



REPUBLIC OF KENYA



**Kangoli v Ngumbi (Originating Summons 3 of 2018)
[2025] KEHC 1084 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1084 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
ORIGINATING SUMMONS 3 OF 2018
EN MAINA, J
FEBRUARY 27, 2025**

BETWEEN

MERCY MWIKALI KANGOLI PLAINTIFF

AND

JOSHUA MATHEKA NGUMBI DEFENDANT

RULING

1. There are two (2) pending applications in this case; one dated 8th May, 2023 for stay of execution of the decree of this court pending appeal and the other dated 20th May 2024 seeking orders to enforce the decree. Both Applications flow from the judgment of this court delivered on 2nd March, 2023.
2. This Ruling pertains to the application dated 8th May, 2023 which the parties have through their lawyers canvassed by way of written submissions filed on 25th January, 2024 and 16th May, 2024 respectively.
3. Learned Counsel for the Defendant Applicant submitted that being aggrieved by the Judgment and decree he filed a Notice of Appeal on 30th March, 2023 and has been following up on the typed proceedings and judgment of this court; that contrary to the Plaintiff's/Respondents submissions there was no delay in filing the Notice of Motion; that this court is not functus officio and that the Applicant has met the conditions for grant of a stay of execution pending appeal in that he has demonstrated that he will suffer substantial loss if stay is not granted given that the Plaintiff/Respondent is incapable of refunding or making good the financial loss should the appeal succeed. Further that the Applicant is willing to abide with any conditions as may be imposed by this court as to security.
4. Counsel further argued that no overwhelming hindrance has been demonstrated by the Respondent as would cause this court not to grant the stay and that no prejudice will be occasioned to the Plaintiff/Respondent if the stay is granted. Counsel stated that the appeal has overwhelming chances of success and urged this court to allow the application.



5. Learned Counsel for the Respondent vehemently opposed the application and submitted that there is no proper appeal filed against the judgment and decree of this court; that the Notice of Appeal was lodged after the lapse of the fourteen (14) days prescribed for such notice. Counsel also submitted that the Applicant has not demonstrated that she will suffer substantial loss should the stay sought be granted.
6. In the judgment delivered on 2nd March 2023 the court found in favour of the Respondent herein and held that Plot No.5 Athi River constitutes matrimonial property and as such the same is to be divided equally so that each party gets four (4) flats but with an option that either party could buy the other out at the current market rate. Each party was at liberty to occupy any of their four flats and/or correct the rent therefrom (rent them out). It is the above order which the Defendant/Respondent now seeks to stay. The gravamen of his application being that he has appealed against the order, that the appeal shall be rendered nugatory and he shall suffer substantial loss should the Plaintiff/Respondent execute the decree arising from the orders of the court and further that the Plaintiff/Respondent has not demonstrated any hindrance as would warrant this court to grant the stay sought.
7. A party seeking a stay of execution must convince the court that the application has been filed without undue delay; that they stand to suffer substantial loss and that they are willing to abide by any condition as may be imposed by the court for deposit for security for costs. The Applicant must demonstrate all the three conditions set out in Order 42 Rule 6 of the *Civil Procedure Rules*.
8. I have considered the application, the grounds thereof, the facts deposed to in the Affidavits, the rival submissions and the cases cited.
9. The Applicant has not met even one of those conditions. Not even the one that requires that the application be filed without undue delay. This is given that the Judgment was delivered on 2nd March, 2023 but the Application was not filed until 9th May, 2023. The delay of two months was not explained.
10. I have also not been persuaded that the Defendant stands to suffer substantial loss should the stay not be granted and the appeal succeeds. I say so given that the Applicant was himself allocated half the property and also because despite the orders of Kemei J issued on 9th October, 2018 and 10th December, 2019 the Defendant/Applicant has solely been collecting the rent from the property to the prejudice of the Plaintiff/Respondent. Secondly, the Applicant has not demonstrated that he stands to suffer substantial loss given that the four flats decreed to the Plaintiff/Respondent will still be there even should the Appeal succeed. As for the rent that shall be collected by the Plaintiff/Respondent there is nothing to demonstrate that the Plaintiff/Respondent shall not be in a position to refund the same.
11. Moreover, the Defendant/Applicant's allegation that he has been using the rent to repay a loan is not valid and is without any basis as he has been doing so in violation of the orders of this court, hence unlawfully.
12. It is also instructive that the Defendant/Applicant has not, save for averring that he is willing to comply, offered to deposit any security for costs.
13. The upshot is that the application is not merited and it is therefore dismissed with costs to the Plaintiff/Respondent.

Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 27TH DAY OF FEBRUARY, 2025.

E. N. MAINA



JUDGE

27/02/2025

In the presence of:

Mr. Webale - for the Plaintiff/Respondent

Mr. Chacha - for the Defendant/Applicant

C/A: Geoffrey

