



**GJO v RSA (Civil Application E246 of 2021) [2022] KECA 421 (KLR) (4 March 2022) (Ruling)**

Neutral citation: [2022] KECA 421 (KLR)

**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL AT NAIROBI**  
**CIVIL APPLICATION E246 OF 2021**  
**DK MUSINGA, W KARANJA & AK MURGOR, JJA**  
**MARCH 4, 2022**

**BETWEEN**

**GJO ..... APPLICANT**

**AND**

**RSA ..... RESPONDENT**

*(Being an application for stay of execution of orders, decree and judgment of (M. Thande, J) delivered on 11th June 2021 in Matrimonial Cause No. 62 of 2019)*

**RULING**

1. The parties herein were in a common law union and were blessed with children born in 1990, 1991 and 1997 respectively. In a judgment of 15th June, 2017 in Divorce Cause OS No. xx of 2019 GJO vs RSA No. xx of 2008, the Court presumed a marriage between the parties and proceeded to dissolve the same.
2. By Originating Summons dated 12th September, 2019 the applicant GJO filed an application before the High Court being Nairobi Family Division Matrimonial Cause No. xx of 2019 seeking orders that the following properties be declared to be matrimonial property and that the same are jointly owned by both him and the respondent and that the same be divided equally between them:  

Lukenya Ranch Plot xxx (Lukenya property)Kajiado Olekasasi/xxx, Ongata Rongai (Rongai property)Nairobi/Block xxx/xxx Komarock Estate (Nairobi property)
3. The applicant also sought a declaration that the respondent holds the Title Nos. Lukenya Ranch Plot xxx and Kajiado/Olekasasi/xxx in trust for herself and him and that in the alternative, that Kajiado/Olekasasi/xxx be divided between them according to their contribution.
4. The respondent denied the averments by the applicant in her replying affidavit sworn on 21st February, 2020. Her case was that she purchased the properties through her own means including loans from her employer and family without any contribution from the applicant since the applicant lost his job in 1992 before she even purchased the first property.



5. The trial Judge upon considering the matter, by the judgement dated 11th June, 2021 held that Lukenya Ranch Plot xxx belongs to the respondent and that the applicant did not prove contribution. The court proceeded to make orders as follows;

- “1. A declaration is hereby made that Nairobi/Block xxx/xxx Komarock Estate is matrimonial property.
2. A declaration is hereby made that the applicant is entitled to a 25% share in Nairobi/Block xxx/xxx Komarock Estate while the respondent is entitled to 75%,
3. The property shall be sold and the proceeds shared between the parties in the proportions stated.
4. The applicant shall account for all the rent he has collected from the said property and 75% thereof shall be deducted from the applicant's share of the proceeds of sale of the property.
5. A declaration is hereby made that the respondent is entitled to 100% of Lukenya Ranch Plot xxx and Kajiado Olekasasi/xxx.”

6. Aggrieved by the decree and orders of the court the applicant filed an appeal and also filed this Notice of Motion dated 8th July, 2021 made under Rule 5(2)(b) of this Court's rules, seeking inter alia:-

- a. Stay of execution of the judgement of the Honourable Court in Nairobi OS No. xx of 2019; GJO -versus-RSA, delivered on 11th June 2021 and the subsequent decree and all the orders arising therefrom pending the hearing and determination of the intended Appeal.

7. The motion is premised on fourteen grounds set out on the face of the Motion and supported by the affidavit of the applicant sworn on 8th July, 2021. The application is premised on grounds, inter alia, that:-

1. That the intended appeal is arguable and has high chances of success.
2. That the respondent is about to initiate the execution process and evict the appellant and their children from one of the properties being Kajiado/Ole Kasasi xxx in Ongata Rongai, which is their home at the moment and the tenant at the Komarock property is apprehensive that he might soon be evicted yet he has a running contract.
3. That the children go to school within the neighbourhood in Ongata Rongai and if they are evicted, their schooling will be greatly disrupted and affected.
4. That the appellant is a man of no means as he is currently unemployed and if he and the children are evicted, they will be completely rendered destitute, as they have nowhere else to go.
5. That due to the threats and conduct of the Respondent, the Appellant is apprehensive that the Respondent will soon initiate the execution process and evict them from their current home and render them completely destitute.
6. That from the foregoing, if the stay of execution is not granted, the Appellant stands to suffer substantial loss.
7. That the Appellant is willing to abide by any conditions that this Honourable Court may impose as a condition precedent for the grant of the Orders sought herein.



8. That it is therefore in the interest of justice that the orders sought herein be granted for the ends of justice to meet. (sic)
8. In a replying affidavit sworn on 27th July, 2021 RSA opposes the application and contends that the motion is an abuse of the court process and thus unmerited.
9. Both parties filed written submissions in support of their rival positions. Ms. Foza learned counsel for the respondent adopted the written submissions and clarified to the Court that the children the applicant is referring to in his application are children from another relationship, not his children with the respondent. The applicant was absent when the application was called out but the Court proceeded with the hearing on the basis of the written submissions. No prejudice was therefore occasioned to the applicant.
10. We have considered the application along with the said submissions and the applicable law. In order for the application to succeed, the applicant needs to demonstrate that his intended appeal is arguable and further, that the same will be rendered nugatory in the event the orders sought are not granted. See *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others* [2013] eKLR).
11. In this case, bearing in mind that an arguable appeal is not necessarily one that will succeed, but simply one that is deserving of the Court's consideration, (See *Dennis Mogambi Mang'are vs Attorney General & 3 Others* [2012] eKLR, we have no hesitation in finding that the appeal herein is arguable as the question of the mode and proportions of distribution of the matrimonial property is not an idle one.
12. On the nugatory aspect, it is doubtful that the respondent can dispose of the matrimonial properties. We were told that attempts to sell the property made earlier have been unsuccessful on account of the applicant's hostility and violence. That notwithstanding however, it is in the interest of justice that the said property be preserved. In the same interest of justice, we need to reiterate that the Court has the sacrosanct responsibility to balance both sides of the scales.
13. The applicant has for many years been receiving rent from one of the properties and utilising it without accounting to the respondent. If the judgment of the trial court is stayed, this would mean that the applicant will continue benefitting from the rent to the respondent's detriment. He is also in occupation of one of the premises and the situation he has created is heavily yet unjustly in his favour. In *Oraro & Rachier Advocates vs Co-operative Bank of Kenya Limited* [2000] eKLR this Court emphasised the need for the court to balance both sides when dealing with situations like the one before us. Having considered all the circumstances of this case, the order that commends itself to us is that a conditional stay be granted in the following terms:-
- i) The status quo pertaining as at the date of this ruling be preserved pending the hearing and determination of the appeal, on condition that the applicant deposits all the rent he receives from NAIROBI/xxx/xxx/ KOMAROCK ESTATE from the date of this ruling with counsel for the respondent, to be held in trust for the respondent and her children until the appeal is heard and determined.
  - ii) In default of payment of the said rent for any one month, the orders herein will automatically stand vacated and the respondent will be at liberty to execute the judgment appealed from.
  - iii) Costs of this application be in the appeal.
  - iv) It is so ordered.



DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2022.

D. K. MUSINGA, (P)

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

*Signed*

**DEPUTY REGISTRAR**

