



**Frann Investment Limited v Wambui (Civil Application
E011 of 2025) [2025] KECA 1693 (KLR) (24 October 2025) (Ruling)**

Neutral citation: [2025] KECA 1693 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E011 OF 2025
AK MURGOR, P NYAMWEYA & GW NGENYE-MACHARIA, JJA
OCTOBER 24, 2025**

BETWEEN

FRANN INVESTMENT LIMITED APPLICANT

AND

JAMES MWANGI WAMBUI RESPONDENT

(An application for stay of execution pending the hearing and determination of an appeal against the Ruling of the Environment and Land Court at Mombasa (L.L. Naikuni J.) dated 24th January 2025 in Mombasa ELC No. 207 of 2019)

RULING

1. The applicant herein, Frann Investment Limited, filed a Notice of Motion application dated 13th February 2025, seeking stay of execution pending appeal of the ruling dated 24th January 2025 delivered by the Environment and Land Court at Mombasa [L. L. Naikuni J.] in Mombasa Environment and Land Court No. 207 of 2019. The application is brought pursuant to Article 159 of *the Constitution* of Kenya, 2010, Section 3A and 3B of the *Appellate Jurisdiction Act* and Rule 5 [2][b] of the Court of Appeal Rules. The principles that apply to an application brought pursuant to Rule 5[2][b] for an order of stay are well settled. An applicant has to satisfy two requirements. Firstly, that he or she has an arguable appeal. Secondly, that unless an order of stay is granted the intended appeal would be rendered nugatory. These principles have been restated and amplified by this Court in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR and various other decisions. In addition, this Court exercises original jurisdiction under Rule 5 [2][b], as held in *Ruben & 9 others v Nderitu & another* [1989] KLR 459.
2. The applicant's case is in this regard as set out in the application and affidavit in support thereof sworn on even date by Edward Kagume, one of its directors; a supplementary affidavit sworn on 10th March 2025 by Gikandi Ngibuini, its advocate; and in submissions dated 10th March 2025 filed by its advocates



on record. In summary, the applicant avers that it was the landlord of James Mwangi Wambui, the respondent herein concerning a property situated on Plot No. MN/III/1696 off Mombasa – Malindi Road within the Mtwapa Area of Kilifi County, with respect to which the respondent instituted a claim for compensation in Mombasa Environment and Land Court Case No. 207 of 2019 - James Mwangi Wambui v Frann Investments Limited. The Environment and Land Court [hereinafter “ELC” or the “trial Court”] found in the respondent’s favour in a judgment delivered on 28th November 2023, a ruling dated 18th March 2024 and in an amended judgment dated 18th March 2023, and awarded the respondent general damages in the sum of Kenya Shillings Sixty-Two Million Forty-Seven Thousand Three Hundred and Fifty [Kes. 62, 047, 350/=].

3. The applicant, being aggrieved by the said judgments and ruling, filed three [3] appeals being Mombasa Court of Appeal Civil Appeal No. E106 of 2024 - Frann Investment Ltd v James Mwangi Wambui, Mombasa Court of Appeal Civil Appeal No. E107 of 2024 - Frann Investment Ltd v James Mwangi, and Mombasa Court of Appeal Civil Appeal No. E109 of 2024 - Frann Investment Ltd v James Mwangi. The applicant further averred that it also filed an application in the trial Court dated 8th July 2024 for stay of execution of the said judgments and ruling, and the ELC in a ruling dated 24th January 2025 allowed the said application for stay of execution, but on condition that the applicant deposits the sum of Kenya Shillings Twenty Million, Six Hundred and Eighty Two Thousand, Four Hundred and Fifty [Kshs 20,682,450/-] in a joint account held in the names of the respective advocates for the parties within forty-five [45] from the date of delivery of the said ruling. However, that the trial Court declined the security the applicant had offered to deposit with the court, being the original title deed of Plot No. MN/111/1700 Off Mombasa-Malindi Road within Mtwapa area, Kilifi County, which land is valued at the sum of Kenya Shillings One Hundred and Twenty-Five Million [Kshs 125,000,000/=], and which is still available as security.
4. The applicant being aggrieved by the said decision filed a Notice of Appeal, and it avers its appeal is arguable and to this effect it annexed a draft memorandum of appeal. Further, that if the respondent is allowed to proceed with the execution for the award of general damages amounting to Kshs 62,047,350/-, a sum the applicant did not have, the appeal would be rendered nugatory and if the appeal succeeds, the applicant will be unable to recover the decretal sum, as its property would be attached and sold through public auction. Further, the respondent has never indicated his financial capacity and means and thus recovering the money that the respondent will receive if execution is not stopped will be impossible.
5. These grounds were reiterated in the written submissions filed by the applicant’s advocates. While referring to the principles for grant of a stay set out in Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 others [supra], it was urged therein that the appeal raises several triable points of law as set out in the draft memorandum of appeal, and in particular that the trial Court did not give any valid reason for rejecting the use of LR. No. MN/III/1700 as security for the due performance of the decree since the respondent was claiming Kshs 62,047,380/- and the security offered is valued at Kshs 125,000,000/-. Therefore, that it was not open to the trial Court to reject the use of the security offered despite the existence of the title document, valuation report and the official search of LR. No. MN/III/1700 which evidence had not been rebutted by the Respondent at all.
6. The applicant’s advocates reiterated that the resources by the respondent remained unknown, and reliance was placed on the decision by this Court in National Industrial Credit Bank v Aquinas Francis Wasike & Another [2006] eKLR, that once an applicant expresses a reasonable fear that the respondent would be unable to pay back the decretal sum, the evidential burden shifts to the respondent to show what resources he has since that is a matter which is particularly within his knowledge. It was submitted that it was incumbent on the respondent to produce evidence to clear the applicant’s doubt with



