



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mohammeed & another v Shimanyula & 3 others (Civil Suit  
1 of 2021) [2025] KEHC 1302 (KLR) (28 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1302 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL SUIT 1 OF 2021  
S MBUNGI, J  
FEBRUARY 28, 2025**

**BETWEEN**

**ZENAH MAKOKHA MOHAMMEED ..... 1<sup>ST</sup> PLAINTIFF**

**MARTHA ATIENO ANYANGO ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JOYCE PACILISHA SHIMANYULA ..... 1<sup>ST</sup> DEFENDANT**

**THOMAS SHIMANYULA ..... 2<sup>ND</sup> DEFENDANT**

**FAMILY BANK LTD ..... 3<sup>RD</sup> DEFENDANT**

**PAWARA AUCTIONEERS ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. By way of notice of motion application dated 23<sup>rd</sup> January 2025, the Applicants herein are seeking the following orders;
  - a. Spent
  - b. That pending the hearing and determination of this application inter parties and Appeal, this Honorable court be pleased to order stay of execution of judgment delivered 11<sup>th</sup> December 2024.
  - c. That the 3<sup>rd</sup> and 4<sup>th</sup> Respondents, their agents, servants, employees or any other person acting on their behalf be estopped from attaching and sale of land parcel no. Butsotso/Shikoti/2866 pending hearing and determination of this application and Appeal.
  - d. That the costs of this Application be provided for.



2. The application is premised on the grounds set out on its face and on the supporting affidavit sworn on 23<sup>rd</sup> January 2025 by the Applicant.
3. The 3<sup>rd</sup> Respondent filed a replying affidavit dated 11.2.2025 opposing the application.

### **Background**

4. The Applicants sued the 4<sup>th</sup> Respondent seeking injunction orders prohibiting a public auction scheduled by the 4<sup>th</sup> Defendant of land parcel No. Butso/Shikoti/2866 because it was as a resort of recovering money secured by a charge which was void. They also prayed for the costs of the suit and for any other reprieve the court deemed fit. Their suit was anchored on allegation that they were the wives of 2<sup>nd</sup> Respondent and their spousal consent was not sought when the 3<sup>rd</sup> Defendant loaned 2<sup>nd</sup> Defendant the money in question. After hearing the case the court dismissed their case with costs to 3<sup>rd</sup> Defendant.
5. Having been aggrieved they lodged appeal against the judgment dated 11.12.2024 and filed this application dated 23.01.2025 seeking the Orders as stated in the Application.

### **Applicant's Case**

6. The Applicant avers that the judgment delivered on 11<sup>th</sup> January 2024 against them have a serious implication on them and they have since filled a memorandum of appeal at the Court of Appeal Kisumu for which they have attached a copy of the record of appeal.
7. They claim that the 4<sup>th</sup> defendant who is the auctioneer has scheduled a public auction against their land BUTSOTSO/SHIKOTI/2866 where they currently reside with their families and if the stay of execution of the judgment is not granted, they stand to lose their matrimonial home where they have built their residential home.

### **Respondent's Case**

8. In their reply to the application the 3<sup>rd</sup> respondent/ defendant filled a replying affidavit dated 11<sup>th</sup> February 2025 where it depones that the application is defective and the incompetent since the court is already functus officio.
9. On the prayer for stay of execution, the 3<sup>rd</sup> Respondent position is that the order cant be granted for the Court dismissed the Applicants suit, thus there is nothing to execute. Meaning that there is not Activity to stay.
10. On the prayer for injunction pending Appeal, the 3<sup>rd</sup> Respondent submitted that this court does not have jurisdiction it is the only court of appeal which can issue such injunction.
11. The application was canvassed by way of written submission.

### **Analysis and Determination**

12. I have looked at the Application, supporting affidavit and the 3<sup>rd</sup> Respondents replying affidavit plus the submissions.
13. I isolate 2 issues for determination
  - i. Whether orders of stay can issue.
  - ii. Whether the court has Jurisdiction to grant injunction pending appeal.



