

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
HCFOS NO. E006 OF 2022
IN THE MATTER OF SECTION 17 OF THE MATRIMONIAL PROPERTY
ACT, 2013

RAMADHAN MOHAMED MUTUA.....
.....CLAIMANT

VERSUS

REHEMA WAIRIMU RAMADHAN.....RESPONDENT

RULING

1. This court delivered a judgment on **16th August 2024**, vide which it found and held that certain properties registered in the name of the respondent were matrimonial properties. The court ordered that the properties be sold, with the respondent having the right to buy out the claimant or be sold by way of public auction.
2. Being aggrieved by the said decision, the respondent filed an appeal vide a memorandum of appeal dated **14th July 2025**. The respondent subsequently filed a notice of motion dated **21st August 2025** seeking to stay the execution of the judgment of this court pending the hearing and determination of the appeal.
3. On the other hand, the claimant filed an application dated **14th August 2025**, vide which he sought to have the orders issued by the court in its judgment executed by way of provision of statements of

account, inventory, for the properties to be valued, and also for injunctive relief.

4. The two applications were canvassed together by way of written submissions. Both parties filed written submissions, which I have considered.
5. Since the respondent's application seeks a stay of the orders issued in the impugned judgment pending appeal, I shall consider it first, for if a stay is granted, the application filed by the claimant will be moot.
6. It is a common ground that there is an appeal pending before the Court of Appeal, *to wit*, Court of Appeal **Civil Appeal No E131of 2025; Rehema Wairimu Ramadhan v Ramadhan Mohamed Mutua**. The claimant contends that the appeal was filed out of time and without leave of the court and that the application for stay pending appeal was filed after an inordinate delay. The foregoing notwithstanding, I have perused the memorandum of appeal. The same raises substantive questions of law which ought to be determined by the Court of Appeal on the merits.
7. The conditions for the grant of a stay pending appeal are set out in Order 42 Rule 6 (2) of the Civil Procedure Rules, which states that:
“No order for 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.”

8. The respondent has to show

- a. That he will suffer substantial loss unless a stay is granted;
- b. That the application was filed without undue delay; and
- c. Provide security for the due performance of the decree that may ultimately be binding.

9. In the case of JAMES WANGALWA & ANOTHER V AGNES NALIAKA CHESETO [2012] KEHC 1094 (KLR), Gikonyo, J, stated as follows:

“11.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.”

With this observation, of course, a frivolous appeal cannot, in practical terms, be rendered nugatory. The only admonition, however, is that the High Court should not base the exercise of its discretion under Order 42 Rule 6 of the CPR only on the chances of the success of the appeal. Much more is needed in accordance with the test I have set out above.

- 10.** The properties in issue in this matter are matrimonial properties as found by this court. Such properties have great sentimental value. Their loss, through disposal, has an effect on the parties that goes beyond the value. In the case of *MN v CMM [2025] KEHC 8233*, the court stated that:

“This court finds merit in the applicant's position. The nature of matrimonial property is inherently unique, often

carrying sentimental and historical value that cannot be quantified in monetary terms. Unlike commercial assets that can be readily replaced through monetary compensation, matrimonial properties represent irreplaceable family heritage and emotional investment accumulated over years of marriage. The systematic disposal of such properties creates an irreversible situation where a successful appeal would yield only pyrrhic victory. Furthermore, the respondent's acknowledged disposal of properties during the pendency of these proceedings demonstrates a real and continuing threat to the remaining matrimonial estate. The court is particularly mindful that once matrimonial property passes to third parties, recovery becomes practically impossible regardless of the appeal's outcome, thereby effectively nullifying the applicant's appellate rights. In these circumstances, the potential for substantial and irreparable loss is clearly established..

- 11.** I agree with the said holding. In my view, the respondent stands to suffer substantial loss.

- 12.** I note that there was a delay of 1 year in filing the application for stay. The respondent explained that there was a long period of time when the court file was unavailable. In my view, the explanation given is reasonable. In the circumstance I find and hold that the second condition has been met.

13. Regarding security, I note that the properties the subject of proceedings are land and motor vehicles. In my view, the interest of justice will be served by having the properties preserved pending the hearing and determination of the appeal. In the circumstances, I order that inhibitions be registered against the respective title documents, prohibiting disposal of the same pending the hearing and determination of the appeal.

14. The upshot of the foregoing is that I allow the application dated **21st August 2025**. Having found as above, there is no need for me to consider the notice of motion dated **14th August 2025**.

15. Since this is an application arising from a matrimonial matter, I find and hold that the parties shall bear their own costs.

16. It is so ordered.

Dated and signed in Mombasa, this 19th day of February 2026.

Delivered virtually via **Microsoft TEAMS**.

Gregory Mutai

JUDGE

In the presence of:

Mr. Omulama, for the Respondent/Applicant;

No appearance for the Claimant/Respondent; and
Bancy – Court Assistant.

Original