



**Mohamedali v Bamoto Distributors Limited (Civil Appeal (Application)
E0125 of 2024) [2024] KECA 1731 (KLR) (6 December 2024) (Ruling)**

Neutral citation: [2024] KECA 1731 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E0125 OF 2024
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
DECEMBER 6, 2024**

BETWEEN

NAJMUDIN NOORALI MOHAMEDALI APPLICANT

AND

BAMOTO DISTRIBUTORS LIMITED RESPONDENT

*(Being an application for stay of execution of the judgement and decree
of the Environment and Land Court at Mombasa (L. L. Naikuni, J)
dated and delivered on 5th June 2024 in ELC Case No. E003 of 2022)*

RULING

1. The respondent, vide a plaint dated 11th January 2022, instituted a suit in the Environment and Land Court (ELC) at Mombasa against the applicant herein seeking: that it be declared as the registered owner of the go down on plot no. Mombasa/Block XV/47 (the suit property) having purchased the same from a public auction on 16th September 2021; a declaration that the applicant is a trespasser on the suit property; an order that the applicant vacates the suit property; a permanent injunction restraining the applicant from trespassing thereon; general damages for trespass; costs and interests.
2. The suit was premised on the fact that the respondent lawfully purchased the suit property in a public auction on 16th September 2021 subsequent to which it was issued with a Certificate of Lease on 19th November 2021. Subsequently, the respondent demanded that the applicant, who was in occupation of the suit property, gives vacant possession, but the applicant failed to do so.
3. The suit was defended by the applicant, who pleaded that he was the proprietor of the suit property which he had offered to his brother as security. On receiving information that the property had been advertised for sale, he instituted Mombasa HCCC No. E093 of 2024 in which he sought and obtained an order of injunction stopping the intended auction sale. However, the auction proceeded as advertised on 16th September 2021. He therefore sought orders for the dismissal of the suit with costs.



4. After hearing the case, in its judgement delivered on 5th June 2024, the ELC granted the orders sought in the plaint and awarded the respondent Kshs 7,000,000 in damages for trespass.
5. Dissatisfied with the said decision, the applicant filed an appeal before this Court, being Civil Appeal No 125 of 2024 and, by way of a Notice of Motion dated 29th June 2024, seeks an order that, pending the hearing of the said appeal, there be an order of stay of execution of the decision. The application was supported by an affidavit sworn by the applicant on 29th June 2024 in which he averred: that he has preferred an appeal against the said judgement before this Court; that there is imminent threat that the respondent will proceed to evict him during the pendency of the appeal; that such an eventuality would render the appeal nugatory as he will suffer irreparable losses; that the sale was illegal as no public auction was conducted; that, before the sale, the respondent had approached the applicant with a view to purchasing the suit property, but that they did not agree on the purchase price; that the suit property was sold at an undervalue; that the respondent is a man of straw who will not be in a position to repay the applicant the value of the property in the event that the appeal succeeds; that there are fundamental questions of law to be determined in the pending appeal; that, although the applicant applied for, and the court pronounced that it had granted stay for fourteen days, the record did not reveal that fact; and that the application ought to be granted so as to ensure that the applicant's right of appeal is not eroded.
6. In a supplementary affidavit sworn by the applicant on 6th August 2024, he explained that, although he sought an extension of the interim orders of stay granted by the lower court after delivery of the judgement, he withdrew the same upon realising that the recorded proceedings did not match the pronouncements of the trial court.
7. The application was opposed by a replying affidavit sworn by Raksha Hasit Shah, a director of the respondent, on 5th July 2024. According to the deponent, the respondent is not a party to Mombasa High Court Civil Suit No. E093 of 2021 because the High Court, in its ruling dated 13th July 2023, struck out the suit as against the respondent with costs; that the said suit has since been struck out in its entirety with costs; that the applicant had also filed HCCC E011 of 202 touching on the suit property, which was dismissed on 13th July 2023; that the transfer of the suit property was lawful as the order of the High Court purporting to stop the sale scheduled for 16th September 2021 was issued on 17th September 2021, a day after the auction; that the application does not meet the threshold for grant of stay of execution pending appeal; that the appeal will not be rendered nugatory since the suit property is a go-down for which the respondent holds a title; and that, even if the applicant were to be evicted and the appeal succeeds, the property can still revert to the applicant; that the respondent is a limited liability company and that, having bought the suit property, it cannot be termed as a man of straw as alleged; that the applicant is a forum shopper who has filed several suits over the suit property, and that the appeal herein is another gamble with the justice system; and that the respondent will be subjected to prejudice if the application is allowed as it would deny the respondent enjoyment of property lawfully acquired.
8. We heard the application on the Court's GoTo virtual platform on 14th August 2024 when the applicant was represented by learned counsel, Mr. Mwanzia while learned counsel, Ms. Memia, appeared for the respondent. Learned counsel relied on their written submissions, which they briefly highlighted.
9. In his submissions, the applicant cited the case of Multimedia University & Another v Professor Gitile N. Naituli [2014] eKLR, highlighting the conditions under which an order of stay pending an appeal is granted; and the case of Thomson Smith Aikman, Alan Malloy & others v Muchoki & others [1982] eKLR, submitting that the act of transferring the suit property to the respondent without conducting an auction, being an unlawful act, ought not to be condoned.



