CMM v TOL (Civil Application E237 of 2025)
[2025] KECA 1481 (KLR) (12 September 2025) (Ruling)

Neutral citation: [2025] KECA 1481 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E237 OF 2025

SG KAIRU, AO MUCHELULE & FA OCHIENG, JJA

SEPTEMBER 12, 2025

BETWEEN

CMM ..... APPLICANT

AND

TOL ..... RESPONDENT

(An application for an order of stay of execution against the judgment and decree of the High Court at Nairobi (C. Kendagor, J.) dated 17th March 2025 in HCFOS No. E009 of 2022)

RULING

1. The applicant, CMM, and the respondent, TOL, cohabited for 17 years and have a son. In Divorce Cause No. 382 of 2020 at Milimani, the applicant successfully filed for divorce. During the subsistence of the marriage, the parties resided at [Particulars Withheld] Runda, House No. xx LR No. xxx/xx (the suit property) which was registered in their joint names. In the matrimonial property cause before the High Court at Milimani, each party claimed to have exclusively purchased the suit property to the exclusion of the other. The respondent sought a declaration that 50% or such higher proportion of the property was held by the applicant in trust for him. He asked that the property be sold and the net proceeds be equally shared between them. The applicant's defence was that the acquisition of the property was solely by her, and that the inclusion of the respondent in the title was only because he was her husband. Later in the case the respondent retracted the 50%:50% offer and asked the court to determine that the applicant did not contribute to the acquisition of the property.

2. The superior court heard the respective evidence, and in a judgment delivered on 17th March 2025 declared that this was matrimonial property whose acquisition had been jointly contributed to by the parties, and that each party's contribution was equal. It was ordered that the property be sold, after valuation, that the sale be by public auction and that the net proceeds be shared equally. There was a provision for a buyout by either side. In the meantime, the rental income was to be deposited into a joint account held in the names of their counsel, and shared equally.

3. The applicant was aggrieved by this decision and filed a notice of appeal, subsequent to which she filed the present notice of motion under Rule 5(2)(b) of the *Court of Appeal Rules, 2022* seeking the stay of the execution of the decree to await the hearing and determination of the intended appeal. The motion is dated 10th April 2025. In the grounds, supporting affidavit and the draft memorandum of appeal, the applicant's complaint was that the learned Judge failed to consider the circumstances in which the suit property was bought and the respective contributions of either party; that the court failed in law and fact to find that the respondent's contribution was only Kshs.6,000,000/= which went to the improvement of the house and which she had reimbursed; that the court had failed to consider that the respondent had failed to disclose the other properties acquired during coverture. Further, the applicant stated that she had put the property on rent to meet the cost of educating their son in the USA since the respondent had completely refused to contribute to the education.

4. The respondent filed a replying affidavit sworn on 22nd April 2025. He opposed the application, saying that it lacked merits. According to him, the trial court had considered all the evidence before concluding that each party had equally contributed to the acquisition of the property; that the intended appeal raised no arguable point. Even if it did, it was deponed, there was no indication that the appeal will be rendered nugatory, if stay is not granted. He stated that the orders to value the property and either party be given an option to buy out the other, failing which the property be sold in public auction and proceeds shared equally, were procedural and any consequence was of commercial nature that could not render the appeal nugatory. It was deponed that the applicant continues to enjoy exclusive possession of the property and rental income from the same to the exclusion of the respondent, and that this is the status that the applicant wishes to continue enjoying until the intended appeal is heard and determined. This situation, it was deponed, has obtained since 2021. The respondent swore that he was in poor health, unemployed and relies on his elderly mother for financial support. This is why he wants the execution to proceed so that he can benefit from the share of the proceeds of the sale of the suit property. He stated that, in the meantime, the sharing of the rental income would help alleviate his financial predicament and also help him contribute to their child's education.

5. Learned counsel Mr. Kirimi for the applicant and learned counsel Mr. Waithaka for the respondent each filed written submissions and addressed us in highlighting the submissions.

6. According to learned counsel Mr. Kirimi, the applicant had properly invoked the Court's jurisdiction under Rule 5(2)(b) of the *Rules* and had demonstrated that the intended appeal had arguable grounds. Further that, if the property is eventually sold before the intended appeal is heard and determined, she stands to suffer irreparably.

7. In the submissions by learned counsel Mr. Waithaka, the applicant had not identified any question of law or fact that the trial court made an error on, and which was the basis for his dissatisfaction. Learned counsel pointed out that an appeal or intended appeal will only be rendered nugatory where the orders sought to be stayed are either irreversible or where damages cannot adequately compensate the aggrieved party. He submitted that the orders in the impugned judgment were commercial and neutral remedies that were easily reversible if the intended appeal were to be successful.

8. On the claim by the applicant that if stay is not granted, she will be rendered homeless, or that she will be denied money to pay for their child's fees, the respondent's counsel submitted that the property was rented and was therefore not the applicant's residence. Secondly, that the applicant had refused to share in the rent as ordered and yet she insists that he has to contribute towards the fees of the child.

9. We have considered the application and the rival submissions. We have to determine whether the threshold for grant of stay under Rule 5(2)(b) of the *Rules* has been met by the applicant.

10. It is now established that to succeed on the question of stay under Rule 5(2)(b) of the *Rules*, an applicant has to show that the intended appeal is arguable, on at least one point. Once this is established, the applicant has to demonstrate that, if the intended appeal were to be successful, it would be rendered nugatory absent stay. (See *Trust Bank Limited & Another - vs- Investeck Bank Limited & 3 Others* [2000]eKLR).

11. Having in mind that an arguable point is not one that must succeed, as it is simply one that is deserving of the Court's consideration, we have no problem in finding that, whether or not the trial court erred in finding that the applicant had not placed on record evidence to counter the presumption that the joint registration meant equal interest in the property, raised an arguable point that should disturb the minds of the bench that will hear the intended appeal.

12. In the case of *Reliance Bank Ltd -vs- Norlake Investments Ltd* [2002]I EA 227, this Court held that factors which can render an appeal nugatory are to be considered within the circumstances of each case, and that, in so doing, the court is obliged to consider the conflicting claims of both sides. In the circumstances of each case, the court should consider whether:

> " To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicant's appeal to be heard and determined."

13. Referring us to the decision in *Board of Management Kaimosi TTC -vs- Pambazuka Builders* [2025] KECA 662 (KLR), the respondent's counsel pointed out that his client was suffering financial deprivation despite him being a co-owner of the suit property, while the applicant had the possession of the property and had obtained orders to keep him out of the property. He was alone enjoying all the rental proceeds. It was submitted that greater hardship was being borne by the respondent.

14. We consider that the respondent is a registered joint owner of the suit property. It is evident that he was removed from the property by an order of restriction at the instance of the applicant. Since 2021 the applicant is renting the property and utilizing all the proceeds alone. Having rented out the property, there is no immediate threat from the respondent. She is not residing in the property to be able to say that she will have nowhere to stay, if stay is not granted. Further, she will have the option to buy out the respondent, when the property is made available after valuation. We do not think that, if stay is not granted, the applicant will be placed in greater hardship, compared to the respondent, as they wait for the resolution of the intended appeal. In other words, the applicant has not demonstrated that the intended appeal will be rendered nugatory, if stay is not granted.

15. Consequently, we find that the threshold under Rule 5 (2) (b) of the *Rules* has not been fully met. We dismiss the application, and order that costs shall abide the appeal.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF SEPTEMBER, 2025.

S. GATEMBU KAIRU, C.Arb, FCIArb

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.