



**AWM v MGK & another (Civil Appeal E024 of 2024)  
[2024] KEHC 11994 (KLR) (Civ) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11994 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL APPEAL E024 OF 2024**

**SN RIECHI, J  
SEPTEMBER 19, 2024**

**BETWEEN**

**AWM ..... APPELLANT**

**AND**

**MGK ..... 1<sup>ST</sup> RESPONDENT**

**WMK ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Applicant was married to the 2nd Respondent on 9/12/1995 and lived together in L.R.Dagoretti/riruta/2xxxx(hereinafter suit property) until their marriage was dissolved and the applicant moved out living the 2<sup>nd</sup> respondent on the suit property . Upon their divorce the 2<sup>nd</sup> respondent herein remarried the 1<sup>st</sup> respondent and they lived together in house number L.R.Dagoretti/riruta/2xxxx and the suit property is registered in the name of the 2<sup>nd</sup> respondent.
2. The 2<sup>nd</sup> respondent and 1<sup>st</sup> respondent due to irreconcilable reasons separated and the 1<sup>st</sup> respondent moved out of the suit property. The 1<sup>st</sup> respondent also filed a divorce cause in Milimani Commercial Court E009 of 2023 that is still pending hearing and determination.
3. While the matter is pending the applicant moved back to the suit property to continue staying with the 2<sup>nd</sup> respondent which triggered the 1<sup>st</sup> respondent to file an application dated 28<sup>th</sup> February 2024 seeking orders against the applicant to vacate the suit property.



4. Upon hearing the application the honourable magistrate Hon.E.Olwande delivered a ruling on 7<sup>th</sup> March 2024 as follows;

“The 2<sup>nd</sup> respondent AWM do vacate the house where the applicant and 1<sup>st</sup> respondent lived during the subsistence of their marriage being xxxx Estate within the next 3 days failure to which Riruta Police Station is ordered to enforce this order.”

5. Following the above ruling the applicant, filed this instant application dated 12<sup>th</sup> March 2024 which is subject of this ruling. The Applicant in the application dated 12<sup>TH</sup> March 2024 is seeking for orders;

1. That there be a stay of the orders of Learned Magistrate issued on 7<sup>th</sup> March,2024 on the respondent's application dated 28<sup>th</sup> February,2024 pending hearing of this application.
2. that there be a stay of the orders of the learned magistrate issued on 7<sup>th</sup> March,2024 on 1<sup>st</sup> respondent application dated 28<sup>th</sup> February,2024 pending hearing and determination of this appeal.
3. That there be a stay of any further proceedings in the original case MCFO No.E009 of 2023;Milimani Commercial Court;Nairobi pending hearing and determination of this appeal.

6 The application is premised on the grounds that;

1. That the Applicant was married to the 2nd Respondent on 9/12/1995 and lived together with the 2<sup>nd</sup> Respondent as the 2<sup>nd</sup> Respondent's wife until their marriage was dissolved vide the certificate of making decree Nisi Absolute dated 23/6/2018.
2. That the Applicant and the Respondent have 4 Children who after the dissolution of the marriage continued to live with the 2<sup>nd</sup> Respondent and do still live with the Respondent to date.
3. That during the subsistence of their marriage the Applicant and the 2<sup>nd</sup> Respondent in their joint efforts acquired various assets and made investments over the years; and amongst the assets and investments so acquired and or acquired with the proceeds of the joint investments between the Applicant and the 2nd Respondent were the house L.R Dagoretti/riruta/2xxxx, motor vehicle KAZ xxxx, and the Petrol Station operated in the name xxxx Limited.
4. That since the divorce between the Applicant and the 2nd Respondent there has been no distribution of the matrimonial property there was between the Applicant and the 2<sup>nd</sup> Respondent for the sole reason that there has been a mutual agreement between the Parties that the matrimonial property that existed during the subsistence of the marriage shall remain intact in the name of the 2<sup>nd</sup> Respondent and or their joint names where applicable for their personal use, support and maintenance of the children born out of the dissolved marriage; and to be eventually transmitted to the 4 children born of the Applicant and the 2<sup>nd</sup> Respondent.
5. That the Applicant learnt with profound shock that the 1<sup>st</sup> Respondent who contracted the said civil marriage with the 2nd Respondent subsequent to the said divorce on 16/12/2020, has laid claim before the trial court under the case file MCFOS No. E009 of 2023; Milimani Commercial Court; Nairobi of ownership and entitlement of the matrimonial property that existed between the Applicant and the 2nd Respondent prior to their divorce, and prior to the Respondents contracting their subsequent marriage.
6. That the Appellant having not been involved in the proceedings before the said case MCFOS No. E009 of 2023; Milimani Commercial Court; Nairobi yet the property that is subject of the



proceedings and which the 1st Respondent has laid claim to is property to which the Appellant is interested in and has a legal entitlement to having a beneficial interest in the matrimonial property owned between her and the 2<sup>nd</sup> Respondent during the subsistence of their dissolved marriage, the Appellant made an application dated 6th October, 2023 praying to be enjoined in the case as a Respondent and seeking stay of the proceedings then before the court pending determination of her application.

