



REPUBLIC OF KENYA



Geepak Limited & another v Kigio Group Company Limited & 2 others (Civil Appeal (Application) E601 of 2025) [2025] KECA 1594 (KLR) (3 October 2025) (Ruling)

Neutral citation: [2025] KECA 1594 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E601 OF 2025
WK KORIR, JM NGUGI & GV ODUNGA, JJA
OCTOBER 3, 2025**

BETWEEN

GEEPAK LIMITED 1ST APPELLANT

PARKSONS PACKAGING EA LIMITED 2ND APPELLANT

AND

KIGIO GROUP COMPANY LIMITED 1ST RESPONDENT

HOUSING FINANCE COMPANY LIMITED 2ND RESPONDENT

DEQMART COMMERCIAL AGENCIES LIMITED 3RD RESPONDENT

(Being an Application for stay of execution of the Ruling and Orders of the High Court of Kenya at Nairobi, (Moses Ado, J.) dated 24th day of July, 2025 in H.C.COMM.C. No. E140 of 2023)

RULING

1. The dispute herein has its origins in the contested sale of Thika Business Centre, a commercial complex situated on L.R. Nos. 4953/IV/45 and 46, Thika Municipality, conducted by public auction on 25th May 2021. The 1st respondent, Housing Finance Company of Kenya (HFCK), exercising its statutory power of sale, instructed Garam Auctioneers to auction the property. The 1st Applicant, Geepak Limited, was declared the highest bidder at Kshs. 563,000,000 and paid the requisite 10% deposit of Kshs. 56,300,000. A certificate of sale was issued to the applicants.
2. Almost immediately, however, the sale became the subject of challenge. The 2nd respondent, Kigio Group Company Limited, the chargor of the property, obtained interim orders from this Court in Civil Application No. E140 of 2021 purporting to stay completion of the transfer. Those orders were served at 2:17 p.m. on the auction date, after the fall of the hammer. A series of applications and suits followed, including HCCOMM No. E634 of 2021 before Sifuna J., where Kigio Group sought to restrain HFCK from transferring the property to the applicants.



3. In a ruling delivered on 21st November 2024, Sifuna J. held that the equity of redemption was extinguished at the fall of the hammer and affirmed the validity of the auction. Similarly, this Court in its ruling of 26th September, 2023 in Civil Appeal No. E193 of 2022 (Kigio Group Co. Ltd v HFC Ltd & Others) held that Kigio had failed to demonstrate that HFCK was served with, or was aware of, the restraining order before the auction.
4. Meanwhile, in HCCOMM No. E140 of 2023, the applicants sought injunctive reliefs relating to rents collected from the property. They argued that as purchasers at the public auction, they were entitled to the rental income, which HFCK had continued to collect. On 4th September, 2023, Mong'are J. allowed the application and granted a mandatory injunction directing that rents be paid into the applicants' account and that historical rents, amounting to over Kshs. 177 million, be applied to offset their loan obligations to HFCK.
5. The 2nd respondent, having not been joined in the proceedings leading to Mong'are J.'s ruling, challenged those orders. By an application heard by Ado J., the 2nd respondent sought to stay execution of Mong'are J.'s ruling. On 24th July 2025, Ado J. granted stay and directed that:
 - a. The orders of Mong'are J. of 4th September, 2023 be stayed.
 - b. All rents collected from 4th September, 2023 to the date of ruling be deposited in an interest-bearing joint escrow account in the names of counsel for the applicants and for the 2nd respondent.
 - c. Future rents also be deposited in the said account pending determination of the appeal.
6. The applicants, aggrieved by the ruling of Ado J., lodged a Notice of Appeal. They also filed the present application dated 30th July, 2025 under Rule 5(2)(b) of the Court of Appeal Rules. Principally, it seeks stay of execution of the ruling and order of the High Court issued on 24th July, 2025 in Milimani HCCOMM No. E140 OF 2023 and all consequential orders flowing thereon. It is supported by an affidavit sworn on 30th July, 2025 by Grace Wamuyu Mathenge.
7. The 1st Respondent opposed the application through a replying affidavit sworn on 6th August, 2025 by Regina Kajuju Anyika, its Director, Legal and Company Secretary. The 2nd Respondent, Kigio Group Company Limited, similarly opposed the application through a replying affidavit sworn on the same date by Stanley Njenga Ndegwa, one of its directors. Both affidavits traverse the applicants' case and urge the Court to dismiss the application. As for the 3rd Respondent, although its counsel, Mr. Nyaberi, indicated during the plenary hearing on 20th August, 2025 that he had filed a replying affidavit, no such affidavit is on the Court's record. Nonetheless, in his oral submissions, Mr. Nyaberi made it clear that the 3rd Respondent opposed the application and associated itself fully with the submissions of the 1st and 2nd Respondents.
8. The application was canvassed by way of written submissions and oral highlighting. It came up for hearing on 20th August, 2025. Mr. Fred Ngatia, SC together with Mr. Hillary Kiplagat appeared for the applicants; Mr. Isaac Kiche for the 1st respondent; Mr. Daniel Mwaura for the 2nd respondent; and Mr. Nyaberi for the 3rd respondent. The applicants, the 1st respondent and the 2nd respondent had filed their written submissions and relied on them. Additionally, they gave oral highlights. The 3rd respondent had not filed submissions. However, we allowed Mr. Nyaberi to orally address the Court in opposition to the application.
9. The application is governed by Rule 5(2)(b) of the Court of Appeal Rules. The principles guiding the exercise of our jurisdiction under Rule 5(2)(b) are well settled. The applicant must demonstrate,



