



**AMW v HAW (Civil Appeal E002 of 2023)  
[2024] KEHC 13941 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13941 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MARSABIT  
CIVIL APPEAL E002 OF 2023**

**JN NJAGI, J**

**OCTOBER 17, 2024**

**BETWEEN**

**AMW ..... APPELLANT**

**AND**

**HAW ..... RESPONDENT**

**RULING**

1. The applicant herein has filed an application dated 19<sup>th</sup> January 2024 seeking for orders that:
  - (a) Spent
  - (b) Spent
  - (c) This Honourable court issues a stay order against execution of decree and judgment of Hon. Kadhi in matrimonial suit No.EOO3 of 2023 pending the hearing and determination of the current appeal.
  - (d) That the costs be in the cause.
2. The application was premised on grounds stated on the face of the application and supported by the affidavit of the applicant dated 18<sup>th</sup> January 2024 wherein the applicant avers that he has filed an appeal against the judgment and decree of the Honourable Kadhi, Marsabit. That unless the orders sought are granted, the appeal will be rendered nugatory. That the applicant has an arguable appeal with good probability of success. Further that the application has been filed without undue delay. Additionally, that it is in the interests of justice and fairness that the orders sought be granted.
3. The application was opposed by the respondent vide her replying affidavit sworn on the 19<sup>th</sup> February 2024 wherein she deposes that the application is baseless, vexatious, frivolous and an abuse of the process of the court. That the application is only inclined to cause delay in the expeditious finalization and determination of the matter and to deny the children their basic needs.



4. It was deposed that the sum of Ksh.18,000/= ordered by the Kadhi for maintenance of 6 children in a month is not sufficient. That the applicant makes money as a contractor and drives a luxury car. Therefore, that the application lacks merit and is made in bad faith.

### **Submissions**

5. The application was disposed of by way of written submissions of counsel appearing for the applicant and those of the respondent.
6. The applicant submitted that the application herein was filed without undue delay. That the power of the court in granting stay of execution pending appeal is discretionary and that discretion ought to be exercised in favour of the applicant in this application so as to safeguard the right of the applicant and not render the appeal nugatory.
7. It was submitted that it is not necessary to deposit security in this matter in view of the fact that it involves a dispute over matrimonial property and children who are the issue of the marriage. In support of this proposition, the applicant relied on the decision in the case of *RWW v EKW (2019) eKLR* where it was held that:

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.....

8. It was submitted that the applicant has an arguable appeal with high probability of success.
9. The submissions for the respondent were confined to the merits of the appeal and not to the application at hand, thus rendering the submissions not relevant for the purposes of the application at hand.

### **Analysis and Determination**

10. I have considered the grounds in support of the application, the grounds in opposition thereto and the submissions.
11. The instant application is anchored on the provisions of Sections 1A & 1B & 3A and 79 G of the *Civil Procedure Act* Cap 21 Laws of Kenya and Order 42 Rule 6 and Order 51 of the Civil Procedure Rules, 2010. Order 42 Rule 6 of the Civil Procedure Rules 2010 grants this court a discretion to grant stay of execution of a decree under such terms as may deem just. In the case of *Butt vs. Rent Restriction Tribunal (1982) KLR 417*, it was held that the power to grant stay of execution is discretionary and being as such it should be exercised judiciously and in such a way so as not to prevent an appeal especially if successful so as to be rendered nugatory. It is however important to observe that granting such an order though a matter of discretion should be made in the interests of justice.
12. An Applicant for stay of execution pending appeal has to satisfy the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010. These are that:
  1. The application was brought without unreasonable delay.
  2. The Applicant will suffer substantial loss unless the orders sought are granted.



