



**MTH v MAM (Originating Summons 10 of 2017)  
[2023] KEHC 24524 (KLR) (24 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24524 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
ORIGINATING SUMMONS 10 OF 2017**

**G MUTAI, J**

**OCTOBER 24, 2023**

**IN THE MATTER OF SECTION 6, 7, 9, 13, 14 AND 17 OF  
THE MATRIMONIAL PROPERTY ACT NO.49 OF 2013**

**IN THE MATTER OF QUESTIONS ARISING BETWEEN MTH & MAM CONCERNING  
THE OWNERSHIP AND DIVISION OF HOUSE, PLOT, CARS, HOUSEHOLD  
GOODS AND ACCOUNTS ACQUIRED DURING MARRIAGE**

**BETWEEN**

**MTH ..... APPLICANT**

**AND**

**MAM ..... RESPONDENT**

**RULING**

1. The applicant and the Respondent contracted a civil marriage on 29<sup>th</sup> December 2010. Their union wasn't a happy one. Consequently, the applicant filed the Divorce Cause No. 59 of 2017; MTH versus MAM. The said cause was finalised in 2019, with the court dissolving the marriage.
2. The applicant also filed this matrimonial property cause. After hearing the parties, this court (per Onyiego, J), divided the matrimonial properties in the ratio of 60:40, having found that the respondent contributed to their acquisition. The applicant is aggrieved by the said decision and has filed an appeal. Vide the application dated 12<sup>th</sup> June 2023, the applicant sought a stay of execution of the judgment pending the hearing and determination of the appeal.
3. The said notice of motion Application seeks the following orders:-
  - a. Spent;
  - b. Spent;



- c. Spent;
  - d. That execution of the judgement of the honourable Justice Onyiego be stayed pending the hearing and determination of this application and the appeal; and
  - e. That costs of this application be provided for.
4. In her grounds in support of the application, the applicant denied that the respondent contributed towards the purchase of the suit properties. She contended that there was no demonstration by the respondent that the acquisition, improvement and or development of the same was conducted for the primary benefit of the union between the parties. She was apprehensive that if the suit properties were sold, and the proceeds divided up, it would be most difficult to reverse the transactions, in the event the appeal is successful. She thus urged this court to issue the orders sought.
  5. The application was supported by the affidavit of the applicant. The affidavit raised broadly the same grounds as those I have stated above. The applicant annexed to the said affidavit, inter alia, the Notice of Appeal, the draft Memorandum of Appeal and the court order issued on 31<sup>st</sup> October 2017 vide which the respondent was, amongst other orders, restrained from being within 100 metres of the applicant.
  6. The applicant stated that she was aggrieved by the judgment delivered by Onyiego, J. She further stated that her appeal is arguable, with overwhelming chances of success. She argued that there is a likelihood that the respondent would execute the decree of the court to her detriment, which action would occasion her substantial loss. The applicant contended that the application was filed without undue delay and that if the orders sought are not granted the appeal would be rendered nugatory. She expressed her willingness to abide by any reasonable condition that the court may impose by way of security for the grant of the orders sought herein.
  7. In a rather terse response, the respondent stated that all properties, save for Title No. Kwale/Diani S.S/xxxx, are still in the custody of the applicant and if the application is allowed, he will suffer a substantial loss. He urged the court to dismiss the application with costs.
  8. The applicant, through her advocates, V.N. Okata & Company Advocates, filed written submissions dated 6<sup>th</sup> July 2023. Counsel submitted on two issues, which in her view, ought to be determined by this court, namely, whether the applicant has satisfied the test for the grant of stay pending appeal and who is entitled to the costs of this application.
  9. On the first issue, Ms. Okata, learned counsel for the applicant, submitted that the applicant filed an appeal against the judgement of this honourable court. The appeal, in the applicant's view, has a high chance of success. The applicant is apprehensive that the respondent may proceed to execute the judgment, which would be prejudicial to her if the appeal is successful. Execution would render the appeal nugatory. Counsel relied on the case of *Butt v Rent Restriction Tribunal (1979)* eKLR, where the court held that the power to grant or refuse an application for a stay of execution is discretionary and should be exercised in such a way as not to prevent an appeal.
  10. Counsel further submitted on the factors to be considered by a court when determining whether or not to allow an application for stay of execution.
  11. Counsel submitted that the contestation between the parties herein revolves around the division of properties. She urged that the sale of the said properties would result in substantial loss to the applicant. Counsel relied on the case of *James Wangalwa & another versus Agnes Naliaka Chesoto* [2012] eKLR, where the court held that 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, as it is a lawful process. The applicant has



to establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the core of the applicant's case as the successful party in the appeal.