7. That the Applicant learnt of the proceedings before the trial court belatedly when their children with the 2<sup>nd</sup> Respondent informed the Applicant that their father was unwell and the Applicant visited the 2<sup>nd</sup> Respondent only to find the 2<sup>nd</sup> Respondent sickly and alone in the house Dagoretti/riruta/2xxxx in the company of their children.
8. That the house Dagoretti/riruta/2xxxx is the house that the Applicant and the 2<sup>nd</sup> Respondent first purchased during their marriage and moved into from previously rented houses and raised their children.
9. That on the Appellant arriving at Nairobi to visit the sick 2<sup>nd</sup> Respondent on the 17<sup>th</sup> September, 2023, she found their children in the process of taking their father to hospital where he was admitted, and the Appellant has since then joined their children who were nursing the 2<sup>nd</sup> Respondent; and has since resided in the said matrimonial property of the Applicant Dagoretti/riruta/2xxxx.
10. The 2<sup>nd</sup> Respondent has since been discharged from hospital not resided in the said house. He was discharged on 29<sup>th</sup> September, 2023. THAT prior to their separation with the 2<sup>d</sup> Respondent, the Applicant had for her use the motor vehicle KAZ, xxxJ which vehicle she left behind amongst other matrimonial assets, for use by the family; and which vehicle she was later informed was sold and replaced with another vehicle KCE 955C which is registered in the name of the 2<sup>nd</sup> Respondent.
11. That the Applicant's application 6/10/2023 having come up in court, the trial court directed that it would hear the application alongside other proceedings then before the court involving the other parties and having heard the application made a ruling on 25th January, 2024. As at the date of the ruling the Applicant was not a party to the proceedings and was not party to the other applications before the court, subject of the same ruling.  
Since the delivery of the ruling the Applicant has filed her counter-claim against the Respondents before the trial court.
12. That the Applicant being aggrieved of some of the findings and orders in the said ruling of 25th January, 2024 which were made without the Applicant being heard, the Applicant filed the application dated 19th February, 2024 seeking to review orders made on 25th January, 2024 under a certificate of urgency, and the application having been certified urgent was to be heard on 7th March, 2024; meanwhile the court had in the ruling of 25/1/2024 scheduled the case for mention on 6/3/2024 for directions for hearing of the substantive claim before the court.
13. That when the matter was mentioned on 6/3/24, counsel for the 1st Respondent presented to the court that the 1<sup>st</sup> Respondent had an application dated 28/2/24, of which no directions had issued from the court, and the court stated that it had not seen the application, and it would check it up from the system; and the same would be mentioned on 7/3/24 when the court would be hearing the Appellant's application scheduled for hearing on the material date.



Counsel for the Appellant informed court the Applicant had not been served the application alluded to by the 1<sup>st</sup> Respondent dated 28/2/24 and the 1<sup>st</sup> Respondent was directed to serve the application upon the parties.

