



**BHM v IKH (Family Appeal E034 of 2023) [2024] KEHC 4203 (KLR) (15 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 4203 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA**

**FAMILY APPEAL E034 OF 2023**

**G MUTAI, J**

**MARCH 15, 2024**

**BETWEEN**

**BHM ..... APPLICANT**

**AND**

**IKH ..... RESPONDENT**

**RULING**

1. Before this court is a Notice of Motion dated 27<sup>th</sup> November 2023. *Vide* the said Motion, the Appellant/Applicant seeks the following orders: -
  - a. Spent;
  - b. Spent;
  - c. Spent;
  - d. That this honourable court be pleased to grant stay of execution of the order and/or decision of this honourable court made on the 19<sup>th</sup> of October 2023 until the hearing – and final determination of the intended appeal to the Court of Appeal by the applicant herein.
  - e. Spent; and
  - f. That the costs of this application be provided for.
2. The application is premised on the grounds listed in the body of the Motion and the supporting affidavit of the Appellant/Applicant sworn on 27<sup>th</sup> November 2023.
3. The Appellant/Applicant deposed in her affidavit that the trial court, in its judgement dated 19<sup>th</sup> October 2023, ordered her to vacate the house at Kadzandani and stop collecting rent. Aggrieved by the said judgement, she instructed her advocates to lodge an appeal to have the impugned decision set aside.



4. She stated that her appeal is meritorious and arguable with the likelihood of success and that unless a stay of execution is granted, she and her children would suffer a substantial loss that would be irreversible if the intended appeal succeeds. She contended that the children are in danger of not being catered for due to the order stopping her from collecting rent, which rent proceeds sustains and maintains them. Further, the Respondent has threatened to levy execution against her, which action would render the appeal nugatory.
5. In response, the Respondent filed a Replying Affidavit sworn on 10<sup>th</sup> January 2024. He termed the application as one brought in bad faith, an abuse of the court process aimed at wasting precious judicial time and preventing him from executing the judgment. He averred that the Appellant/Applicant filed a similar application in the Kadhi's Court, seeking similar orders. Thus, filing the application herein before this honourable court was an abuse of the court process and in contravention of the principles of sub-judice under Section 6 of the *Civil Procedure Act*.
6. He further stated that the applicant's application is time-barred under section 79G. He averred that the applicant had not demonstrated substantial loss, and thus, the application ought to be dismissed.
7. He averred that the main issue between him and the Appellant/Applicant is the division of the matrimonial properties. He stated that has no intention of removing the Appellant/Applicant from the matrimonial home as he is awaiting directions from the Children's Court. He urged that since they are divorced, the best thing is for both of them to stay out of the matrimonial home, as any directions from the children's court on custody will also give directions on shelter for the minors.
8. Further, if the orders sought are granted, he will suffer irreparable loss as the applicant will continue living in the matrimonial home and collecting rent without accounting for the same, which is unfair and inhuman.
9. The Appellant/Applicant filed a further affidavit sworn on 1<sup>st</sup> February 2024 stating that she had withdrawn her application for stay of execution that had hitherto been pending at the Kadhi's Court. She urged that her application is not time-barred as it was filed 29 days after the judgement was delivered.
10. She further stated that her application for stay is based on the fact that the Respondent had asked her to vacate the premises and, through various letters before the court, to stop collecting rent from the premises, which she is using to sustain and maintain the children. She urged the court not to interfere with the minors living arrangements at this stage as they are settled and have established a routine which, if interfered with, will cause them emotional distress.
11. The application was canvassed by way of written submissions. Through her advocates, Lawrence Obonyo Legal Advocates, the Applicant filed her written submissions dated 10 February 2024. Her advocates submitted on two issues: whether this application offends the principles of res-subjudice under Section 6 of the *Civil Procedure Act* and whether the applicant has satisfied the conditions for grant of a stay of execution pending appeal.
12. On the 1<sup>st</sup> issue, counsel relied on Section 6 of the *Civil Procedure Act* and submitted that since the Appellant/Applicant withdrew the application for a stay of execution that had been pending before the Kadhi's Court, the doctrine of subjudice did not therefore apply in this case.
13. On the second issue counsel relied on Order 42 rule 6 of the *Civil Procedure Rules* and submitted that stay of execution ought to be granted where sufficient cause is shown. Counsel further submitted that granting of orders for stay of execution pending appeal is at the discretion of the Court and that the purpose of a stay of execution is to preserve status quo pending the hearing of the appeal.