## Determination

### Whether orders of stay of execution can issue

14. Power to grant stay of execution is provided for under order 42 rule 6 (1)(2)

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application

1. for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.
2. No order for stay of execution shall be made under sub rule 1 unless: -
  - a. The Court is satisfied that substantial loss may result to the 1st 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.
  - c. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:
    1. Substantial loss may result to him/her unless the order is made;
    2. That the application has been made without unreasonable delay; and
    3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

15. According to the applicants / appellants they stand to suffer substantial loss as the 4<sup>th</sup> defendant who acts under the instruction of the 3<sup>rd</sup> defendant intend to sell their matrimonial home by way of public auction, which loss cannot be quantified by way of damages.

16. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicants are required to show how execution shall irreparably affect them or will alter the status quo to their detriment therefore rendering the appeal nugatory, which the applicants in this case have failed to do.

17. From the court record, the judgment dated 11<sup>th</sup> December 2024 dismissed the applicants case where they claimed that as wives to the 2<sup>nd</sup> Defendant, the 2<sup>nd</sup> Defendant failed to obtain their spousal consent before putting up their home as security to the loan he obtained from the 3<sup>rd</sup> Defendant's institution.



18. Notably, the court cannot grant stay of the impugned judgment as it dismissed the suit which in essence is a negative order and incapable of execution since the court did not order any party from doing anything.
19. In *Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Others* [2016] eKLR the Court of Appeal expounded on stay of execution stating: -

In *Kanwal Sarjit Singh Dhiman v Keshavji Juvraj Shah* [2008] eKLR the Court of Appeal while dealing with a similar application for stay of a negative order, held as follows: -

The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December 2006. The order of 18th December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only.
20. In *Raymond M. Omboga v Austine Pyan Maranga Kisii HCCA No 15 of 2010*, Makhandia, J (as he then was) stated thus:

“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favor of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise...”
21. In light of the above, the order being a negative order which did not order any of the parties to do anything or restrain any party from doing anything is incapable of execution and thus the court cannot order stay of execution of that negative order.
22. Consequently, the prayer for stay of execution must fail.
23. The second issue for determination is whether the court can issue a temporary injunction. The applicants are praying for a temporary injunction to stop the auctioneers from selling off their matrimonial home as they have already filed a memorandum of appeal at the court of appeal in Kisumu.
24. They depose that they have an arguable appeal with a high chance of success and will suffer injustice if this court does not issue the orders sought as the Respondents will proceed to finalize the sale of the suit property, thereby occasioning them irreparable loss, and thereby rendering their appeal nugatory.
25. This court is alive to the fact that power to grant injunction is a discretionary and the discretion must be exercised judiciously and for purposes of meting justice.
26. In the case of *Venture Capital case (Venture Capital and Credit Ltd v Consolidated Bank of Kenya Ltd Civil Application No. Nairobi 349 of 2003 (UR))* the Court of Appeal said that an order for injunction pending appeal is a discretionary matter. The discretion must, however, be “exercised judicially and not in a whimsical or arbitrary fashion.”
27. Evidently, the prayer in this application is similar to the prayer which was sought in the suit which was dismissed by this court in its Judgment of 11.12.2024. It is my considered view that this court cannot



hear and determine an application similar to a similar one it had dealt with earlier. It is trite law that this court cannot sit on appeal of its own ruling or judgement.

28. I find that the application for temporary injunction is misconceived and incompetent in that this court lacks jurisdiction in view of Order 42 Rule 6 which provides:- Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”
29. The High Court can only grant a temporary injunction when it is exercising its appellate jurisdiction only. If a party appealing against a judgment of High Court and wants a temporary injunction can only get such relief from the court of Appeal.
30. The upshot of the above analysis it is my finding that this Application has no merit and it is dismissed with costs to the 3<sup>rd</sup> Respondent.
31. Right of Appeal 30 days.
32. This file is closed.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**S.N MBUNGI**

**JUDGE**

In the presence of:-

Court Assistant: Elizabeth Angong'a

Mr. Kimathi for the 3<sup>rd</sup> Defendant present online.

Ms. Juma holding brief for Namasi for the Applicant present online.

