



**Capital Care Homes & Property Consultants Limited v Sabatia CEO
Gillian Sabatia Foundation (NGO) (Environment and Land Appeal
E001 of 2025) [2025] KEELC 4031 (KLR) (21 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4031 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E001 OF 2025**

MAO ODENY, J

MAY 21, 2025

BETWEEN

**CAPITAL CARE HOMES & PROPERTY CONSULTANTS
LIMITED APPELLANT**

AND

**EDWARD ENGASHA SABATIA CEO GILLIAN SABATIA FOUNDATION
(NGO) RESPONDENT**

RULING

1. This ruling is in respect of a Notice of Motion application dated 21st January, 2025 filed by the Appellant/Applicant seeking the following orders:
 - a. Spent
 - b. Spent
 - c. That this Honourable Court be pleased to stay the execution of the trial Court's ex-parte Judgment delivered on 11th February, 2022, decree and all consequential orders in Nakuru Chief Magistrate ELC Case No E156 of 2021 pending hearing and determination of the appellant's appeal to this Court.
 - d. That the costs of this Application abide by the outcome of the appeal.
2. The application is supported by the affidavit of Edwin Njuguna sworn on 21st January, 2025 where he deponed that he is the Applicant's Estate Manager and that on 24th May, 2024, the court in Nakuru Chief Magistrate ELC Case No E156 of 2021 delivered a ruling in respect of the Applicant's application dated 1st December, 2022, that sought to dismiss the said suit for misjoinder of parties and to strike out the suit.



3. The Applicant further stated that on 23rd July, 2024, the Respondent was in the process of executing the decree arising out of the ex-parte judgment delivered on 11th February, 2022, despite the fact that the Honourable court had set aside the interlocutory judgment on 2nd September, 2022.
4. It was his deposition that on 24th July, 2024 the Applicant filed an application seeking to vary and/or set aside the orders dismissing the Applicant's application dated 1st December, 2022 which the Trial Court dismissed vide its ruling dated 7th January, 2025.
5. The Applicant deponed that they were served with warrants of attachment of sale and proclamation notices dated 17th January, 2025 respectively and that the Applicant will suffer substantial loss unless the stay order is issued.
6. Edward Engasha Sabatia filed a Replying Affidavit sworn on 31st January, 2025 and deponed that the Applicant's application lacks merit and that he should not be denied the fruits of his judgment. He deponed that the Applicant has not indicated his willingness to furnish security for the due performance of the order and how he stands to suffer substantial loss if the orders sought are not granted.

Applicant/appellant's Submissions

7. Counsel for the Applicant filed submissions dated 7th February, 2025 and identified the following issues for determination:
 - a. Whether substantial loss may result to the applicant unless the order is made.
 - b. Whether the application has been made without unreasonable delay?
 - c. Whether there is an arguable appeal against the ruling delivered in the instant suit?
8. On the first issue, counsel submitted that if the application is not allowed, then the Applicant would be condemned to pay the decretal amount of Kshs 716, 873/= to the Respondent which would render the Appeal nugatory as the Respondent may be unable to refund the Appellant money paid to him.
9. Counsel submitted that the Applicant is amenable to furnishing security-pending appeal that may be ordered by this Honourable court and relied on Order 42 Rule 6 of the Civil Procedure Rules and the case of *Butt vs Rent Restriction Tribunal, Civil App No NAI 6 of 1979*, *Masisi Mwita vs Damaris Wanjiku Njeri* [2016] eKLR, *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR, *Nicholas Stephen Okaka & Another vs Alfred Waga Wesonga* [2022] eKLR and *Sentrim Contracts Ltd vs Joseph Mutinda Menya* [2016] eKLR.
10. On the second issue, counsel submitted that the application was filed on 21st January, 2025 while the ruling was delivered on 7th January, 2025 hence the application was made without unreasonable delay and relied on the cases of *Arun C Sharma vs Ashana Raikundalia t/a Raikundalia & Co Advocates & 2 others* [2014] eKLR and *HGE vs SM* [2020] eKLR.
11. On the third issue, counsel submitted that the Applicant's appeal has merit and asked the court to grant the orders sought and cited the case of *Kenya Power & Lighting Company Limited vs Esther Wanjiru Wokabi* [2014] eKLR.



