



REPUBLIC OF KENYA



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**CKK Estates (1973) Ltd v General & 4 others (Civil Application
E162 of 2025) [2025] KECA 1741 (KLR) (24 October 2025) (Ruling)**

Neutral citation: [2025] KECA 1741 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E162 OF 2025
F TUIYOTT, AO MUCHELULE & GV ODUNGA, JJA
OCTOBER 24, 2025**

BETWEEN

CKK ESTATES (1973) LTD APPLICANT

AND

ATTORNEY GENERAL 1ST RESPONDENT

DIRECTOR OF SURVEY 2ND RESPONDENT

DAID GICHIA KINYITTA 3RD RESPONDENT

CHIEF LAND REGISTRAR 4TH RESPONDENT

KIFARU PROPERTIES LIMITED 5TH RESPONDENT

(An application for injunction pending lodging, bearing, and determination of an intended appeal from the ruling and order of the Environment and Land Court at Thika (Mogeni, J) delivered on 27th February 2025 in ELC Petition No. 16 of 2022)

RULING

1. On 27th February 2025, the learned Judge (Mogeni, J) delivered a ruling in Thika ELC Petition No. 16 of 2022 in which the applicant's petition was struck out with costs on the ground that the issues therein ought to have been brought by way of a normal plaint as opposed to a constitutional petition. Prior to that decision, Kemei, J. had on 9th November 2023, found that the applicant had established a prima facie case with a probability of success and granted an injunction to preserve the subject matter of the suit, a three hundred and five acre coffee and tea farm comprised in LR. No. 134/8 and LR. No 245/4 (suit property), which the applicant claimed it had been in possession of for 52 years, since September 1973.



2. Aggrieved with the said decision, the applicant lodged a Notice of Appeal dated 28th February 2025 and thereafter lodged the application brought by way of a Notice of Motion dated 12th March 2025 seeking orders that:
 1. That this Court be pleased to restrain the 2nd - 5th respondents from interfering with the applicants' enjoyment of the suit property LR. NO. 134/8 and LR. No 245/4 until further orders of this Court.
 2. That this Court be pleased to restrain the 2nd - 5th respondents from interfering with the applicants' enjoyment of the suit properties LR. NO. 134/8 and LR. No 245/4 pending lodging, hearing, and determination of the applicant's intended appeal against the ruling of Hon. Justice Mogeni delivered on 27th February 2025.
 3. That the 4th and 5th respondents be restrained by themselves, their servants and/or agents from entering LR. NO. 134/8 and LR. No 245/4 or remaining there until further orders of this Court.
 4. That the 4th and 5th respondents be restrained by themselves, their servants and/or agents from entering LR. NO. 134/8 and LR. No 245/4 pending the hearing and determination of this appeal.
 5. That the 4th and 5th respondents be restrained by themselves, their servants and agents from evicting the applicant from the suit premises pending the lodging, hearing and determination of the intended appeal against the ruling of Hon. Justice Mogeni delivered on 27th February 2025.
 6. That the costs abide by the outcome of the intended appeal.
3. It is that application that is the subject of this ruling. The application is premised on the grounds: that the learned Judge vacated the injunctive orders in force at a time the applicant had applied for committal to jail on 24th December 2024, of the 4th respondent and the directors of the 5th respondent for excluding from the farm, three managers of that farm; that the intended appeal raises serious principles of law and constitutional questions; that the impugned ruling allows the 4th respondent to lay claim over the applicant's property, despite the existence of official searches confirming the applicant's ownership; that the 4th respondent has fraudulently obtained title documents over the suit property, and unless a stay is granted, he may proceed to dispose of, alienate or encumber the property, thereby rendering the intended appeal nugatory; that the trial court ignored the fact that the applicant has been in possession of the suit properties for 52 years after buying it from European owners and that its ownership is protected by section 203 of the 1963 Constitution; that unless the stay is granted, the applicants' right of appeal will be rendered nugatory; and that it is in the interest of justice for this court to grant the orders sought so as to preserve the subject matter of the appeal.
4. In support of the application, the applicant's shareholder and a member of the Board of Directors, Samuel Karuga Koinange, swore a supporting affidavit in which he averred: that soon after the ruling was delivered, the applicant informed the court that it wished to appeal to this Court against that ruling and applied orally for an injunction to preserve the subject matter; that the learned Judge declined to give priority to the hearing of the applicant's contempt of court application dated 31st December 2024; that the applicant filed that application to arrest the action of the 4th and 5th respondents who were in the process of endeavoring to dispossess the applicant of his farm since December 2022; that the 2nd and 3rd respondents, behind the back of the applicant, purported to survey the suit properties and create



