



**MGK v KDH (Family Appeal E001 of 2025)
[2025] KEHC 15915 (KLR) (3 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 15915 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
FAMILY APPEAL E001 OF 2025**

**FR OLEL, J
NOVEMBER 3, 2025**

BETWEEN

MGK APPLICANT

AND

KDH RESPONDENT

RULING

A. Introduction

1. The application before this court is the Notice of Motion application dated 28th July 2025 brought pursuant to provisions of Section 1A, 1(B), 3A and 79G of the *Civil Procedure Act*, Order 42 Rule 6(2), & Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of law. Prayers 1 and 2 of the said application are basically spent, and the main prayers sought are prayers 3 and 4 for stay of execution of the decree dated 30th June 2025, issued in Marsabit Kadhi’s court, KCDC No E007 of 2025, and that costs of the said Application be provided for.
2. This application is supported by the grounds on the face of the said application and the affidavit of the appellant dated 28th July 2025, while the respondent opposed this application through his preliminary objection dated 6th October 2025
3. The Appellant averred that she was wholly dissatisfied with the Judgment of Hon Mustafa G. Shunu, Senior Resident Kadhi, dated 30th June 2025, delivered in Marsabit Kadhi’s court, KCDC No E007 of 2025, and had preferred an appeal against the same, on grounds that the said Kadhi had acted beyond his jurisdiction in dealing with thier matrimonial property and ordering her to observe Eddah for a period of 3 months before she moves out. she avers that she has an arguable appeal which has high chances of success as demonstrated in the Memorandum of Appeal filed.



4. The appellant was apprehensive that there was strong likelihood that the respondent would evict her, thereby causing her substantial loss and rendering the appeal filed to be rendered nugatory. She thus urged the court to grant the orders sought pending hearing and determination of the said Appeal.
5. The Respondent did oppose this application through his preliminary objection dated 6th October 2025. He averred that the application was hopelessly incompetent for the reason that no Appeal had been filed, which would have anchored this Application. He further averred that the firm of Mutuearandu Murithi & Co. advocates, who were acting for the Appellant, had not sought leave to come on record to represent the Appellant as required under Order 9 rule 9 of the Civil Procedure Rules. As such, all pleadings filed were irregular and ought to be struck out.
6. The Respondent thus urged this court to find that the application under consideration was not merited and prayed that it be dismissed with costs.

B. Analysis & Determination

7. I have carefully considered the Application, its Supporting Affidavit, the Respondent's preliminary Objection, and the only issue for determination is whether the Appellant has met the conditions necessary for the grant of stay pending appeal.
8. Stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. It is evident from the said provision that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay and the court will impose such security as the court may impose for the due performance of any decree or order as may ultimately be binding on the Applicant. See *Amal Hauliers Limited Vs Abdunasi Abukar Hassan* (2017) eKLR & *Butt Vs Rent Tribunal* (1982) KLR 417
9. The ruling appealed against was delivered on 30th June 2025. The Appeal herein was filed on 28th July 2025, which is within the statutory period provided under Section 79 of the *Civil Procedure Act*. It can thus be said that this appeal and application have been filed timeously.
10. On the likelihood of suffering substantial loss, the court has to balance the interest of the Appellant who seeks to preserve the status quo pending hearing of the appeal and to ensure the appeal is not rendered nugatory, and the interest of the Respondent who seeks to enjoy the fruits of his judgment. In other words, the court should not only consider the interest of the Appellant but also consider, in all fairness, the interest of the Respondent who has been denied the fruit of his judgment. See *Attorney General Vs Halal Meat Products Limited* Civil Application No. Nairobi 270 of 2008; *Kenya Shell Ltd Vs Kibiru & another* (Supreme); *Mukuma Vs Abuoga* (1988) KLR 645 &
11. When considering such Applications, the Court is also expected to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the *Civil Procedure Act* are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination that is unlikely to lead to an undesirable or absurd outcome.
12. The court also when considering such an application for stay must consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always



opt for the lower rather than the higher risk of injustice. See *Suleiman vs. Amboseli Resort Limited* [2004] 2 KLR 589.

13. This was the position of Warsame, J (as he then was) in *Samvir Trustee Limited vs. Guardian Bank Limited, Nairobi (Milimani) HCCC 795 of 1997*, where he expressed himself as hereunder:

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal, and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be an overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to the fruits of his judgment; hence, the consequence of a judgment is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...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...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

14. The parties herein have been married for over 30 years, and the respondent has been residing on the suit property since 1988. If the Kadhi Judgment is effected, she will be evicted from her matrimonial property, and that would wipe away the substratum of this Appeal. Under the circumstances, the lower rather than the higher risk of injustice would be to stay the said judgment and expedite the hearing of this Appeal.
15. As to the issue of security, given that the parties are family members and the decree is not monetary, it would be in the best interest of justice not to burden the Appellant with the same, but to expiate this Appeal to uphold the rights of both parties.
16. Finally, on the two issues raised by the respondent, I do find that the Memorandum of Appeal was filed simultaneously with this Application and the same anchors this application, and secondly, this being a fresh Appeal filed before this court, the Appellants' counsel does not leave of this court to file pleadings.



Disposition

- 17. Taking all relevant factors into consideration, I do grant stay of execution of the decree herein pending the hearing and determination of this Appeal
- 18. The hearing of this Appeal will be expedited, and it shall be heard and determined within the next six (6) months.
- 19. The costs of this Application will be in the cause
- 20. It is so ordered.

READ, SIGNED AND DELIVERED VIRTUALLY AT MARSABIT ON THIS 3RD DAY OF NOVEMBER, 2025.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 3RD DAY of NOVEMBER, 2025.

In the presence of:-

N/A Applicant

N/A..... Respondent

Mr. Jarso... Court assistant