14. On whether the application was filed without undue delay, counsel submitted that the judgment of the trial court was delivered on 19<sup>th</sup> October 2023. The Memorandum of Appeal was filed on 3<sup>rd</sup> November 2023. It was thus submitted that the appeal and the present application were filed without undue delay.
15. On whether there would be a substantial loss, counsel submitted that it is not only the Appellant/Applicant who would suffer substantial loss but also the children of the marriage. It was urged that there was immediate risk of execution of the trial court's judgement's unless stay of execution unless stay of execution was granted.
16. In conclusion, counsel submitted that the matter involved the welfare of children. A stay of execution was in the best interest of the minors, not herself or the respondent. It was urged that the minors deserve stability in their lives. Counsel urged the court to allow the application as prayed.
17. The Respondent, on the other hand, through his advocates Madzayo Mrima & Jadi Advocates, filed his written submissions dated 5<sup>th</sup> February 2024. Counsel submitted on two issues for determination: whether the applicant's application is merited and whether the Memorandum of Appeal as filed raises any arguable issues.
18. On the first issue, counsel relied on Order 42 rule 6(1) and (2) and submitted that the applicant had not demonstrated that she would suffer substantial loss and that her statement does not substantiate any actual loss that would warrant granting the said orders. It was urged that the Respondent would suffer loss as he has been out of the matrimonial home for years and has not been able to enjoy the rental income, which is solely collected and utilized by the Appellant/Applicant. Counsel further urged that the Appellant/Applicant ought to be ordered to deposit security as a pre-condition for appeal for the due performance of the decree.
19. Regarding the 2<sup>nd</sup> issue, Counsel submitted that the applicant does not have an arguable appeal as all grounds in the appeal were addressed by the Honourable Kadhi and that there are no errors in the Kadhi's judgment and the applicant is only re-litigating issues and thus wasting precious judicial time. Counsel urged the court to dismiss the application with costs. Counsel further urged the court to direct the rent to be collected by an estate agent who will deposit the same in court or in a joint account in the names of the parties. It was further urged that the court direct the Appellant/Applicant to move out of the matrimonial home as he is willing to provide an alternative home for her and the children as directed by the Honourable Kadhi.
20. Stay of execution is provided for under Order 42 Rule 6 of the [Civil Procedure Rules](#) 2010, which provides: -

“ 6.

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 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 order set aside.

- (2) No order for stay of execution shall be made under subrule (1) unless— (a) the court is satisfied that substantial loss may result to the 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.”

21. On whether stay of execution should issue the court in the case of *HGE v SM* [2020] eKLR stated: -

“The court, in *RWW v EKW* [2019] eKLR, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words: -

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

22. The first condition to be satisfied in an application for stay is the condition that substantial loss may result if the same is not granted. The court in the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR discussed substantial loss and stated: -

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma v Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42



of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

23. The Appellant/Applicant has urged that not only she but also the children of the marriage will suffer substantial loss. There is an immediate risk of execution of the trial court judgement if a stay of execution is not granted, and the loss will be irreversible if the intended appeal is successful.

24. Having considered the arguments of both parties, I find and hold that the Appellant/Applicant has demonstrated that she will suffer substantial loss. The possibility that execution may be commenced at any time is clear and present. If there is execution, she will no doubt suffer substantial loss.

25. On whether the application was filed without undue delay, the court in the case of *Jaber Mohsen Ali & another v Priscilla Boit & another* [2014] eKLR stated that: -

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be an unreasonable delay depending on the judgment of the court and any order given thereafter.”

26. The judgment appealed against was delivered on 19<sup>th</sup> October 2023, whereas the application herein was filed on 4<sup>th</sup> December 2023. A similar application had been filed in the trial court on 3<sup>rd</sup> November 2023, which was withdrawn via a notice of withdrawal of application dated 10<sup>th</sup> January 2024 and filed on 18<sup>th</sup> January 2024. Taking all these events into consideration it is my view the application herein was filed without undue delay.

27. The third condition is security, as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant. The court in the case of *Gianfranco Manenti & another v Africa Merchant Assurance Company Ltd* [2019] eKLR in discussing the issue of security stated: -

“Thirdly, the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal.”

28. Whereas I agree with the above holding this is a family matter. In my view provision of security in such matters is inapplicable and inappropriate.



29. The upshot of the foregoing is that this Court is satisfied that the orders sought are merited.
30. The application is thus allowed, and the execution of the orders issued by the Kadhi on 19th October 2023 is hereby stayed pending the hearing and determination of the appeal.
31. Each party will, however, bear his/her own costs.
32. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 15<sup>TH</sup> DAY OF MARCH 2024.**

**GREGORY MUTAI**

**JUDGE**

**In the presence of:-**

Ms. Jadi for the Respondent;

Mr. Oyas for the Appellant/Applicant; and

Arthur – Court Assistant.