14. That on 7/3/ 24 when the Appellant's application dated 19/2/2024 came up for hearing counsel for the Applicant informed court that the application having been duly served on 23/2/2024 and an affidavit of should be granted.
  15. That the court upon application by the 1s Respondent granted the 1st Respondent extension of time to reply to the Applicant's application dated 19/2/2024 and deferred the hearing to another date.
  16. That the court further was informed that the Applicant was served the 1st Respondent's application dated 28/2/24 only on 6/7/24 after the court attendance for the day for which reason the Applicant had no time to have responded and prayed time to respond to the said application.
  17. That the trial court went ahead to issue what it called directions on the said application by the 1st Respondent dated 28/2/2024 and proceeded to issue orders against the Applicant to vacate her house Dagoretti/riruta/2xxxx in which she is in occupation within 3 days and in default the police to evict her from her property, without giving any hearing to the Applicant on the said application, and contradictorily the court went ahead to state it was granting time to the Applicant to respond to the same application dated 28/2/2024.
  18. That the court off the cuff stated that the Applicant had occupied her house Dagoretti/riruta/2xxxx after the court issued orders to the 1<sup>st</sup> Respondent for reinstatement to the said house which orders were issued on 25/1/2024, and in an application involving the Respondents and excluding the Applicant. The court also directing at counsel for the Applicant stated that if the Applicant was aggrieved of the orders of the court, counsel knows what to do and the orders of the court must be obeyed.
7. The application is further supported by the supporting affidavit sworn by the applicant on even date in which she briefly stated that she was married to the 2<sup>nd</sup> Respondent and lived together until their marriage was dissolved vide the certificate of making decree Nisi Absolute dated 23/6/2018. The applicant averred that during the subsistence of the marriage in joint efforts they acquired various assets and made investments over the years; and amongst the assets and investments was the house L.R. Dagoretti/riruta/2xxxx, motor vehicle KAZ xxxx which was later replaced with the vehicle KCE xxxC, and the Petrol Station operated in the name xxxx Limited. The applicant deposed that the assets are registered in the name of the 2<sup>nd</sup> Respondent .
  8. The applicant averred the 1<sup>st</sup> respondent conducted a civil marriage with 2<sup>nd</sup> respondent on 16. 12.2020. The applicant stated the 1<sup>st</sup> respondent filed MCFOS E009 OF 2023, before the commercial court on entitlement of property of matrimonial property. The applicant averred that the respondent filed an application dated 28.2.2024 and the trial court issued orders that the applicant vacate her house Dagorretti/Riruta/2206 in which she is in occupation within 3 months and in default the police to evict her from the property.
  9. The applicant averred that the conduct of the Learned Magistrate of hearing the 1<sup>st</sup> Respondent's application without regard for due procedure and issuing the orders it did while the court disregarded applicant's application and adjourned it manifests open bias against applicant which is an abuse of the court process and a miscarriage of justice.



10. The applicant averred that she does not have any other place to reside besides her house which she is occupying with my children. The applicant averred that she has no employment since she ceased doing the family business they had during the marriage. The applicant averred that the property is her current residence that for the court to make adverse orders against her over her right to her matrimonial property prior to hearing her is subjecting her to suffer loss and irreparable damage such as has been occasioned by the unilateral orders issued by the court for her eviction from the property without been heard.
11. The applicant averred that application has been filed expeditiously without any delay and it is in the interest of justice that the prayers in her application be granted.
12. The application is opposed by the respondents through a replying affidavit dated 15<sup>th</sup> May 2024 sworn by Millicent Gatwiri Kinyua. The respondent's case is that the Applicant has not satisfied the grounds for staying the execution of the Orders of the Trial Court as sought. The respondent averred that the Applicant has not demonstrated with any cogent evidence any lawful or reasonable grounds for which the proceedings before the Trail Court should be stayed or set aside as sought. It is respondent's case that stay of further proceedings before the Trial Court shall only defeat justice, and shall violate the tenets of expeditious disposal of suits as enshrined in the Constitution of Kenya and all the enabling laws. The respondent averred that all the grounds of the instant appeal are similar to the grounds which have been raised by the Applicant in the Notice of Motion dated 19<sup>th</sup> February 2024 which is pending before the Trial Court. That until those issues are determined by the Trial Court, they are not ripe for appeal.
13. The respondent averred that this application seeks the court's assistance to aid the Appellant in her endless disobedience of the orders of the trial Court directing her to vacate the matrimonial home DAGORETTI/ RIRUTA/xxxx. The respondent averred that the Appellant had disobeyed two court orders and now seeks to stamp her wrongdoings by filing this application in attempt to disobey the 2<sup>nd</sup> Court Order issued on 7<sup>th</sup> March 2024. The respondent referred to annexed and marked MGK-9, MGK-10 and MGK-11 copies of the Ruling of the Trial Court dated 25<sup>th</sup> January 2024 the Order dated 7<sup>th</sup> March 2024 and rectified on 8<sup>th</sup> May 2024.
14. The respondent deposed that by this Honourable Court staying the Court Order dated on 7th March 2024 by the trial court, it will be assisting the Applicant commit an injustice towards the 1st Respondent who was reinstated to her Matrimonial Home vide the court order, which is the house in contention in this matter. The respondent averred she has not been able to access and reside into the said house even with trial court having issued two Court Orders reinstating her in the Matrimonial Home until the matter is heard and concluded
15. The respondent stated that despite the clear orders of the Trial Court reinstating the 1<sup>st</sup> Respondent to her matrimonial home, she does not have a shelter ever since the 2<sup>nd</sup> respondent forcefully evicted her from their matrimonial home, and she is hosted by friends and her parents. The 1<sup>st</sup> respondent averred that her and 2<sup>nd</sup> Respondent since have lived in Dagoretti/riruta/2xxxx in xxxx Estate as their Matrimonial Home.
16. The respondent averred that in the instant application, the Applicant is merely inviting the Honourable Court to aid his illegality of evicting him from their matrimonial home without first obtaining a lawful court order. The respondent averred that the instant application does not satisfy the mandatory requirements of Order 42 Rule 6 of the Civil Procedure Rules to warrant the stay of the Orders of the Trial Court as sought.