first, that the appeal or intended appeal is arguable, that is to say, it raises at least one bona fide point deserving of the Court's consideration; and, second, that unless stay is granted, the appeal would be rendered nugatory. See *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR and *Hashmukhlal Virchand Shah & 2 Others v Investec Bank Ltd & Another* [1998] eKLR.

10. The applicants submit that their intended appeal is eminently arguable. They maintain that the application leading to the impugned ruling was neither a proper review application under Order 45 of the Civil Procedure Rules nor a stay application pending appeal. They argue that the High Court wrongly assumed "inherent and residual jurisdiction" to stay and effectively overturn Mong'are J.'s earlier orders, thereby contradicting another court of concurrent jurisdiction. They argue that Ado J. effectively reviewed the orders of Mong'are J. in the guise of determining an application for stay, notwithstanding that review jurisdiction could not be so invoked. They contend that the learned Judge proceeded on an erroneous assumption that mandatory injunctions cannot issue at an interlocutory stage, contrary to authorities such as *Canadian Pacific Railway v Rand* [1949] 2 KB 239 and *Locabail International Finance Ltd v Afro-Export* [1988] All ER 901.
11. They further submit that an arguable appeal need not succeed but must raise a bona fide issue worthy of consideration, relying on *Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd. & 2 Others*, Civil App. No. 124 of 2008, and *Cabinet Secretary, Ministry of Health v Aura & 13 Others*, Civil Application E583 of 2023 [2024] KECA 2.
12. On nugatoriness, the applicants argue that the retroactive aspect of Ado J.'s order is oppressive and impossible to implement, as rents since 4th September, 2023 have already been applied to utilities, management, and business expenses. Requiring them to raise equivalent new funds would cause irreparable prejudice. They rely on *Hashmukhlal Virchand Shah & 2 Others v I&M Bank Ltd* [2014] KECA 548 (KLR) and *Safaricom Ltd v Ocean View Beach Hotel Ltd & 2 Others* [2010] eKLR.
13. The 1st respondent, HFCK Limited, opposes the application and prays for its dismissal. It submits that the appeal is not arguable and that the orders of Ado, J. were properly made to preserve the subject matter. It points out that although Geepak Ltd was the highest bidder at the auction of 25th May, 2021, transfer of the property was halted by this Court's ruling of 23rd July, 2021 in Civil Application No. E140 of 2021, which emphasized that rental income was at the heart of the pending dispute and must remain within reach of the Court. HFCK stresses that the balance of the purchase price has never been paid and that as at 25th July, 2025 the outstanding loan stood at approximately Kshs. 734,010,423. In its view, the ruling of Ado, J. was preservatory in nature, requiring the parties to account for rent and to hold future collections in an escrow account, thereby ensuring reversibility and protecting both sides. HFCK argues that such orders cannot render the appeal nugatory, but rather secure the substratum of the dispute. In support, it relies on *Bob Morgan Systems Ltd & Another v Jones* [2004] eKLR, *Butt v Rent Restriction Tribunal* [1982] KLR 417, *Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd & 2 Others* (supra), *Kenya Tea Growers Association & Another v Kenya Planters & Agricultural Workers Union* (Civil Application No. 72 of 2001), *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227, and *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* (supra).
14. The 2nd respondent, Kigio Group Company Limited, also opposes the application. It stresses that the mandatory injunction granted by Mong'are, J. on 4th September, 2023 was both drastic and undeserved, as the case was far from clear and the 2nd respondent had not been joined at the time. Relying on *Nation Media Group & 2 Others v John Harun Mwau* [2014] eKLR, it contends that mandatory injunctions at the interlocutory stage demand a very high standard and may only issue in the clearest and most exceptional cases, which were plainly absent here.



