



**MAS v FMS (Civil Application E088 of 2021) [2024] KECA 35 (KLR) (26 January 2024) (Ruling)**

Neutral citation: [2024] KECA 35 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E088 OF 2021  
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA  
JANUARY 26, 2024**

**BETWEEN**

**MAS ..... APPLICANT**

**AND**

**FMS ..... RESPONDENT**

*(Being an application for stay of execution pending appeal from the Judgment and Decree of the High Court of Kenya at Mombasa (M. Thande, J.) delivered on 23rd February 2021 in Matrimonial Cause No. 9 of 2018)*

**RULING**

1. Before us is a Notice of Motion dated November 19, 2021 by which the applicant, MAS , seeks orders of stay of execution of the judgment and decree of the High Court of Kenya at Mombasa (Family Division) in Matrimonial Cause No 9 of 2018 dated February 23, 2021 pending hearing and determination of his appeal.
2. The applicant’s motion is supported by his annexed affidavit sworn on November 19, 2021, and is anchored on 14 grounds set out on the face of the Motion, which we need not rehash here. Suffice it to observe that the supporting affidavit essentially depones to the grounds on which his application is made. Salient among those grounds are that the appeal has high chances of success; that the respondent, FMS, would not suffer any prejudice because she is in occupation of the property subject of the appeal; and that it is in the interest of justice to grant this application as prayed.
3. The applicant’s motion is opposed *vide* the respondent’s replying affidavit sworn on December 9, 2021 in which she contends that the applicant is the greatest beneficiary of the impugned judgment and will not suffer any prejudice; that the applicant has not stated how his appeal will be rendered nugatory if stay is not granted; that the properties in issue are presently registered in his name, and that he might dispose of them if stay is granted. It was also deponed that the applicant had not complied with the trial court’s order to account for the proceeds of sale of plot No. Kwale/Sabharwal S.S/xxx.



4. Briefly stated, the precis of the claims leading to the motion before us is that the respondent took out originating summons in the Family Division of the High Court of Kenya at Mombasa in OS No. 9 of 2018 praying for: a declaration that the properties listed in her summons (the suit properties) comprised matrimonial property, and that they were held by the applicant in trust for her; a declaration that she was entitled to 50% share in the suit properties; an order that the said shares be registered in her favour; an order that the applicant do execute all documents necessary to effect transfer of 50% shares in the suit properties to the respondent within 30 days of the impugned order and, in default, the deputy registrar do execute the requisite instruments; an order that the applicant do account for the proceeds of sale of any property that may have been sold; an order that the suit properties be valued and sold, and that the proceeds thereof be shared equally; and an order that the applicant do render a full account of the income of the underlisted companies from January 2017 to-date, and pay to the respondent 50% of the income thereof.
5. In his response, the applicant denied that the respondent contributed towards acquisition of the suit properties and prayed that she be ordered to vacate his house situate on plot No. xxxx Port Reitz.
6. In her judgment dated February 23, 2021, M. Thande, J. made the following declarations and orders:
  - “i) Plot No. 6xxx (Orig. No. 58xx/xx) Section I, Mainland North is hereby declared to be matrimonial property.
  - ii) The following properties are jointly owned by the Applicant and the Respondent in the ratio of 40:60 respectively:
    - a) Plot No 61xx (Orig No xxxx/xx) Section I, Mainland North
    - b. Plot No 24xx Section/VI/MN Chaani, Port Reitz
    - b. Motor vehicles KBQ xxx and KAX xxx
  - ii) The Respondent shall within 30 days of the date hereof execute transfer documents to give effect to the orders herein and in default, the same shall be executed by the Deputy Registrar of this Court.
  - v) The Respondent shall within 30 days, account for the proceeds of sale of Plot No Kwale/Sabharwal SS/xxx and pay to the Applicant, 40% of the same.
  - v) Each party shall bear [its] own costs.”
7. Dissatisfied with the learned Judge’s decision, the applicant moved to this Court setting out 7 grounds in his memorandum of appeal dated April 23, 2021. According to the applicant, the learned Judge erred in law and in fact: by reaching a decision in the respondent’s favour notwithstanding that no evidence had been adduced before it; in holding that the applicant’s properties were acquired through joint efforts; in ordering that the applicant’s properties be sold; in failing to consider the provisions of sections 3 and 9 of the *Matrimonial Property Act*; failing to consider the applicant’s submissions; failing to evaluate the issues on record; and in failing to consider the legal authorities on record.
8. As to whether the applicant has satisfied the requirements for granting an order for stay of execution pending appeal, we take note of this court’s age-old pronouncements, that whether it be an application for injunction, stay of execution or stay of proceedings, the applicable principles remain the same. To succeed in an application under rule 5(2) (b), the applicant has to establish that the appeal is arguable; and that, if successful, the appeal would be rendered nugatory absent stay.