a sub division of 29Ha which was to be sold by the 4th respondent who is not the owner thereof; that the 5th respondent purported to buy that subdivision for Kshs 210 million; that in November (sic), the 4th and 5th respondents entered the suit properties and tried to evict the applicant from his farm; that unless an injunction is granted, the respondents may take steps to interfere with the suit property, thereby rendering the intended appeal nugatory; that the 4th respondent has fraudulently obtained title documents over the suit property, and unless restrained, may proceed to dispose of, alienate, or encumber the property, leading to irreparable loss to the applicant; that the 4th and 5th respondents have been intimidating the officers of the applicant since 10th May 2024 and have forced them to abandon their houses; and that since Mogeni J. vacated the orders of Kemei J, it is in the interest of justice that the orders be granted so that the subject matter of the intended appeal may be preserved.

5. In opposition, the 4th respondent swore a replying affidavit on 5th May 2025 wherein he deposed: that the application was vexatious, frivolous, and incompetent and an abuse of this Court's legal process, and the same ought to be dismissed with costs; that he is the registered proprietor of the suit property, which measures approximately 63 acres having purchased the same from Emma Krag Jan Groos Helmer and Rikke Augusta Berg-Jensen for a consideration of Kshs. 1,209,969.00 on or about the 18th September, 1973; that the applicant's allegations in its petition that the 3rd respondent, through its corrupt officers had caused the records of the suit properties to disappear or get lost and that the 3rd respondent was abetting and/or aiding the fact of his proprietorship of the suit properties, were issues that ought to have been canvassed through a normal civil suit to wit a plaint; that the applicant had not shown that it has a merited and arguable appeal since the grant of a temporary injunction by Kemei J. did not bar him from applying to strike out the petition as being incompetent; that the applicant's informal application for injunction before the trial Court upon the striking out of the petition was rejected on grounds inter alia that an order of injunction could not be sustained or granted in a suit or a petition which had been struck out since the trial Court could only issue an order of injunction where there was a pending suit for determination; that the instant application has since been overtaken by events since there is already an order maintaining status-quo of the suit properties issued at Thika in ELC No. E004 of 2025, where the applicant is the 1st defendant; that the issuance of an order of injunction will tentatively interfere with the hearing of the pending suits, namely Thika ELC No. E 112 of 2024 and Thika ELC No. E004 of 2025; that the counter-claim by the applicant in ELC No. E 112 of 2024 amounts to filing a new suit, which in itself is an admission that the trial Court was right in striking out the petition and renders the instant application for injunction frivolous and an abuse of the Court's legal process; that the applicant has similarly filed an application for injunction in ELC No. E 112 of 2024 asking for similar orders of injunction as sought herein, where directions were issued for an inter partes hearing on 14th July 2025; the applicant has not demonstrated how the appeal will be rendered nugatory if the injunctive orders are not issued since the issue of ownership of the suit properties is yet to be determined and in any case, the applicant is a party in both ELC No. E 004 of 2025 and ELC No. E 112 of 2024, where it has filed pleadings thereto relating to its alleged ownership of the suit properties; the issue as to whether the 4th respondent's title to the suit property is null, is for determination in ELC No. E 112 of 2024 where the court will determine, upon evidence being tendered by the parties, which of the two titles to the suit properties is genuine; and that the applicant's claim that its alleged title is sacrosanct and that the 4th respondent's title is a product of forgery is but vanity.
6. During the plenary hearing of the application on 26th May 2025, learned Senior Counsel, Dr Gibson Kamau Kuria, appeared for the applicant, learned counsel, Mr Donald Owang, appeared for the 4th respondent while learned counsel, Mr Alphonse Barack, appeared for the 6th respondent. While Dr Kamau Kuria and Mr Owang highlighted the written submissions filed on behalf of their respective