10. The applicant submitted: that it has an arguable appeal based on, inter alia, the fact that the learned Judge relied on documents which were not produced as exhibits in arriving at his decision; that the learned Judge failed to appreciate the evidence showing that the sale was illegal; that the certified proceedings did not tally with the transcript; and that evicting the applicant before the pending appeal, Mombasa Civil Appeal No E125 of 2024 is determined, would prejudice the appeal since the success of the said appeal would not restore the applicant's loss.
11. On behalf of the respondent, reliance was placed on the case of *National Assembly & 47 Others v Okoiti & 169 others* [2024]eKLR on the conditions for grant of stay under rule 5(2) (b) of this Court's Rules. According to the respondent, based on the averments in the replying affidavit, the applicant has evinced an arguable appeal since the learned Judge relied on documents that were not produced before the Court contrary to the decision in the case of *Kenneth Nyaga Mwigie v Austin Kiguta & 2 others* (2015) eKLR. On the second condition, it was submitted that the suit property is an immovable property and that, in the event that the respondent takes vacant possession and the Court eventually finds in favour of the applicant, the status quo can be reversed in favour of the applicant, hence the appeal will not be rendered nugatory.
12. We have considered the application and the submissions made before us. The basis for the exercise of this Court's jurisdiction under rule 5(2) (b) of this Court's Rules have now been clearly crystallised by numerous case law emanating from this very Court. The exercise of this jurisdiction is original, independent and discretionary (see *Githunguri v Jimba Credit Corporation Ltd No (2)* (1988) KLR 838). It is a procedural innovation designed to empower the Court to entertain interlocutory application for the preservation of the subject matter of the appeal where one has been filed or is intended (see *Equity Bank Ltd v West Link Mbo Limited* [2013] eKLR. It only arises where the applicant has lodged a notice of appeal or the appeal itself (see [*Safaricom Ltd v Ocean View Beach Hotel & 2 Others Civil Application No. 327 of 2009*](#) UR).
13. The conditions to be met before a party can obtain relief under rule 5(2) (b), as enunciated in case law, are that the applicant has to demonstrate that the appeal is arguable on the one hand and, on the other hand, that if the stay sought is not granted, the appeal or the intended appeal, as the case may be, will be rendered nugatory (see *Githunguri v Jimba Credit Corporation Ltd No (2)* (supra). By the term "arguable", it is not meant that the appeal or the intended appeal will succeed, but one which raises a bona fide issue worth of consideration by the Court (see *Kenya Tea Growers Association & Another v Kenya Planters Agricultural Workers Union*, Civil Application No. Nai. 72 of 2011 UR). In any event, an appeal need not raise a multiplicity or any number of such points, and a single arguable point is sufficient to earn an applicant such a relief, subject to the satisfaction of the second condition (see *Damji Praji Mandavia v Sara Lee Household Body care (K) Ltd* Civil Application No. Nai 345 of 2005 (UR). It is therefore trite that demonstration of one arguable point will suffice (see *Kenya Railways Corporation v Ederman Properties Ltd* Civil Appeal No. Nai. 176 of 2012; and [*Alimohamed Musa Ismael v Kimba Ole Ntamorua & 4 others Civil Appeal No. Nai. 256 of 2013.*](#))
14. As for the second requirement, an appeal or intended appeal is said to be rendered nugatory where the resulting effect is likely to be irreversible or, if it is not reversible, whether damages will reasonably compensate the party aggrieved (see *Stanley Kangethe Kinyanjui v Tony Keter & 5 others* Civil Appeal No. 31 of 2012). Loss to the parties on both sides of the appeal plays a central role in the determination since it is what the Court must strive to prevent by preserving the status quo (see *Total Kenya Limited versus Kenya Revenue Authority* Civil Application No. 135 of 2012).



15. Both limbs must be demonstrated before a party can obtain relief under rule 5(2) (b) (see Republic v Kenya Anti-Corruption Commission & 2 others (2009) KLR 31; Reliance Bank Ltd v Norlake investments Ltd (2012) IEA 22); and Githunguri v Jimba Credit Corporation (supra).
16. Before us, it is contended that the learned Judge relied on documents which were not formally produced as exhibits in arriving at his decision. It is trite that documents, even if identified by the parties during the trial, but not produced as exhibits, cannot be relied upon as evidence in arriving at a judicial decision. This ground, in our view, is arguable and we do not have to look for further grounds.
17. Regarding the second condition, the applicant has not alluded to any hardship that he is likely to face if the decree is executed, save for the fact that he faces the threat of being evicted and that, in the event that the appeal is successful, he might not be able to recover the amount that he would have paid to the respondent. Apart from a mere averment that the respondent, a limited liability company is “a man of straw” no grounds have been disclosed in regard to this contention. A party seeking stay of execution ought to show, based on some reasonable grounds, that the respondent is unlikely to repay the decretal sum if paid over to him. The respondent, being the successful litigant, cannot be denied the enjoyment of the fruits of his litigant on bare averment without any basis. Further, the suit property is an immovable property, and it is not contended that there is likelihood of it changing hands. Apart from the fact that the applicant deposed that there was an earlier attempt at selling the suit property to the respondent, but that an agreement was not reached. This is evidence that the applicant appreciates that the suit property has a value which can be quantified and paid if the appeal fails.
18. We find that the applicant has failed to prove that the appeal, should it succeed, will be rendered nugatory.
19. As the applicant has failed to meet the twofold threshold for grant of stay of execution pending appeal under rule 5(2) (b) of this Court’s Rules, we hereby dismiss the Notice of Motion dated June 29, 2024 with costs to the respondent.
20. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER 2024

A.K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

