



**Airwave Real Estate Limited v Mwaura & 2 others (Environment and Land Appeal E118 of 2024) [2025] KEELC 4916 (KLR) (26 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4916 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E118 OF 2024  
JA MOGENI, J  
JUNE 26, 2025**

**BETWEEN**

**AIRWAVE REAL ESTATE LIMITED ..... APPELLANT**

**AND**

**JACOB RIUNGE MWAURA ..... 1<sup>ST</sup> RESPONDENT**

**JOHN KAINGATI T/A KAINGATI KAMONJO & CO  
ADVOCATES ..... 2<sup>ND</sup> RESPONDENT**

**REGISTRAR OF LANDS, RUIRU ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Appellant/Applicant, Airwave Real Estate Limited, formally moved this Honorable Court urging it to make a determination of a Notice of Motion Application dated 16/10/2024. The Application was premised under the provisions of Sections 1A, 1B, 3, and 3A, of the [Civil Procedure Act](#) and Order 42 Rule 2 and Order 50 Rule 1 the Civil Procedure Rules seeking the following orders:
  1. Spent.
  2. That there be a stay of execution of the Order and Decree of the Subordinate Court in RUIRU MELC No. 165 Of 2022: Jacob Riunge Mwaura Versus Airwave Real Estate Limited & 2 Others pending the hearing and determination of this Application.
  3. That there be a stay of execution of the Order and Decree of the Subordinate Court in RUIRU MELC NO. 165 OF 2022: Jacob Riunge Mwaura Versus Airwave Real Estate Limited & 2 Others pending the hearing and determination of this Appeal.
  4. That such further or other Orders as the Court may deem just and expedient be issued.
  5. That the costs of this Application be in the cause.



2. Pursuant to that and upon service the 1<sup>st</sup> Defendant/Respondent while opposing the said Application, filed his reply dated 11/04/2024.
3. The Application is premised on the grounds, testimonial facts and the averments found in the 35 Paragraphed Supporting Affidavit of Elijah Njoroge, the Appellant/Applicant herein sworn on the same day.
4. It is the Plaintiff/Applicant's averment that there is an improper, irregular and prejudicial Judgment against the Appellant in Ruiru Melc No. 165 Of 2022: Jacob Riunge Mwaura Versus Airwave Real Estate Limited & 2 Others delivered in the absence of the Appellant, following at least 6 adjournments on the delivery of the Judgment. A copy of the impugned Judgment was attached as annexure ENN-1A.
5. That the Appellant was not able to apply immediately for stay of the Judgment since he was never served with hearing notices and so the proceedings are to a large extent ex parte. The Judgment was delivered on 11/10/2024 in the absence of the Appellant and their counsels.
6. It is the Appellant's contention that the impugned Judgment affects at least twenty 3<sup>rd</sup> parties who are innocent purchasers for value and who have put up permanent structures on the property and who were not accorded benefits of due process.
7. Given the skewed process in the hearing of this suit the Appellant has strong case and should execution of the impugned decree not be stayed the appeal shall be rendered nugatory and an academic exercise. To the contrary the 1<sup>st</sup> Respondent will suffer no prejudice or harm as the Appellant is a legal corporation and not in danger of closing down.
8. That only the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were in attendance during the hearing of the main sit in the subordinate Court and the failure to attend Court by the Appellant was not deliberate nor reckless but it was because the Appellant was not aware of the hearing date. Which the Appellant's counsel only became aware of the Judgment through CTS.
9. The Appellant despite learning of the ex parte hearing still filed its submissions on points of law without prejudice to its right to seek to set aside the ex parte hearing. It was not in dispute in all documents that the 1<sup>st</sup> Respondent's claim was based on the Agreement for Sale produced by the 1<sup>st</sup> Respondent himself.
10. The Appellant contends that based on the sale agreement the Court had no jurisdiction to hear the matter a fact raised as a preliminary point of objection/law in four crucial documents on the record of the subordinate Court. Which point was expressly pleaded under paragraph 3 of the Appellant's Statement of Defence dated 13/11/2023.
11. Further the issue of the Court lacking jurisdiction was also raised vide the Notice of Preliminary Objection dated 11/11/2023, through the Replying Affidavit of the Defendant/Appellant sworn on 19/11/2022 and the written submissions filed on behalf of the Appellant. All the documents that raised the issue of jurisdiction are produced as annexure ENN-2A.
12. The other issue that the Appellant also flagged as having been raised at the Subordinate Court hearing was the issue that the Court had no powers to rewrite the contract for parties. Thus the Court as per Order 21 Rules 4 & 5 was required to render Judgment that identified and addressed each question of law. The Judgment rendered on 11/10/2023 fails to address the issue of jurisdiction and rewriting of contracts for parties and this, the Appellant avers is tantamount to deprivation of its rights under the law.



