



**CKM v EMK (Civil Application E526 of 2024) [2025] KECA 763 (KLR) (9 May 2025) (Ruling)**

Neutral citation: [2025] KECA 763 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E526 OF 2024  
FA OCHIENG, JM NGUGI & WK KORIR, JJA**

**MAY 9, 2025**

**BETWEEN**

**CKM ..... APPLICANT**

**AND**

**EMK ..... RESPONDENT**

*(Being an application for stay of execution pending hearing and determination of an intended appeal from the Ruling and Order of the High Court of Kenya at Nairobi (S.N. Riechi, J.) dated and delivered on 14th August 2024 in HCFS No.2 of 2022)*

**RULING**

1. Before us is a notice of motion dated 16<sup>th</sup> October 2024. The applicant seeks an order for a stay of execution pending the hearing and determination of the intended appeal. Specifically, the applicant prays for a stay of execution of the ruling and order issued on 14<sup>th</sup> August 2024. He also prays for the costs of this application to be in the cause.
2. The application was premised on the grounds that:
  - a. The applicant was aggrieved by the whole of the decision of the superior court made on 14<sup>th</sup> August 2024 and has since lodged a notice of appeal as per rule 75 of the Court of Appeal Rules.
  - b. The intended appeal is not frivolous but has very good chances of success.
  - c. The applicant outlined several perceived errors by the superior court as follows:
    - i. The superior court erred in law and failed to exercise its discretion properly by disallowing the applicant’s application dated 27<sup>th</sup> September 2021, seeking an enlargement of time to file an appeal arising from the ruling given on 27<sup>th</sup> May 2021,



and requiring the applicant to deposit a sum of Kshs. 27,242,505 as a precondition of allowing an appeal out of time.

- ii. The superior court erred in law and fact when it declined to consider the applicant's request in the application to offer his land, L.R. No. Makueni/Kako/xxx as a substitute for the order requiring the deposit of Kshs. 27,242,505.
  - iii. The superior court erred in fact and law when it allowed the respondent's application dated 30<sup>th</sup> July 2021, to execute the decree against the applicant for the sum of Kshs. 27,242,505.
  - iv. The superior court erred in fact and law by allowing an application to execute a decree before the taxation of costs.
  - v. The superior court's finding that the applicant's application for an extension of time and substitution of the order for deposit lacked merit.
  - vi. The superior court failed completely to consider the case of the applicant as embodied in his application.
- d. The intended appeal has high chances of success and will be rendered nugatory and futile unless the orders sought in this application are granted.
- e. The respondent is retired, has no source of income, and if the impugned decretal sum of Kshs. 27,242,505 is paid to her, there is no possibility of the applicant recovering any amounts from her should the applicant succeed in Civil Appeal No. E441 of 2021.
3. The application was further supported by the applicant's affidavit, in which he detailed his dissatisfaction with previous court decisions in the ongoing legal matter involving the distribution of assets following the dissolution of his marriage to the respondent.
  4. The applicant pointed out that the case, originally filed in 1994, had gone through several phases, with a significant judgment being made by the High Court in 1999. The applicant filed Civil Appeal No. 74 of 2001, challenging the judgment, which he alleged partially excluded certain properties from the matrimonial property, and prayed that the valuation of the assets be based on their status as of December 1992.
  5. This Court ordered the assessment of the respondent's share in three properties at 50%. Additionally, the respondent was awarded three-quarters of the appeal costs.
  6. The applicant claimed that the deputy registrar misinterpreted the court's ruling in 2016, particularly regarding the treatment of a loan amounting to Kshs. 13,535,212.81, which was mistakenly considered an asset. This led to an inflated value of the properties, resulting in an unjust division of assets that unfairly favored the respondent.
  7. The applicant contended that this decision was incorrect and that his appeal against the deputy registrar's ruling had a strong chance of success.
  8. Further, the applicant expressed dissatisfaction with the High Court's decision in Civil Appeal No. 329 of 2017, where his attempt to challenge the deputy registrar's ruling was hindered by the court's refusal to grant an extension of time for the appeal and the requirement for a substantial cash deposit. The applicant further contended the refusal by the court to allow him to offer his land as an alternative to the cash deposit.