clients, Mr Barrack made brief oral submissions. The other respondents neither appeared nor filed submissions despite due service of the hearing notice.

7. On behalf of the applicant, it was submitted: that the respondents' titles over parts of the suit property were obtained through collusion with public officers and without the compulsory acquisition notice and compensation required under Article 40(3) of *the Constitution*, rendering those titles void ab initio.; that the applicant has established that it has an arguable appeal, and unless the orders sought are granted, its right to appeal will be rendered nugatory. In urging the Court to allow the application, reliance was placed on *African Safari Club v Safe Rentals Ltd* [2010] eKLR and *Stanley Kang'ethe Kinvanjui v Tony Keter and 5 others* [2013] eKLR. At the plenary hearing Dr Kuria asserted that the applicant had established an arguable case on the issue of title and the doctrine of precedent and that the decision sought to be appealed against amounted to the learned Judge sitting on appeal on the decision given on 9th November 2023. He explained that although the applicant had been evicted, it was reinstated.
8. The submissions on behalf of the 4th respondents were: that since the order striking out the petition was a negative order, the Court has ordinarily refrained from granting orders of injunction; that the intended appeal arises from an interlocutory ruling which did not involve substantive hearing of the parties; that the proper invocation of jurisdiction is attained only when the substantive matters have been addressed; that since the ELC is yet to determine the issue of title to the suit property, the submissions that the title is tainted with fraud and therefore a nullity is misconceived; that on the basis of several authorities cited, in light of the filing of the counterclaim in ELC Case No. E112 by the applicant, the doctrine of constitutional avoidance militates against the grant of the orders sought herein; that in the peculiar circumstances of this case the Court ought to strike a delicate balance by considering the interests of both parties and the likely prejudice to any of the parties; that no compelling argument has been placed before the Court that the applicant cannot be adequately compensated by way of damages in the event that the intended appeal succeeds; that since the appeal is not arguable, the application has no merit and ought to be dismissed with costs.
9. At the plenary hearing, Mr. Owang highlighted: that that applicant filed a counterclaim in ELC Case E112 of 2024 in which it sought for an order of injunction; and that the intended appeal will not be rendered nugatory in light of the existing order maintaining status quo.
10. On behalf of the 6th respondent, Mr. Barack associated himself with the position adopted by the 4th respondent and contended: that the application does not pass muster as the intended appeal will not be rendered nugatory as both parties have titles to the suit property.
11. We have considered the application and the submissions made before us. There is no doubt that this Court has the power pursuant to rule 5(2)(b) of this Court's Rules to "order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just grant". This Court has similarly granted conservatory orders and maintained status quo based on the same rule. That rule makes no distinction between stay or injunction of a final and an interlocutory order. Accordingly, the argument by the 4th respondent that the intended appeal arises from an interlocutory ruling which did not involve substantive hearing of the parties and hence this Court cannot grant the injunctions sought, has no basis.
12. The general rule is that discretion necessarily involves a latitude of individual choice according to the particular circumstances and differs from a case where the decision follows *ex debito justitiae* once the facts are ascertained. In matters of discretion authorities are, generally, not of much value since no two cases are exactly alike and even if they were, the Court cannot be bound by a previous decision to exercise its discretion in a particular way because that would be in effect putting an end to the discretion



as it would amount to legislating exercise of discretion. See *Evans v Bartlam* [1937] AC 473, *Jenking v Bushby* [1891] 1 CH 484 and *Nanyuki Equator Sacco Co- Operative Society Limited v Nyeri Sacco Society & Another Civil Application No. Nai. 86 of 2005*.

