



**ZWO v GVB (Matrimonial Cause E002 of 2021)
[2024] KEHC 11799 (KLR) (2 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11799 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
MATRIMONIAL CAUSE E002 OF 2021**

**F GIKONYO, J
OCTOBER 2, 2024**

BETWEEN

ZWO PLAINTIFF

AND

GVB DEFENDANT

RULING

1. The significant order sought in the chamber summons application dated 27th May, 2024 is stay of execution of the decree herein pending appeal.
2. The application is premised on grounds set out in the application as well as the supporting affidavit sworn by the applicant.
3. The major reasons stated are that; execution of the decree will occasion her grave and irreparable injustice as;
 - i. she will be rendered destitute and her daughter who lives in Cis xxxx/xxxx/7193, 7194 and 7196 homeless;
 - ii. the title deeds to these three properties are held by the charger (bank) which if interfered with will open her to penal sanctions;
 - iii. recovery of Cis Mara/xxxxxxxxxxx/1819 which has already been sold to a third party will open her to liability;
 - iv. readjustments in the other properties in accordance with the judgment before determination of the appeal, will strip her of proprietary rights; and
 - v. the effect of the judgment will render the appeal nugatory.



4. According to her, the cautions registered over the suit properties by the respondent sufficiently protects the rights and interest of the respondent. He will therefore, not suffer any prejudice.
5. In addition, the rent the respondents collect from Cis Mara/xxx/xxx- one of the suit properties- suffices as security for costs in this matter.
6. These arguments were reiterated in the submissions and augmented through judicial authorities below:
7. Meru Environment & Land Case E022 of 2023 *Stanley Kimathi Rugus v Maryann Muthoni Maina*: -
 “ 16 An arguable appeal need not succeed but is one that a court must consider. See *Kin & Another v Khaemba & 3 Others* (C.A Application E. 270 of 2021 [2021] KECA 318 (KLR) (17th December 2021) Ruling.
8. *Shepherds Hospital Limited v Commissioner of Investigations and Enforcement* (Miscellaneous Application E016 of 2023 [2023] KEHC 18173 (KLR)
 “ 8. Provisions of security under Order 42 Rule 6 of the Civil Procedure Rules is not intended to be a punishment to the Appellant or a form of execution of the decree on behalf of the Respondent. It should not also impede access to justice or right of appeal. Therefore, Order 42 Rule 6 does not entail a policy that courts should insist on deposit of security for the entire decretal sum especially where the decretal sum is quite colossal as would stifle the right of appeal and access to justice (Art. 48 of the constitution)
9. *Butt v Rent Restriction Tribunal* (1979) eKLR
 “If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the Applicant at the conclusion of the proceedings.”

Respondent Opposed Application

10. The respondent opposed the application through his replying affidavit sworn on 20th June, 2024 setting out grounds thereof which were also elaborated in the written submissions.
11. According to the respondent, the applicant has not established the particular substantial loss she will suffer if the judgment is executed for it requires registration of both parties in the various matrimonial properties in accordance with their respective entitlements established by the court. Execution of the judgment will, therefore, secure the rights of both parties rather than prejudice rights of any one of them. The execution does not mean eviction and he is willing to let the applicant and her daughter remain in the house they are occupying pending the determination of the appeal. In any event, the house occupied by the applicant is in one of the parcels and not in all the three parcels in issue. He wondered, therefore, how, in these circumstances, the applicant will be rendered destitute or her daughter homeless.
12. He claims that he had waited for a decade for the resolution of this matter and now is advanced in age, thus, any prolonged delay in the realization of his rights in these properties is real denial of right and justice for a person of his age; to him time is of the essence.



13. In his view, placing caveats or cautions on the properties, does not offer sufficient protection of his rights as these measures only temporarily prevent the transfer of the property. Real protection is registration as co-owners of the properties as was ordered by the court. He stated that the proposal that the rent he collects do act as security for costs is neither here nor there; and should not be used to deny him his right to full benefit and realization of the judgment.
14. He therefore asked the court to dismiss the application. He cited the following authorities.
15. The respondent relied on the following statutes and judicial decisions: -
 - i. The *Civil Procedure Act*, Chapter 21 of the Laws of Kenya (Order 42 Rule 6).
 - ii. *Kenya Shell Limited v Benjamin Karuga Kibiru & Another* (1986) eKLR 410 (CA)
 - iii. *Machira T/A Machira & Co. Advocates v East Africa Standard* (2002) eKLR (Justice Kuloba)
 - iv. *James Wangalwa & Another v Agnes Naliaka Cheseto* (2012) eKLR.
 - v. *DKG v EG* (2021) eKLR.
 - vi. *Mwaura Karuga T/A Limit Enterprises v Kenya Bus Services Ltd & 4 Others* (2015) eKLR.
 - vii. *RWW v EKW* (2019) eKLR.
 - viii. *Kuko & Another v Ali & Another; Robinson (Interested Party)* Civil Application E023 of 2023 (2024) KECA 305 (KLR) (22 March 2024) (Ruling) [CA]
 - ix. *Kenya Hotel Properties Limited v Attorney General & 5 Others* (Application 27 of 2020) [2020] KESC 6 (KLR) (20 November 2020) (Ruling)
 - x. *Chege v Gachora* (Civil Appeal 265 of 2023) [2024] KEHC 1994 (KLR) (29 February 2024) (Ruling).
 - xi. *Shepherds Hospital Limited v Commissioner of Investigations and Enforcement* (Miscellaneous Application E016 of 2023) [2023] KEHC 1994 18173 (KLR) (29 May 2023) (Ruling).