3. The Applicant has given security for due performance of the decree as may be binding on him.
13. The first condition in an application for stay of execution pending appeal is for the applicant to show that the application was filed without unreasonable delay. The judgment being appealed against in his matter was delivered on 8<sup>th</sup> August 2023 and the instant application filed on the 22<sup>nd</sup> January 2022. There was therefore a delay of five and a half months in filing the application. The applicant has in his supporting affidavit not given any explanation for that delay.
14. The second condition for grant of stay of execution is that an applicant is required to demonstrate that he/she will suffer substantial loss if the orders sought are not granted. The applicant herein did not touch on that issue in his supporting affidavit, seemingly on the basis that the Kadhi's court did not have jurisdiction to deal with children matters so as to make an order for maintenance of children.
15. In the case of *Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997*, Warsame J. (as he then was) held as follows on the question of substantial loss:

For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...

16. In *Kenya Shell Limited v Kibiru & another (1986) KLR 410*, Platt Ag. JA (as he then was) expressed himself as follows on this subject:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”.

17. Whether the Kadhi's Court had jurisdiction to entertain the matter or not is an issue to be determined in the appeal. The issue is not one that the court can say outrightly at this stage that the Kadhi had no jurisdiction to entertain the matter. Until the issue is determined, the orders of the Kadhi remain lawful and have to be complied with unless the court finds reason to stay the orders.
18. The Hon. Kadhi in this matter ordered the applicant to pay the respondent Ksh.18,000/= per month for maintenance of his 6 children. The respondent swore in her affidavit that the applicant is a contractor and drives a luxury car. The applicant did not make a response to these averments. I therefore find that the applicant has not shown that he will suffer any loss, leave alone substantial loss, in maintaining the children during the pendency of the appeal. In the case of *LAO v OK Arap M (2018) eKLR* where the court was dealing with an application for stay orders pending appeal where a child was involved, it was observed that:

A party seeking stay of execution as well as variation, review or setting aside the orders of a Court affecting a child must satisfy the Court that the orders sought are in the best interests of the child. The paternity of the child is not disputed. It is also not disputed that the child is living with a medical condition that requires constant medical. The orders sought would



result in the reduction of the maintenance amount which in my view would militate against the best interest of the child.

19. In this matter it has not been shown that stay of execution will be in the interests of the children. The second condition for grant of stay of execution has not been established.
20. The third condition is for the deposit of security as may be binding on the applicant. The applicant submits that the same is not necessary in cases involving matrimonial and children matters. The matter herein involves a wife and her husband. There are children of the marriage to be maintained. The welfare and interests of the children has to be considered during the pendency of the appeal. This court has discretion on whether to order deposit of security. I am persuaded by the holding in the case of *RWW v EKW* (supra) that deposit of security can be waived in a case such as the one before this court. I do not see the necessity of making an order for deposit of security for due performance of the decree.
21. In an application for stay of execution pending appeal, the court is called upon to balance the competing interests of the two parties where one party is exercising its undeniable right of appeal and the other who has a judgment in its favour and who should not be deprived the fruits of the judgment without just cause. This position was aptly captured in the case of *Kenya Commercial Bank Ltd –vs- Sun City Properties Ltd & 5 Others* [2012] eKLR where it was held:

“In an application for stay, there are always two competing interest that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced.

22. In balancing the interests of the two parties in this case, I am of the considered view that the applicant should pay the money ordered by the Hon. Kadhi for maintenance of the children during the pendency of this appeal.
23. The upshot is that this court finds some merit in the application dated 19<sup>th</sup> January 2024. In the premises, stay of execution is granted as per prayer (c) of the Notice of Motion, save the order for payment of maintenance money of Ksh.18,000/= per month, pending the hearing and determination of the appeal. The payment for maintenance money to commence at the end of this month and to be paid and continue to be paid by the 5<sup>th</sup> of every succeeding month till the finalization of the appeal.

Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 17<sup>TH</sup> DAY OF OCTOBER, 2024**

**J. N. NJAGI**

**JUDGE**

In the presence of:

N/A Appellant/Applicant

Applicant - Present

Respondent – Absent

Court Assistant - Jarso

30 days R/A.