13. It is the Appellant/Applicant's averment that it is not guilty of laches nor obstruction of the course of justice in this matter.

#### **The Plaintiffs/Respondents' response**

14. The Plaintiff/1<sup>st</sup> Respondent opposed the Application through a 21 Paragraphed Replying Affidavit dated 11/04/2024 sworn by Jacob Riunge Mwaura where he deposed that the Appellant Elijah Njoroge is not a Director of the Appellant Company based on the CR12 Search conducted as per annexure JRM-1. Also that there was no proof produced to support the claim by Elijah Njoroge such as minutes or authority of the Company to attest to the fact that he was authorized to represent the Company.
15. It is the Plaintiff's contention that he will be highly prejudiced if the company or the director come to Court and claim they never authorized the said individual to sign the Court documents on its behalf noting that this matter has been in Court for over 4 years.
16. Further the Plaintiff avers that he is also apprehensive that the Applicant has used the proxy MR. ELIJAH NJOROGI to file this Application and the other Application at the lower Court to delay the execution of the decree as it continues to illegally and unlawfully defraud unsuspecting members of the public as claimed in this Application in paragraph 3 by selling to them plots from the property.
17. That from the forgoing the Application is defective as it offends the provisions of Order 19 Rule 3. Additionally the Application dated 16<sup>th</sup> October 2024 is fatally defective on account of its Supporting Affidavit being incompetent for want of capacity by the deponent. At the same time the said Affidavit is submitting on the Memorandum of Appeal annexed therein and does not give sufficient ground as to why the Applicant should be granted the orders sought in the Application for stay.
18. Thus the Applicant has not shown good grounds why this Court should interfere with the discretion of the lower Court.
19. It is the 1<sup>st</sup> Respondent's contention that the Applicant has failed to demonstrate what substantial loss it may face unless a stay of execution is issued. There is an allegation that over 20 third parties have built on the suit property. No evidence has been adduced to support that allegation because the allegations are untrue. To support the averment the 1<sup>st</sup> Respondent/Plaintiff has attached annexure JRM-3 as a photographic evidence of the area at the time of filing the instant suit in the lower Court.
20. He further avers that if there are third parties who have built on the suit property, any loss suffered as a consequence of the decision of this Court in this matter is the Appellant's own doing as there were injunctive orders issued by the lower Court and the Appellant would be in blatant violation of the said orders and the said loss cannot be visited on the 1<sup>st</sup> Respondent. Annexure JRM-4 is a copy of the orders from the lower Court.
21. According to the 1<sup>st</sup> Respondent, the Application having been brought under Order 42 required that the Applicant satisfies the grounds for granting stay as provided for under Order 42 Rule 6 of the Civil Procedure Rules.
22. It is the 1<sup>st</sup> Respondent's contention that the hearing date for the matter was taken in Court with the consent of both Counsels including Counsel for the Appellant but he opted not to appear and participate in the hearing on the date that was scheduled for hearing. That following hearing the Counsel for the Applicant had all the time to set aside the proceedings before Judgment but opted to file submissions, therefore waiving its right to participate in the said hearing.



23. In response to the submission of the Appellant on Article 159 of *the Constitution* the 1<sup>st</sup> Respondent stated that the principles enshrined in Article 159 of *the Constitution* are a double edged sword. While upholding the principle of substantive justice it prohibits the delay of justice. Hence, a party seeking to have substantive justice done to them, must also know and keep in mind the principle of equality of all parties before the law: almost a case of 'do not do to others what you would not want done to yourself'.
24. On the issue of jurisdiction, the Respondent stated that the lower Court did apply its mind on the issue and the same is captured clearly in the said Judgment. Therefore that the Applicant is only working hard to delay the 1<sup>st</sup> Respondent from executing the decree in this matter and the Application herein is one of the techniques being used to waste the Courts time.
25. That it is in the interest of justice that the Application being misconceived, scandalous, frivolous an utter abuse of the solemn Court process should be treated with extreme prejudice and dismissed with costs.
26. The Application was canvassed by way of written submissions which the parties filed and I have considered them extensively.