9. The applicant was concerned that the respondent had already taken steps to execute the decree, and therefore, without a stay of execution, the intended appeal would be rendered nugatory. He also contended that if the decretal amount was paid, the respondent, being retired, and with no source of income, would not be able to repay the amount if his appeal were to succeed.
10. The respondent filed a replying affidavit opposing the applicant's notice of motion. She outlined the history of the legal proceedings, stating that the initial High Court judgment was delivered on 2<sup>nd</sup> July 1999, and the Court of Appeal made its final determination regarding her entitlement to the matrimonial property on 19<sup>th</sup> April 2002.
11. Following the Court of Appeal's decision, the parties were directed to appear before the deputy registrar to determine the value of her entitlement, with the deputy registrar issuing her ruling on 14<sup>th</sup> November 2016.
12. She pointed out that the applicant failed to lodge a memorandum of appeal within the required time frame, only seeking an extension of time in November 2019. The extension was granted in May 2021, with a condition that the applicant deposit the decretal amount by 11<sup>th</sup> July 2021. However, the applicant failed to meet the deadline, and more than two months later, he filed the motion that is now part of the intended appeal.
13. In her opposition, the respondent stated that since the Court of Appeal made its final decision over 22 years ago, the applicant repeatedly delayed the process, preventing her from benefiting from the court's award. She asserted that the delays had caused her significant frustration, especially since she had not received any benefit from her legally entitled share of the matrimonial properties since their separation in 1992.
14. The respondent emphasized that the applicant's attempts to delay the execution of the judgment were unfair, particularly given that the High Court had granted the conditional extension of time to file the appeal to ensure that the applicant could not further delay the process. She claimed that the applicant was attempting to frustrate the recovery of her share, and in addition to that, he was demanding money from her.
15. The respondent stated that granting a stay of execution would be prejudicial to her, as nothing remains pending in the High Court following the automatic vacation of the extension of time order. She urged the court to dismiss the applicant's application, allowing her to finally enforce the orders made on 14<sup>th</sup> August 2024 and enjoy the benefits of the judgment given in April 2002.
16. When the application came up for hearing on 27<sup>th</sup> January 2025, Mr. Gregory Makambo and Ms. Diana Kimiti appeared for the applicant. There was no appearance for the respondent, despite the firm of Riunga Raiji and Company Advocates being indicated as their representatives. Mr. Makambo relied solely on the written submissions.
17. In his written submission, the applicant submitted that the value of the decretal sum was computed at Kshs. 27,242,505, which he highly contests, and has since filed Court of Appeal Civil Appeal No. E441 of 2021 to challenge the same.
18. The applicant contended that if the stay is not granted, the respondent would proceed with execution, as she had already moved to extract the decree and informed the applicant that she would proceed with execution despite the pending appeal. The applicant submitted that there is an arguable appeal which would be rendered nugatory if an order for stay of execution was not granted.



19. The applicant submitted that this Court has jurisdiction to interfere with the execution of a decree where such discretion has been exercised wrongly.
20. The applicant further submitted that the respondent had extracted the decree, shown her intention to proceed with execution, yet she was not in a position to reimburse the colossal decretal sums in question, if the intended appeal succeeded. He contended that the execution of the impugned decree in the circumstances would unjustly enrich the respondent.
21. The applicant reiterated that the appeal would be rendered nugatory if a stay of execution was not granted because the respondent was retired and had no known source of income. She would be unable to refund the decretal sum if the appeal were successful.
22. Opposing the application, the respondent submitted that the parties herein had been separated for approximately 32 years, and the applicant had exclusively benefited from the matrimonial estate. She mentioned specific properties, including Makueni/Kako/xxxx, L.R.No.12xxxxxx in Karen, and L.R.No.12xxxxxx (Park Place Hotel premises), which were valued at Ksh. 12,680,000 as of December 1992.
23. The respondent submitted that contrary to the applicant's allegations, the deputy registrar did not treat the applicant's claimed debts as assets. The deputy registrar correctly identified that the majority of the alleged loan was for [Particulars Withheld] Hotel and [Particulars Withheld] Restaurant, except for a NHC loan of Kshs. 83,438, which was considered a joint liability and deducted from the agreed value.
24. The respondent submitted that the deputy registrar correctly determined the value of her share of the matrimonial property as of December 1992 as a recoverable debt owed by the applicant, which should accrue interest. She pointed out that the applicant had the opportunity to challenge the deputy registrar's assessment before a judge, but he did not.
25. The respondent also clarified that CACA No. E441 of 2021 was not an appeal against the deputy registrar's assessment itself but rather against the conditional enlargement of time, which she submitted was within the trial judge's discretion and could not be faulted.
26. Regarding the applicant's claim that she would be unable to refund the decretal amount if paid, the respondent submitted that the applicant was previously offered an opportunity on 27<sup>th</sup> May 2021 to deposit the decretal amount in a joint interest-earning account, but he did not agree, and this was factored in the decision to allow execution before taxation.
27. The respondent submitted that the decree in question was a final money decree from the Court of Appeal. She was of the view that the applicant's attempt to offer the title of the least valuable matrimonial property as security was inappropriate and without precedent in civil matters. She further pointed out that if the property offered as security was indeed worth more than the decretal amount, the applicant would have easily sold or charged it to deposit the required sum.
28. The respondent submitted that the applicant's conduct demonstrated an intention to indefinitely delay the finalization of the matter while continuing to exclude her from her rightful share of the matrimonial property. She urged the court to stop these "machinations," as the High Court had done by dismissing the applicant's application.
29. We have carefully considered the application, the affidavits, the submissions by counsel, the authorities cited, and the law. The issue for determination is whether the application has met the threshold for the grant of a stay of execution.