9. In their written submissions and list of authorities dated September 26, 2023, learned counsel for the applicant M/s. A. O. Hamza & Company cited the case of *Regnoil Kenya Limited v Winfred Njeri Karanja* [2019] eKLR for the proposition that

“... all that is needed in law is that there be even one arguable point, and that will suffice.”

On the discretionary nature of the Court’s decision to grant or decline an application for stay of execution pending appeal, counsel cited the case of *Butt v Rent Restriction Tribunal* [1979] eKLR. They urged us to allow the applicant’s Motion.
10. Opposing the applicant’s Motion, learned counsel for the respondent M/s. Oluga & Company filed written submissions and a list of authorities dated October 3, 2023. Counsel cited the case of *Lydia Kaguna Japheth & 2 others v Mbesa Investments Limited & 2 others* [2023] KECA 385 (KLR), highlighting the twin principles required to be satisfied for grant of stay pending appeal.
11. We take to mind the decision in the case of *Wasike v Swala* [1984] KLR 591 where this Court held that an arguable appeal is not one that would necessarily succeed, but one that merits consideration by the court. Also see *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR. The Court also explained that an arguable appeal is one that is not idle and/or frivolous, and that even a single issue would suffice to merit the orders sought.
12. The record as put to us demonstrates that the intended appeal raises arguable issues as to whether the learned Judge was correct in concluding that the suit properties were acquired through joint efforts; whether the learned Judge considered the provisions of sections 3 and 9 of the *Matrimonial Property Act*; and whether she was correct in directing the manner in which the suit properties were to be shared. As has been previously stated by this Court, an arguable appeal is not one that must necessarily succeed, but one which merits consideration by the Court. Having considered the factual background of this case, the grounds advanced on appeal and the law, we are persuaded that the applicant has an arguable appeal.
13. On the issue as to whether the appeal would be rendered nugatory, this Court held in the case of *Reliance Bank Limited v Norlake Investment Limited* [2002]1 EA 227 that the factors which may render an appeal nugatory are to be considered within the circumstances of each case and, in so doing, the Court is bound to consider the competing claims of both sides. The term “nugatory” was defined in the afore-cited case of Reliance Bank Ltd as “... worthless, futile or invalid. It also means trifling.”
14. The peculiar circumstances of the case before us is that the suit properties declared to be matrimonial property are said to be held in the applicant’s name, including the matrimonial home in which the respondent is said to be presently in occupation. Her contention is that if the impugned judgment is stayed, the applicant is likely to dispose of those properties to her prejudice. On the other hand, we are of the considered view that stay would not be prejudicial, save for the inevitable delay in discharge of the applicant’s duty to render an account of the proceeds of any property sold and income of family businesses as ordered by the trial court. Either way, the applicant’s and the respondent’s competing claims present equal hardship, which this Court is called upon to balance in fair and just determination of the second limb of the twin principle for grant of orders under rule 5(2) (b), namely whether the appeal, if successful, would be rendered nugatory absent stay.
15. In the case of *African Safari Club Limited v Safe Rentals Limited* [2010] eKLR, this Court held:

“...with the above scenario of almost equal hardship by the parties, it is incumbent upon the Court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... We think that the balancing act is in keeping with one of the principles



aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable.”

16. In the same vein, and having considered the record as put to us, the rival submissions of the parties, the cited authorities and the law, we reach the inescapable conclusion that the applicant has satisfied the twin principles for grant of the orders sought. Accordingly, we hereby order and direct that:

- a. There be stay of execution of judgment and decree of the High Court of Kenya at Mombasa (Family Division) (M. Thande, J.) dated January 21, 2021 and delivered on February 23, 2021 in HCCC (OS) No. 9 of 2018 pending hearing and determination of the applicant’s appeal;
- b. The stay hereby granted is conditional upon the applicant being restrained from disposing of any of the matrimonial properties in issue otherwise than in accordance with the terms of the impugned judgment and decree; and
- c. The costs of this application do abide the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF JANUARY, 2024**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

.....

**JUDGE OF APPEAL**

**G.V. ODUNGA**

.....

**JUDGE OF APPEAL**

*I certify that this is a True copy of the original*

**DEPUTY REGISTRAR**