13. Nevertheless, judicial discretion, however wide, must be prudently exercised based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously; nor should it be exercised on the basis of sentiment or sympathy. See *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231.
14. The fixed principles in this regard are: that the court's exercise of its mandate under the said rule, is original, independent and discretionary. (See *Githunguri v Jimba Credit Corporation Ltd No. (2) [1988] KLR 88*); that the rule is a procedural innovation designed to empower this Court to entertain interlocutory applications 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 NBO Civil Application No.78 of 2011 (UR)*); and that the jurisdiction under the rule only arises where the applicant has lodged a notice of appeal. See *Safaricom Ltd vs. Ocean View Beach Hotel Ltd & 2 others, Civil Application No. 327 of 2009 (UR)*.
15. As for the conditions to be met, before a party can obtain relief under Rule 5(2)(b) this Court has, on numerous occasions restated the same as was crystallised and summarized in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR*, as hereunder;

“This Court, in accordance with precedent, has to decide first, whether the applicant has presented an arguable appeal, and second, whether the intended appeal would be nugatory if these interim orders were denied. From the long line of decided cases (although none was cited by counsel, perhaps due to their notoriety) on Rule 5(2) (b) aforesaid, the common vein running through them and the jurisprudence underlying these decisions can today be summarized as follows:

- i. in dealing with Rule 5(2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See *Reuben & 9 Others v Nderitu & Another (1989) KLR 459*;
- ii. the discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so;
- iii. the Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. See *Halai & Another vs. Thornton & Turpin (1963) Ltd. (1990) KLR 365*;
- iv. in considering whether an appeal will be rendered nugatory the Court must bear in mind that each case must depend on its facts and peculiar circumstances. See *David Morton Silverstein vs. Atsango Chesoni, Civil Application No. Nai 189 of 2001*;
- v. an applicant must satisfy the Court on both of the twin principles;
- vi. in whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. See *Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004*;
- vii. 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. See



Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 others,
Civil Application No. 124 of 2008;

- viii. in considering an application brought under Rule 5 (2) (b) the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. See *Damji Pragji (supra)*;
- ix. the term “nugatory” has to be given its full meaning. It does not only mean worthless, futile, or invalid. It also means trifling. See *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232;
- x. whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved;
- xi. where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent’s alleged impunity, the onus shifts to the latter to rebut by evidence the claim. See *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403.”

16. Similarly, this Court has consistently held that an order for stay of execution will not be granted where what is sought to be stayed is a negative order. See *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR. The position is, however, different where what is sought is an order of injunction in which case there is no bar to seeking injunction even where a negative order is the subject of the intended appeal. This Court in *Kimanthi v Kiiva & 2 others* [2021] KECA 283 (KLR), therefore held that:

“The above conclusion now leads us to determine which of the two substantive prayers that is stay and injunction is the appropriate relief for us to grant herein. As correctly contended by the respondents, what the High Court issued as the final order is a negative order. It is now trite that a negative order is incapable of being stayed. See *Nairobi Metropolitan PSV Saccos Union Limited and Twenty Five others vs. County of Nairobi Government and three others* [2014] eKLR for the proposition that there is no jurisdiction to grant a relief under Rule 5(2) of this Courts Rules where the High Court’s order either resulted in a dismissal or a striking out order; or alternatively where the court did not order either party to do or refrain from doing something capable of being restrained. The above being the correct position in law, it is our position that it is only the injunction relief that can issue herein as an appropriate relief.” [Emphasis added].

