



REPUBLIC OF KENYA



KENYA LAW
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**Asimba v Asimba (Family Appeal E004 of 2022)
[2024] KEHC 5431 (KLR) (17 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5431 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
FAMILY APPEAL E004 OF 2022
DO OGEMBO, J
MAY 17, 2024**

BETWEEN

DAVID OTIENO ASIMBA APPLICANT

AND

JOSHUA NONDWA ASIMBA RESPONDENT

RULING

1. The Applicant/Respondent, David Otieno Asimba, has moved this court by way of a Notice of Motion Application dated 24/11/2023. The same is brought under the provision of Order 42 Rule 6 of the *Civil Procedure Rules* and Section 1A, 1B, 3, 3A, 63 (c) (e) of the *Civil Procedure Act*. The principal prayer in this application is prayer 2 thereof, that;

“That an order of stay of execution be granted to restrain the Respondent, his duly authorized agents, servants, employees, assigns and or personal representatives from alienating, interfering with the applicant/Respondent’s enjoyment and or possession of all that parcel of land known as East/Gem/Anyiko/108, pending the hearing and determination of this application, appeal until further orders and or directions of this Honourable court.”
2. The Applicant also prays for costs of this application. The application is opposed by the Respondent.
3. The Applicant has submitted that the Applicant/Respondent shall suffer irreparable loss and damage as his home is situated within East Gem/ Anyiko/108 and the Appellant is restrained by injustive stay of execution, the Applicant’s home is likely to be alienated in execution of the judgment.
4. Counsel relied on several authorities in support of this application including:-



i. [RWW v EKW](#) [2019] eKLR, where it was held that;

“... 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.”

ii. [Machira T/a Machira & Co Advocates v E.A Standard](#) [2002] KLR 63, that;

“The Applicant must establish other factors which show execution will create a state of affairs that will irreparably affect or negate the essential core of the Applicant as a 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.

5. The Applicant also relied on the cases of [John Gachanja Mundia v Francis Muriira Alias Francis Mutbika & Ano.](#) [2016] eKLR And [Antoine Ndiaye v African Virtual University](#) [2015] eKLR, on the same point of the appeal being rendered nugatory should the orders of stay prayed for not issue.

6. This ruling is made without the benefit of the court perusing any submissions by the Respondent, who apparently did not file any.

7. I have considered this application and the submissions made to it by the Applicant, together with the authorities cited. This application is basically brought under Order 42 Rule 6 (1) of the [Civil Procedure Rules](#). The same provides:-

“No appeal or second appeal shall operate as a stay of execution of 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 be granted or refused by the court to which such appeal is preferred, shall be at liberty, an 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 which decision the appeal is preferred may apply to the appellate court to have such an order set aside.”

8. Indeed the Applicant has submitted at length on the need to safeguard the rights of the Applicant and that the appeal if successful should not be rendered nugatory. Authorities have been cited and I fully agree with the same.

9. In effect, what the Applicant is pleading with this court is that this court finds that the Applicant has an arguable appeal with a likelihood of success and that this court do issue the order of stay so that in the event that the appeal turns out successful, same should not be nugatory. The Applicant, has however, not gone deeper to submit on whether he has an arguable appeal with likelihood of success. This is in view of the fact that the submissions of the Applicant did not stretch as far as going into the merits of the intended appeal which challenges the judgment of this court. And I guess, this is on purpose. That this court being the court that made the judgment appealed from or against, may not be the proper forum to ventilate on whether the Applicant has an arguable appeal likely to succeed. This may better be considered and determined by the appellate court.



10. Order 42 Rule 6 as seen above, also grants jurisdiction to the court appealed to issue the orders of stay of execution pending determination of the appeal filed as prayed herein. In the circumstances, I am of the opinion that it would only be proper for this court to give the appellate court the opportunity to determine whether or not the applicant has an arguable appeal likely to succeed and if in the circumstances, an order of stay of execution pending determination of the appeal would properly issue.
11. To this extent therefore, it is the opinion of this court that this court, in order to safeguard the interests of the applicant, and facilitate the applicant as he pursues the issue of his appeal, to only issue appropriate interim orders of stay.
12. In the circumstances, I allow the application of the Applicant dated 24/11/2023, in part, and order that there be a stay of execution of the judgment and orders of this court issued on 2/11/2023, for a period of 90 days from today's date. The Respondent is awarded costs of this application. Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 17TH DAY OF MAY, 2024.

D. O. OGEMBO

JUDGE

17/5/2024

Court

Read out in court in presence of Mr. Jaoko for Applicant and absence of Mr. Okumu for Respondent, though served (confirmed by Mr. Jaoko).

D. O. OGEMBO

JUDGE

17/5/2024