Analysis And Determination

16. The court should determine whether the applicant has established sufficient cause for stay of execution pending appeal.
17. The jurisdiction of this court to grant stay of execution pending appeal is conferred under order 42 rule 6 of the *Civil Procedure Rules*. A party applying must establish sufficient reason for which stay of execution should be granted. And, in evaluating such application, the court must ask itself traditional questions concerning: -
 - a. Whether the application has been made without unreasonable delay;
 - b. Whether substantial loss may result to the applicant unless the order is made; and
 - c. 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.
18. But, the decision should depend on the justice-demands in, and the circumstances of the case.
19. There is consensus that, the application was brought without unreasonable delay.



20. the major question being: whether execution of the judgment will result into substantial loss; a loss of real value to the applicant?
21. The applicant claims that; execution of the decree will occasion her grave and irreparable injustice as;
- i. she will be rendered destitute and her daughter who lives in Cis xxxx/xxxx/7193, 7194 and 7196 homeless;
 - ii. the title deeds to these three properties are held by the chargee (the bank) which if interfered with will open her to penal sanctions;
 - iii. recovery of Cis Mara/xxxxxxxxxxx/1819 which has already been sold to a third party will open her to liability;
 - iv. readjustments in the other properties in accordance with the judgment before determination of the appeal, will strip her of proprietary rights; and
 - v. the effect of the judgment will render the appeal nugatory.
22. The respondent stated that these properties namely, Cis Mara/Olopito/7193, Cis Mara/Olopito/7194 and Cis Mara/Olopito/7196 are distinct portions of land except that they are adjoining each other and in the same compound.
23. From the evidence, the court notes that, although these three properties are in the same compound, they are distinct with distinct registration numbers. The respondent stated that the house in which the applicant and her daughter lives, rests in one of the portions of land, i.e. Cis Mara/Olopito/7196. The respondent is also prepared to allow the applicant and her daughter to continue living in the same house where they are living until the determination of the appeal.
24. In these circumstances, claims that she will be rendered destitute and her daughter homeless are not substantiated. However, as both parties have rights in the matrimonial properties, the court will make appropriate orders which secure her rights as well as those of the respondent.
25. Needless to state that, matrimonial property rights are property rights, and enjoy protection under article 40 of the *Constitution*. None of the rights of the parties is the lesser. And, the trust form in Matrimonial Property Act- until rebutted- secures the beneficial rights of the spouses in, even where the matrimonial property stands in the name of one of the spouses. Therefore, registration of both parties in the matrimonial properties in accordance with the judgment, does no harm to anyone; and could be reversed if the appeal is successful. Such act is not ‘readjustments’ which will strip the applicant of proprietary rights. Instead, it is one way of securing the rights of both parties in such applications whilst the applicant pursues her right of appeal.
26. Proportioned balancing of rights does not mean depriving a right or elevating one right over the other. This kind of balancing was aptly put in the case of *Absalom Dova vs. Tarbo Transporters* [2013] eKLR as follows:

“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 which is not a question of discrimination”.

27. But, there are acts, say, sale, transfer to third parties, actual partition, exchange, charging, demolition, eviction which may dissipate the property or affect rights of the other, during the pendency of the appeal, occasioning substantial loss to the party concerned. Accordingly, there is perfect sense in staying such injurious acts except, registration of the properties in the names of the parties in the proportions stated in the judgment. Given the nature of these proceedings and the dictates of justice, the order to be given should be one which is capable of securing the rights of both parties including right of appeal.
28. It bears repeating that, registration of the parties in accordance with the judgment is not ‘readjustments’ which will strip her of proprietary rights.
29. The argument that title deeds to these three properties are held by the chargee (the bank) which if interfered with will open her to penal sanctions does not add any power of punch to the application for stay of execution.
30. Similarly, the trust form in matrimonial property and the remedial process of tracing and following estate property in law and equity, depreciates the argument that recovery of Cis Mara/xxxxxxxx/1819 which has already been sold to a third party will open her to liability; it is not proof of substantial loss in the sense of the law.
31. In the upshot, the order that commends itself to the court is one which prevents acts which may dissipate the matrimonial properties and rights herein by any party except, registration of the parties in the properties in their respective proportions in the judgment shall be effected. Therefore, no party shall sell, charge, exchange, demolish or evict any person from any or any of the suit properties until the appeal is heard and determined. More specifically, the applicant and her daughter will continue to live on Cis Mara/Olopito/7196 until the determination of the appeal.
32. Given the nature of these proceedings, no orders as to costs.

**DELIVERED AT NAROK THROUGH TEAMS MICROSOFT ONLINE APPLICATION THIS
2ND DAY OF OCTOBER, 2024.**

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F. GIKONYO M,

JUDGE

In the presence of: -

Ms. Cheruto h/b for Ms. Sabaya for the applicant

Kapiyo for the respondent

The respondent

Otolo C/A