17. The purpose of this Court’s jurisdiction under rule 5(2)(b) was restated by the Supreme Court in *Okoiti & 3 others v Cabinet Secretary for the National Treasury and Planning & 10 others* [2023] KESC 69 (KLR) (8 September 2023) (Ruling) where it was held that: intended appeal.”

18. Before us it is contended that the learned Judge erred in striking out the petition when, on 9th November 2023, a Judge of the same court had found that the applicant had established a prima facie case and granted an injunction. This Court while dealing with what constitutes a prima facie case, held in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125 that:

“In civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.



A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.”

19. In our view, it is arguable whether in those circumstances, it was open to the learned Judge to strike out the petition as not disclosing an issue for determination by way of a constitutional petition. That one ground suffices for the purposes of the first condition.
20. On the nugatory aspect, we find this ingredient also satisfied in view of the applicant's assertion that the 4th respondent may proceed to dispose of, alienate, or encumber the property, leading to irreparable loss to the applicant and yet the applicant has been in possession of the suit property for 52 years, since September 1973 and in light of the vacation of the injunctive relief granted by the trial Court which lapsed upon the delivery of a judgment. The respondents are silent as regards the applicant's apprehension. See *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.
21. This Court in *Raol Investments Limited v Lake Credit Finance Limited* [1998] KECA 97 (KLR) held that:

“On whether the applicant's intended appeal, if successful may be rendered nugatory if a stay is refused we say this. The respondent already has a judgment in its favour decreeing that the parcel of land known as Kisumu Municipality/Block 8/237, presently registered in the applicant's name, be transferred to it. Mr Owino Opiyo for the applicant informed us from the bar that the respondent intends to take steps to move the superior court to authorize its Registrar to execute the necessary transfer documents respecting the suit premises in favour of the respondent on behalf of the applicant as the registered owner. Should that happen the applicant will lose its property and there is the obvious danger that the respondent may transfer it to a third party and thereby take it beyond the reach of the applicant. In the event that the applicant's intended appeal succeeds it certainly will be rendered nugatory. It is therefore important that the property be preserved.”

22. Whereas generally the Court's determination depends on whether an applicant has satisfied it of the existence of an arguable appeal and that the success of the intended appeal, absent stay would be nugatory, we are alive to the overriding objective in sections 3A and 3B of the *Appellate Jurisdiction Act*, which requires that, when exercising discretion, the principle of proportionality ought to be taken into account. This position was restated in the case of *African Safari Club Limited v Safe Rentals Limited* [2010] eKLR where this Court held that:

“...it is incumbent upon the Court to pursue the overriding objective to act fairly and justly... to put the hardships of both parties on scale... We think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable.”

23. In this case, the respondents contend that there are already in place an order preserving the suit property hence there is no need to grant the orders sought herein. We take that position to also mean that the grant of the orders sought herein will not prejudice them. However, we cannot tell how long the said preservative orders will be in place.



24. Having considered the twin principles as well as the overriding objective, we find the Notice of Motion dated 12th March 2025 is merited. Accordingly, the orders that commend themselves to us and which we hereby grant are:

- 1. That the 2nd - 5th respondents are restrained from interfering with the applicants' enjoyment of the suit properties LR. NO. 134/8 and LR. No 245/4 pending lodging, hearing, and determination of the applicant's intended appeal against the ruling of Hon. Justice Mogeni delivered on 27th February 2025.
- 2. That the 4th and 5th respondents be restrained by themselves, their servants and/or agents from entering LR. NO. 134/8 and LR. No 245/4 pending the hearing and determination of this appeal.
- 3. THAT the 4th and 5th respondents be restrained by themselves, their servants and agents from evicting the applicant from the suit premises pending the lodging, hearing and determination of the intended appeal against the ruling of Hon. Justice Mogeni delivered on 27th February 2025.
- 4. That the costs abide by the outcome of the intended appeal.

25. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF OCTOBER 2025.

F. TUIYOTT

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original
signed

DEPUTY REGISTRAR