Respondent's Submissions

12. Counsel for the Respondent filed submissions dated 7th February, 2025, relied on Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules and submitted that the Applicant has not demonstrated how he stands to suffer if the orders sought are not granted.
13. Counsel cited the cases of *Mbula vs Nzangani (Civil Appeal No 150 of 2022)* and *Gianfranco Manenthi & Another vs Africa Merchant Assurance Co Ltd* [2019] and submitted that the Applicant should be ordered to deposit the decretal sum in court to safeguard the interest of both the Appellant and the Respondent.

Analysis And Determination

14. The issue for determination is whether the Applicant has met the threshold for grant of stay of execution orders as sought in the Notice of Motion Application dated 21st January, 2025.
15. The conditions for grant of stay pending appeal are contained in Order 42 Rule 6(1) and (2) of the Civil Procedure Rules which provide that the application for stay should be brought without unreasonable delay, that Applicant has to demonstrate that if stay of execution is not granted he/she will suffer substantial loss and lastly, the Applicant must offer such security as the court orders for the due performance of such decree or order as may ultimately be binding on the Applicant.
16. On whether the Application has been brought without unreasonable delay, the Judgment being appealed against was delivered on 11th February, 2022. The Applicant filed an application dated 1st December 2022 that sought to dismiss the suit for misjoinder of parties which was delivered on 24th May 2024.
17. The Applicant further filed an Application dated 24th July, 2024, seeking to vary and/or set aside the orders dismissing the Applicant's application dated 1st December, 2022 which was later dismissed vide a court ruling dated 7th January, 2025 on the grounds that the Applicant had not adhered to the condition of payment of thrown away costs as ordered by the court. The Applicant was to pay thrown away costs of Kshs 30,000/ failure to which the Judgment would be inforce. The court found that the Applicant had not complied with the said condition. As to whether the current application was filed timeously, I find that it was filed without undue delay.
18. In the case of *Jaber Mohsen Ali & another v Priscillah Boit & another* [2014] the court held as follows:

“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 unreasonable delay depending on the judgment of the court and any order given thereafter.”
19. An application for stay of execution must be hinged on an appeal, which is arguable. For an applicant to be successful, he must demonstrate that he has an arguable appeal and that the intended appeal is not frivolous. Upon meeting that condition, the Applicant must demonstrate that the appeal, if successful would be rendered nugatory in the absence of an order of stay of execution as was stated in the case of *Trust Bank Limited & Ano. v Investech Bank Limited & 3 Others*, Civil Application Nai.258 of 1999 (unreported)).



20. Arguability of an Appeal does not mean that it ought to succeed but must have serious questions of law and must not be frivolous, as was held in the case of *Dennis Mogambi Mang'are v Attorney General & 3 Others*, Civil Application No. Nai 265 of 2011 (UR 175/2011) that:-

“ An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court’s consideration.”

21. In the current case, the court merely dismissed the application with costs and did not order, any of the parties to do anything or refrain from doing anything or to pay any sum. This makes it a negative order which is incapable of execution save in respect of costs only as was held in the case of *Western College of Arts & Applied Sciences v Oranga & others* [1976] KLR 63.

22. It is not the duty of the court to look at the merits of an appeal at this stage but there are cases where if the application is based on case that is non-existent or has issues that may not qualify as an appeal, for example where a case has been dismissed with a negative order and there is nothing to stay.

23. I have considered the application, the submissions by counsel and find that the application does not meet the threshold for the grant of a stay of execution and is therefore dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 21ST DAY OF MAY 2025 .

M. A. ODENY

JUDGE

