



**RJ v MKC (Civil Appeal E090 of 2024) [2024] KEHC 12940 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12940 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL E090 OF 2024  
RN NYAKUNDI, J  
OCTOBER 25, 2024**

**BETWEEN**

**RJ ..... APPELLANT**

**AND**

**MKC ..... RESPONDENT**

**RULING**

**Representation:**

M/s Kipkosgei & Co. Advocates

1. By a Notice of Motion dated 1/7/2024, the Applicant seeks the following orders:
  1. Spent.
  2. Spent.
  3. That there be a permanent stay of execution of the judgment, decree and all consequential orders arising therefrom in Eldoret Chief Magistrate Court Divorce Cause No. E081 of 2022 pending the hearing and determination the appeal.
2. The application is premised on the grounds therein and is further supported by the Affidavit sworn by the Applicant on the same date.
3. The Applicant’s case is that judgment was rendered on 5/4/2024 in Eldoret Chief Magistrate’s Court Divorce Cause No. E081 of 2022 dissolving he marriage between the Appellant and the Respondent, that she is dissatisfied with the said judgment and she has preferred an appeal against the same, that she is interested in prosecuting the appeal within the shortest time and has already requested for typed proceedings, that the judgment and orders of the Court dissolving their marriage ought to be stayed as the Respondent has already started to threaten her with eviction from her matrimonial home, that her appeal is composed of serious and weighty issues and has very high chances of success, that the



judgment failed to take into consideration her opposition to the divorce and the grounds relied therein, that it is therefore just, expedient and in the interest of justice that the application be allowed as prayed, that no prejudice will be occasioned to the Respondent if the prayers sought are granted as this matter will be determined promptly and that this application has been brought promptly and in utmost good faith.

4. The application is unopposed. There is an Affidavit of Service dated 29/7/2024 showing that the Respondent was served.
5. Parties did not file any submissions.

### **Determination**

6. The issue for determination is whether the Applicant has satisfied the legal grounds to warrant stay of execution order.
7. The principles to be considered by this court in determining whether or not to grant an order staying the execution of the order of this court are set out in Order 42 Rule 6(2) which provides as follows:
8. “(2) No order to 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.”
9. An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See *Antoine Ndiaye vs. African Virtual University* [2015] eKLR.
10. In *Butt v Rent Restriction Tribunal* [1982] KLR 417 at page 419 Madan JA (as he was then) held as follows:

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church* (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 459:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”
11. As to what substantial loss is, it was observed in *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR, that:

“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 ... 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.”

12. In the present case, the Applicant is apprehensive that substantial loss may result if she is evicted from her matrimonial home. According to the Applicant, the Respondent is already threatening to evict her from her matrimonial home. The dispute at hand is premised on a marriage contract and the same is subject to an appeal. It is trite law that the purpose of stay of execution pending appeal is to preserve the subject matter so that the right of appeal can be exercised without prejudicing the Applicant as the appeal would be rendered nugatory if there is no stay. In my view is that if stay of execution is not granted, the Applicant will suffer irreparable loss and the Appeal will be rendered nugatory.
13. With regard to delay, the judgment was delivered on 5/4/2024, the Memorandum of Appeal was filed on 2/5/2024 and this Application was filed 1/7/2024, there has been delay in filing the instant application although in my view the same is not inordinate.
14. With regard to security for costs, the court in *Absalom Dova vs. Tarbo Transporters* [2013] eKLR, stated:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”
15. From the above decision it is clear that the issue of security is discretionary and it is upon the court to determine the same. Looking at the circumstances of the case, it would be in the interest of justice that security is not be imposed on the Appellant/Applicant.
16. In the upshot, I find that the application, dated 1/7/2024, is meritorious, and I hereby allow the same as prayed, with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 25<sup>TH</sup> DAY OF OCTOBER, 2024**

**R. NYAKUNDI**

**JUDGE**

In the presence of:

Mr. Ngarngar Advocate

