Arun C Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* (2014) eKLR. The Applicant submitted that she was willing to abide by the conditions set



Court however the Court should consider her advanced age and the fact she depends on rental income from the two units to survive, and medication.

25. The Respondent has two other homes which he did not deny and has been living away from the Applicant for 30 years with no access to the property. The Court does not see how stay would prejudice him in any way. The Applicant on the other hand in offering to provide Security. That in the Court's opinion is an act of good faith.

26. In *Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & another* [2018] eKLR, it was stated that:

“..... My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

27. The Court in exercising its discretion is always invited to consider the circumstances of each case and the interests of the parties involved.

28. In *RWW vs. EKW* [2019] eKLR the Court opined thus: -

“The other condition for granting stay orders is on the security to be offered. The law is that a party seeking stay must offer such security for the due performance of the orders as may ultimately be binding on the appellant. I am however of the considered view 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. As to whether the application was made without, unreasonable delay, I find in the affirmative.”

29. The fact that the Respondent is not staying in the matrimonial home, in the Court's opinion and from the pleadings on record, there is no indication that the Respondent would be worse off by virtue of an order of stay. Having demonstrated that issue of security is discretionary and it is upon the Court to determine the same, in the circumstances of the case and that the Applicant is of advanced age, the Court is of the opinion that no provision of security is necessary since the Respondent can still benefit from the suit property should the Appeal ultimately fail.

30. The upshot of the foregoing is that the Court finds merit in the Applicant's application dated 23<sup>rd</sup> November, 2023 and is hereby allowed with no orders as to costs.

It is so Ordered.

**SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 19<sup>TH</sup> DAY OF MARCH 2024.**

**MOHOCHI S. M.**

**JUDGE**