15. The 2nd respondent submits further that the applicants' claim is tenuous, since they never paid the balance of Kshs. 506,700,000 within the stipulated ninety days after the auction, meaning that even if the auction was valid, the sale would have collapsed for want of completion. It characterizes the applicants' case as one grounded in deception and misrepresentation, and argues that equity does not permit a party to retain an advantage obtained by such means. It relies on *Kamau Mucuha v Ripples Ltd* [1993] eKLR, which applied the English decision of *Shepherd Homes Ltd v Sandham* [1970] 3 All ER, for the principle that a party should not be permitted to hold on to a position of advantage obtained through a plainly unlawful act. The 2nd respondent also points out that the applicants have not offered any security for the due performance of the decree and insists that the order of Ado, J. requiring rental income to be placed in escrow is the most equitable safeguard to ensure accountability pending determination of the pending appeals.
16. On his part, Mr. Nyaberi, counsel for the 3rd respondent, associated himself with the submissions made by the other two respondents in opposition to the application.
17. The application falls to be determined on the twin principles of arguability and nugatoriness under Rule 5(2)(b).
18. We begin with the first limb of Rule 5(2)(b): whether the intended appeal is arguable. On this aspect, this Court in *Kang'ethe* stated:

“It is sufficient if a single bona fide arguable ground of appeal is raised. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.”
19. Hence, the threshold here is well settled. An arguable appeal is not one that must necessarily succeed; it suffices that it raises at least one bona fide point worthy of full consideration by this Court. In *Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd. & 2 Others*, Civil Application No. 124 of 2008, the Court emphasized that the test is whether the appeal is not frivolous. Similarly, in *Kenya Tea Growers Association & Another v Kenya Planters & Agricultural Workers Union*, Civil Application No. Nai 72 of 2001, it was underscored that even a single point that invites judicial pronouncement is sufficient.
20. Measured against this standard, the applicants have surmounted the first hurdle. Their intended appeal questions whether a Judge of the High Court, when faced with a stay application, could in substance revisit and vary orders previously issued by a court of concurrent jurisdiction. They also contend that the Judge improperly treated what was in essence a stay application as a vehicle for revisiting mandatory interlocutory injunctions. These issues, in our view, are neither frivolous nor academic; they deserve full ventilation in the intended appeal. The appeal is therefore arguable. Differently put, the question whether the learned Judge exceeded his jurisdiction by, in effect, reviewing *Mong'are J.*'s orders in a stay application is arguable. So too is the question whether the learned Judge erred in assuming that mandatory injunctions cannot issue at an interlocutory stage. These are serious points of law that deserve to be considered on appeal.
21. On nugatoriness, the guiding principle is found in *Hashmukhlal Virchand Shah* (supra):