17. The application was canvassed by way of written submissions. The applicant filed written submissions dated 24<sup>th</sup> June 2024 through Mr.Mwangi and the 1<sup>st</sup> respondent filed written submissions dated 10<sup>th</sup> July 2024 through Ms.Chege. I have carefully analyzed and considered the submissions and case law relied on by the parties.
18. The main issues arising for determination are:
  - i. Whether this court should stay order of trial magistrate issued on 7<sup>th</sup> March,2024 pending appeal.
  - ii. Whether this court should stay proceedings in MCFOS No.E009 of 2023.
19. On the 1<sup>st</sup> issue the appellant is seeking an order of stay of trial court orders issued on 7<sup>th</sup> March 2024. I have analyzed the impugned order issued on 7<sup>th</sup> March and it ordered as follows;

“1. The 2<sup>nd</sup> respondent AWM do vacate the house where the applicant and 1<sup>st</sup> respondent lived during the subsistence of their marriage being xxx Estate 6 within the next 3 days failure to which Riruta Police Station is ordered to enforce this order.”
20. It is trite law that for application seeking stay pending appeal the Applicant must meet the statutory requirements set out in Order 42 Rule 6 which states: - (2) No order for stay of execution shall be made under sub rule (1) unless-
  - a. The court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and
  - b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.
21. Stay of execution of orders may only be granted for sufficient cause. In granting or refusing stay of execution, the court exercises discretion which must, however, be based on sound judicial principles, as espoused in Sections 1A and 1B of the Civil Procedure Act which espouse the overriding objectives of the law, thereby enlarging the conditions under Order 42 rule 6(2) of the Civil Procedure Rules for stay pending appeal.
22. In the instant case, on prima facie case the appellant submitted that she is and has at all material times to the proceedings herself and the 2<sup>nd</sup> respondent have been occupation of the matrimonial home and therefore has established a prima facie case.
23. With regard to substantial loss, the applicant has submitted that the orders were issued without granting her a right to be heard. The applicant submitted the trial court violated the rules of natural justice and has exposed the appellant to irreparable loss and damage through the impugned order.
24. The respondent on her part submitted that the appellant has not demonstrated grounds for grant of orders of stay as set out in instant application.
25. I note that the applicant has filed an appeal and also the issue on matrimonial property is still pending before the commercial court. In order to protect the subject matter of this cause this court in exercise of its discretion will make appropriate orders to restrain the 2<sup>nd</sup> respondent either by himself or any other person acting on her behalf from selling, leasing, mortgaging, charging, transferring the following properties, the property known as House Dagoretti/riruta/2xxxx pending the hearing and determination of MCFOS NO.E009 OF 2023.



26. On the 2<sup>nd</sup> issue the applicant is seeking order stay of proceedings. In *Global Tours & Travels Limited; Nairobi HC Winding up Cause No. 43 of 2000 Ringera J*, (as he then was) stated that: -

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”.

27. In *Halsbury’s Law of England*, 4th Edition. Vol. 37 page 330 and 332, it was stated:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

28. The prayer for stay of proceedings is an equitable relief. An applicant must have come to court with clean hands. It is therefore important for the court to consider whether or not the application for stay of proceedings has been filed expeditiously.

29. The court noted that the Ruling the Appellant intended to appeal was delivered on 7<sup>th</sup> March 2024. The Memorandum of Appeal was filed on 12<sup>th</sup> March 2024 while the present application was filed on 12<sup>th</sup> March 2024. The application has been filed without inordinate delay. This court is satisfied that the present application was filed without any delay.

30. A perusal of the aforesaid Memorandum of Appeal led this court to the conclusion that the intended appeal was indeed arguable and not frivolous as the question before the appellate court was whether or not the lower court was in breach of rules of natural justice and the appellant is appealing on grounds that impugned orders were made without the appellant been heard and or without a fair hearing.

31. I find that the applicant has an intended appeal which she wants to prosecute. I find no reason to stay the proceedings before lower court.

32. In the result, I make the following orders;

1. That an injunction order is hereby issued restraining the 2<sup>nd</sup> Respondent either by himself or any other person acting on her behalf from selling, leasing, mortgaging, charging, transferring the following properties, the property known as House Dagoretti/riruta/2xxxx pending the hearing and determination of MCFOS NO.E009 OF 2023.
2. Costs of the application will be in the cause.

**DATED at NAIROBI this 19th day of September, 2024**

**S. N. RIECHI**

**JUDGE**