30. Rule 5(2)(b) of the Court of Appeal Rules provides that:

- “(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—
- a. ....
  - b. in any civil proceedings where a notice of appeal has been lodged in accordance with rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

31. To succeed in an application of this nature, the applicant must satisfy the court that it has an arguable appeal which is not frivolous, that it would suffer irreparable loss if the injunction is not granted, and that the balance of convenience favours the granting of the order. In the case of *Stanley Kang'ethe Kinyanjui vs. Tony Keter & 5 Others* [2013] eKLR, the Court held that:

- “i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See *Ruben & 9 Others v Nderitu & Another* (1989) KLR 459.
- ii. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
- iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. *Halai & Another v Thornton & Turpin* (1963) Ltd. (1990) KLR 365.
- iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni*, Civil Application No. Nai 189 of 2001.
- v. An applicant must satisfy the court on both of the twin principles.
- vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.
- vii. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.
- viii. In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. *Damji Pragji* (supra).
- ix. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.



- x. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.
  - xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403.”
32. The first consideration is whether the appeal is arguable. The applicant raised several grounds of appeal in his application. He challenged the superior court's decision to deny him an extension of time to file an appeal and the court's requirement for him to deposit Kshs. 27,242,505 as a precondition for filing the appeal out of time. Furthermore, the applicant raised the question of whether the court exercised its discretion properly when it declined to allow land as a substitute for the required deposit. The applicant also challenged the decision allowing the execution of the decree, contending that execution should not proceed before the taxation of costs, and asserted that the decree was based on erroneous valuations of assets.
33. As was held in the case of *Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd*, (supra), it is sufficient if a single bonafide arguable ground of appeal is raised, for an appeal to be deemed as arguable. From the respondent's submissions, she went into detail why the decretal amount should not be challenged, and why execution was ordered before taxation. These are issues which can only be determined by this Court at a full hearing, and not within this application. In the circumstances, we find that the applicant's intended appeal is arguable.
34. The second consideration is whether the appeal would be rendered nugatory if the stay is not granted. The applicant demonstrated that the respondent was in the process of executing the decree for Kshs. 27,242,505, and that the respondent, being retired and with no known source of income, would be unable to refund the money if the appeal were successful. This is a crucial factor, as it means that the applicant's success on appeal would be meaningless if the respondent were not in a position to repay the amount.
35. This Court in the case of *Kenya Shell Limited vs. Benjamin Karuga Kibiru & Another* [1986] eKLR emphasized that the nugatory aspect was central in stay applications, where the court considers whether a party will be left without remedy if the appeal is successful. In this case, the applicant's position is that the respondent has no means to repay the decretal sum, which would render the success of the appeal futile if the stay is not granted.
36. The respondent rightly pointed out the long history of the case and the delays in execution. The applicant had multiple opportunities to comply with the court orders, and there was concern that further delay would cause undue prejudice to the respondent, who has been deprived of her entitled share of the matrimonial property for several years.
37. However, the court must balance the interests of the parties. The applicant has shown that his appeal raises legitimate issues of law and fact, which should be determined through the intended appeal. Moreover, the applicant has demonstrated that without the order for stay, his appeal would be rendered nugatory. Therefore, while we understand the respondent's frustration, this Court must ensure that the applicant's right to a fair hearing is protected. A conditional stay will serve to protect the interests of both parties and prevent any unjust enrichment.
38. In the result, we make the following orders:



- a. A stay of execution is hereby granted in respect of the ruling and order of the High Court of Kenya at Nairobi (S.N. Riechi, J.) dated and delivered on 14<sup>th</sup> August 2024 in HCFOS No.2 of 2022 pending the hearing and determination of the intended appeal.
- b. The applicant shall deposit the sum of Kshs. 7,000,000 in an interest-earning account in the joint names of the advocates for the applicant and the advocates for the respondent within 90 days from the date of this ruling.
- c. In the event that the applicant fails to deposit the said sum within the stipulated time, the stay of execution shall automatically lapse.
- d. The costs of this application shall be in the cause of the intended appeal.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF MAY, 2025.**

**F. OCHIENG**

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**JUDGE OF APPEAL**

**W. KORIR**

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**JUDGE OF APPEAL JOEL NGUGI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**