### **Analysis and Determination**

27. I have carefully read and put into account all the filed pleadings, the Application, Replying Affidavit, the written submissions, the cited authorities relied on and the relevant provisions of *the Constitution* of Kenya, 2010 and the appropriate and enabling laws with regard to the Applications filed in this Court.
28. It is my considered view that the following are the issues for determination:
  - a. Whether the Court should grant the prayers for stay of execution of the Judgment and the decree in Ruiru MELC Suit No. 165 of 2022 pending the hearing and determination of the appeal.
  - b. Who will bear the costs of the Notice of Motion Application dated 16<sup>th</sup> October, 2024
    - a. Whether the Court should grant the prayers for stay of execution of the Judgment and the decree in Ruiru MELC Suit No. 165 of 2022 pending the hearing and determination of the appeal.
29. The Appellants/Applicants are seeking for stay of execution of the Judgement and decree issued in Ruiru MELC Suit No. 165 of 2022. The 1<sup>st</sup> Respondent opposes the grant of the said stay and argues that the Applicant is only working hard to delay him from executing the decree in this matter and the Application is one of the techniques being used to waste the Court's time.
30. In the case of Victory Construction Vs BM (a minor suing through next friend one PMM) [2019] eKLR, the Learned Judge stated that the Court in deciding whether or not to grant a stay of execution, the overriding objective stipulated in Sections 1A and 1B of the *Civil Procedure Act*, should also be taken into consideration. He stated that the Court is no longer limited to the provisions of Order 42 Rule 6 adding that the Courts are now enjoined to give effect to the overriding objectives of the Act and Rules in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.



31. The principles for granting stay of execution are provided for under Order 42 rule 6 (1) of the Civil Procedure Rules as follows:

“No appeal or a second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 an Application being made, to consider such Application and to make such orders thereon as may to it seem just, 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 the orders set aside.”

32. Order 42, rule 6 states:

“No order for stay of execution shall be made under sub-rule (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.”

33. The Appellant needs to satisfy the Court on the following conditions before he can be granted the stay orders:

1. Substantial loss may result to the Applicant unless the order is made.
2. The Application has been made without unreasonable delay, and
3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the Applicant has been given by the Applicant.

34. The principles governing the exercise of the Court’s jurisdiction are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the Applicants must show that they have an arguable appeal; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. These principles were well stated in the case of *Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd – Civil Appl. No. Nai. 93/02 (UR)*, thus:

“Hitherto, this Court has consistently maintained that for an Application under rule 5(2) (b) to succeed, the Applicant must satisfy the Court on two matters, namely:-

1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,
2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”

35. The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in *Chris Munga N. Bichange Vs Richard NyagakaTongi & 2 Others eKLR*



where the Learned Judges stated the principles to be applied in considering an Application for stay of execution as thus:-

“.... The law as regards Applications for stay of execution, stay of proceedings or injunction is now well settled. The Applicant who would succeed upon such an Application must persuade the Court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the Application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated ....”

36. In the case of Mohamed Salim T/A Choice Butchery Vs Nasserpuria Memon Jamat (2013) eKLR, the Court stated that:-

“That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the Judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right ....”

37. We are further guided by the Court’s decision in Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997, at Page 4 where the Court stated as follows:

“.... the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay ... the Applicant must establish a sufficient cause; secondly the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the Applicant must furnish security, and the Application must, of course, be made without unreasonable delay.”

38. From the grounds, the Applicant who was dissatisfied with the Judgment delivered on 11/10/2022 and has appealed against the said Judgment. That the said appeal has high chances of success. Be that as it may, this Court is not persuaded, that the appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, I am not persuaded that if the Application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. I find that the Applicant has not fulfilled any of the grounds to enable me grant the stay. I find this Application has no merit and I dismiss it with costs.

39. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 26<sup>TH</sup> DAY OF JUNE 2025 VIA MICROSOFT TEAMS.**

.....

**MOGENI J**

**JUDGE**

In the presence of:

Appellant – Absent

Ms. Kiama holding brief for Mr. Mageto for the 1<sup>st</sup> Respondent

Mr. Kamonjo for the 2<sup>nd</sup> Respondent

3<sup>rd</sup> Respondent – Absent

Mr. Melita – Court Assistant