“We have to ensure that the word ‘nugatory’ has been given its full meaning, namely that the appeal will not be rendered worthless, futile; invalid or even trifling (*Reliance Bank Ltd vs. Nor Lake Investment Ltd* [2002] IEA 227). Secondly we have to consider whether what



has been sought to be stayed is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

22. This second limb of Rule 5(2)(b) — whether the appeal would be rendered nugatory absent stay — requires closer scrutiny in this case. The classic statement of the principle appears in *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227, where this Court held that “nugatory” encompasses more than futility; it includes situations where, even if an appeal ultimately succeeds, the successful party would have suffered irreversible prejudice or damage that cannot be adequately remedied. The Court explained that the focus is on whether the subject matter of the appeal will be preserved in such a manner that the appellate process remains meaningful. This is closely allied with the reasoning in *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR, where the Court observed that the nugatory limb requires an assessment of whether what is sought to be stayed is reversible, or if not reversible, whether the applicant can reasonably be compensated.
23. Applying these principles, it is necessary to distinguish between two aspects of the orders made by Ado, J. The first aspect is retrospective: the direction that all rental income collected from 4th September, 2023 until the date of his ruling be deposited into a joint escrow account. We accept the applicants’ argument that this part of the order, if implemented, would irretrievably prejudice them. The rents in question have already been applied to loan repayments, utilities, and maintenance expenses. To compel the applicants to “recreate” those funds and deposit them afresh would require them to marshal new resources. That would not only impose an immediate and onerous financial burden, but would also operate as a substantive deprivation that cannot be reversed even if the appeal succeeds. In this sense, the retrospective aspect of the order would render the appeal nugatory: once executed, the prejudice cannot be undone.
24. The second aspect of Ado J.’s orders is prospective: the requirement that future rental income be deposited into a joint interest-bearing escrow account in the names of the advocates for the parties. That order is of a preservative nature. Far from rendering the appeal nugatory, it ensures that the rental income is safeguarded and remains available for allocation in accordance with the outcome of the appeals. It is a classic case of preserving the substratum of the dispute. As was noted in *Butt v Rent Restriction Tribunal* [1982] KLR 417, the purpose of interim orders is to ensure that the appeal, if successful, is not stifled, while at the same time balancing the rights of the successful party. The escrow arrangement achieves that balance. The funds remain intact, traceable, and reversible depending on the final outcome.
25. In our judgment, therefore, the nugatory test is satisfied with respect to the retrospective part of Ado, J.’s orders, but not with respect to their prospective part. The just outcome is to stay only the retroactive portion while allowing the prospective safeguard to remain operative.
26. In light of the foregoing analysis, this Court is satisfied that the applicants have demonstrated that their intended appeal raises arguable points deserving of consideration and that, unless tailored relief is granted, part of the impugned orders would render their appeal nugatory. At the same time, it is our duty to balance the equities of the parties and to preserve the substratum of the dispute, in accordance with the principle articulated in *Butt v Rent Restriction Tribunal* [1982] KLR 417, namely that the Court must exercise its discretion in a manner that does not render an appeal illusory while equally safeguarding the interests of the successful party.
27. For the reasons above, the Notice of Motion dated 30th July, 2025 succeeds in part. We order as follows:



- a. The order of the High Court (Ado J.) dated 24th July, 2025 requiring the applicants to deposit into escrow all rents collected from 4th September, 2023 to the date of that ruling is hereby stayed pending the hearing and determination of the intended appeal.
- b. The order requiring that all future rents to be deposited into a joint interest-bearing account in the names of the advocates for the applicants and the 2nd respondent shall remain in force. It shall, however, be varied to begin from the date of this ruling.
- c. The parties shall proceed forthwith to open the said account and ensure compliance.
- d. For the avoidance of doubt, the applicants shall not be required to deposit sums already received and applied prior to the date of this ruling.
- e. The costs of this application shall abide the outcome of the intended appeal.

28. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER, 2025.

W. KORIR

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