12. Counsel submitted that the court directed that the properties be sold, and the applicant and respondent divide the proceeds at a ratio of 60 /40. The consequence of not granting a stay of execution is that if the same is done in accordance with the order of the court, the ratio will cause the applicant extreme hardship as it is irreversible in the event the court varies the said ratio. In the event the appeal succeeds, the process of reverting back to the original position will be costly and inconvenient, thus amounting to a substantial loss.
13. On whether there is an arguable appeal counsel submitted that the grounds set out in the draft memorandum of appeal go to the root of the appeal, and a party should be allowed to exhaust the legal process without hindrance.
14. Regarding the question as to whether the application was filed without undue delay and or within a reasonable time, counsel submitted that the judgement was delivered on 12<sup>th</sup> May 2023 and the application herein filed on 12<sup>th</sup> June 2023. In her view, the application was made without undue delay.
15. It was submitted that this being a family matter, the court should exercise its discretion and order the applicant to pay a minimal amount of money as security. Counsel suggested a nominal payment of Kshs 30,000 to be deposited in court within 60 days.
16. Counsel submitted the costs of the application be in the cause.
17. The respondent did not file written submissions. When this matter came up for highlighting of the written submissions on the 31<sup>st</sup> of July 2023, the respondent was absent. I have, however, considered the contents of a document he has referred to as "Respondent's submissions to the application date 12<sup>th</sup> June 2023 in response to certificate of urgency."
18. I must now make my determination. I will consider each of the two issues identified by the applicant, as I agree with her that those are the salient issues in this matter.

**a. Whether a stay of execution should be granted**

19. Stay of execution is provided for under Order 42 rule 6 (1) and (2) of the [Civil Procedure Rules 2010](#), which provides: -
  - a. 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.
  - b. No order for a 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.



20. From the above provision, there are three grounds for consideration by a court before issuing a stay of execution orders. They include: -
- a. Substantial loss;
  - b. Application has been filed without unreasonable delay; and
  - c. Security for due performance of such decree or order.
21. On substantial loss, the applicant's argument is that if stay of execution is not granted, the respondent will proceed to execute, which would cause her extreme hardship as it is irreversible in the event she is successful. In the event the appeal succeeds, the process of reverting back to the original position will be costly and inconvenient, amounting to substantial loss.
22. In discussing substantial loss, the court in the case of *James Wangalwa & another versus Agnes Naliaka Chesoto* [2012] eKLR stated: -
- “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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the *CPR* and Rule 5(2) (b) of the *Court of Appeal Rules*, respectively, emphasized the centrality of substantial loss thus:
- “...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.”
23. The properties, the subject matter of the appeal are of substantial value. The respondent appears to me to be a man of modest means. There is a clear and present risk that if the appeal is successful, the respondent won't be able to reimburse whatever he would have got from the division of the subject properties. That, to me, is a substantial loss. The applicant has therefore met the first test.
24. On whether the application has been filed without unreasonable delay, the court in the case of *Jaber Mohsen Ali & another versus Priscillah Boit & another* [2014] eKLR stated that: -
- “The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be an unreasonable delay depending on the judgment of the court and any order given thereafter.”
25. In this case, the judgment was delivered on 12<sup>th</sup> May 2023, and the application was filed on 12<sup>th</sup> June 2023. The delay in filing the application herein was for one month, which in my view, is not an unreasonable delay.



26. The third factor for consideration is security for the performance of such decree or order. The applicant has submitted that she is willing to abide by the orders of the court on the same and suggested a nominal payment of Kes. 30,000/-. Accordingly, it's my view that the applicant has satisfied this ground. I am guided by the case of *Focin Motorcycle Co. Limited versus Ann Wambui Wangui & another* [2018] eKLR, where the court stated: -

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. 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. On whether the applicant has an arguable appeal with a high chance of success, the applicant referred to the grounds in the Memorandum of Appeal and submitted that she has an arguable appeal with a high chance of success.

28. The court in the case of *Beatrice Ndunguri Mwai & another versus Sicily Wawira Titus & another* [2020] eKLR stated: -

“There is no requirement for a party to prove that he has an arguable appeal or one that has chances of success. Where a party has satisfied the above conditions, the court exercises discretion to order a stay. In the exercise of the discretion, the court is supposed to do so in a manner that would not prevent the appeal from being heard and determined on merits...”

29. Having said so, I have considered the grounds in the draft Memorandum of Appeal. It is my view that the applicant has an arguable appeal.

30. The application is merited. The same is allowed. Consequently, I issue the following orders: -

1. I stay the execution of the judgment delivered by Onyiego, J, on 12<sup>th</sup> May 2023, pending the hearing and determination of the appeal filed by the applicant;
2. I order the applicant to deposit Kes.100,000/- in court as security for costs, within 30 days of the date of this ruling, failing which the stay granted herein will lapse automatically; and
3. Each party will bear own costs.

Orders accordingly.

**DELIVERED, DATED AND SIGNED THIS 24<sup>TH</sup> DAY OF OCTOBER 2023 AT MOMBASA VIA MICROSOFT TEAMS**

**GREGORY MUTAI**

**JUDGE**

In the presence of:-

Ms. Okata for the Applicant;

Munyi Allan Muchangi (in person);

Arthur – Court Assistant.