- regards to his ability to refund the decretal sum, which he failed to do and it was thus not guaranteed of getting the decretal sum back in the event the appeal succeeds.
7. The respondent filed a replying affidavit sworn on 5th March 2025 in opposition to the application, and confirmed that the ELC delivered a judgment in his favour, and averred that the subject application seeks to deny and deter him from enjoying the fruits of the said judgment. In response to the applicants averments, the respondent stated that Order 42 of the Civil Procedure Rules, 2010 granted the trial Judge the powers to exercise discretion in granting the stay orders including giving directions on deposit of security and to determine the nature of the security; the applicant has not demonstrated any irregularity nor illegality in the exercise of the Court's discretion; the applicant had not demonstrated the substantial loss it stood to suffer since it had categorically stated in their application for stay in the trial Court dated 8th July 2024 that it was a reputable company with the ability to pay the decretal sum and had offered to deposit the full decretal sum in a joint interest account; and that the trial Court was within its mandate in directing that the title deed was not sufficient as the title was encumbered and in the name of the persons' not party to the suit. Lastly, that the annexed memorandum of appeal did not raise any triable or arguable issues and the applicant had approached this Court with unclean hands since it was yet to comply with the orders issued on 24th January 2024 .
 8. The respondent's advocates on record similarly emphasised on the principles that apply in the grant of orders of stay of execution in their written submissions dated 20th March 2025, and cited the decision in the case of Kenyariri t/a Kenyariri & Associated Advocates v first Community Bank Limited [Now Premier Bank Kenya Limited] [2023] KECA 160 [KLR] in this regard. On the issue of whether the applicant has an arguable appeal before this Court it was submitted that the intended appeal did not raise an arguable ground as it invites this Court to interfere with the ruling of the trial Court without any sufficient cause as the trial Judge properly exercised discretion in issuing the conditional stay order. Reliance was placed on the decision by the Supreme Court of Kenya in the case of John Florence Maritime Service Limited & Another v Cabinet Secretary, Transport and Infrastructure & 3 Others [2021] eKLR that an appellate court will not interfere with the exercise of discretion by a trial Court unless the discretion was exercised in a manner that is clearly wrong. In addition, that it is the applicant who had offered to deposit the full decretal amount in a joint interest account and further provided the trial Court with a title deed was in the name of persons not parties to the suit, and that the trial Judge was indeed lenient by ordering them to deposit a third of the decretal sum in a joint interest earning account.
 9. On the second limb of whether the intended appeal will be rendered nugatory, the respondent's advocates submitted that the intended appeal will not be rendered nugatory, as the applicant will not suffer any irreversible damage since the deposit ordered by the trial Court will be maintained in a joint interest account held by the respondent's advocates and applicant's advocates, to protect both the interests of the respondent and applicant.
 10. We heard the application on 1st April 2025 on this Court's virtual platform. Learned counsel Mr Gikandi Ngibuini, appearing together with Mr. Wairoto, were present for the applicant, while learned counsel Mr. Gachie Mwanza appeared for the respondent. Mr. Gikandi Ngibuini and Mr Mwanza highlighted their respective written submissions dated 10th March 2025 and 20th March 2025, a summary of which we have already set out hereinabove.
 11. As indicated at the beginning of our ruling, we need to be satisfied firstly, that the applicant's intended appeal is arguable; and secondly, that if the orders of stay of execution sought are not granted, the appeal will be rendered nugatory. On the first requirement, the applicant annexed a draft memorandum of appeal, in which it raises four grounds around the issue of whether the trial Court reasonably exercised its discretion in ordering that the applicant deposits the sum of Kenya Shillings Twenty Million, Six



Hundred and Eighty-Two Thousand, Four Hundred and Fifty [Kshs 20,682,450/-] as security instead of the title deed for LR. No. MN/III/1700. It is established that a single bona fide issue is sufficient to find an intended appeal is arguable, and the Court will not interrogate the grounds of appeal at this stage, which is a task to be undertaken by the bench that will hear and determine the substantive appeal. To this extent, we find the applicant's intended appeal to be arguable.

12. The second requirement an applicant is required to demonstrate is that should the application for stay be declined, the appeal or intended appeal, if successful, will be rendered worthless. Additionally, as was held in *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others* [supra], 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. The applicant is in this regard apprehensive that it will lose the suit property in an auction to execute the order, and may not recover the deposit ordered if the stay is not granted. The applicant also reiterates that it is still willing to avail the title deed to LR. No. MN/III/1700 as alternative security, therefore the respondent will suffer no prejudice.
13. It is notable in this respect that the respondent has a money judgment in his favour, and the applicant did not controvert the respondent's averments that it had indicated in the trial Court that it was ready and willing to deposit the entire decretal sum, and that the title deed it provided as alternative security was encumbered and in the name of a third party who is not a party to this appeal. It is also notable that the applicant did not avail a copy of the title deed it avers is available as alternative security. Lastly, as indicated by the respondent, the orders sought to be stayed required the applicant to deposit a third of the decretal sum in a joint interest earning account to be opened in the name of the advocates of both the respondent and applicant.
14. Therefore, no sums of money are being released to the respondent as alleged by the applicant, and on the contrary, the said orders protect both the interests of the applicant and the respondent in the event the intended appeal succeeds or fails. We are therefore not satisfied that the applicant has demonstrated any irreversible prejudice it will suffer if the orders of the trial Court are not stayed, and the intended appeal will thereby not be rendered nugatory.
15. In conclusion, we find that the applicant has not met the threshold for the grant of stay orders. The application dated 13th February 2025 is accordingly hereby dismissed with costs to the respondent.
16. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF OCTOBER, 2025

A.K. MURGOR

JUDGE OF APPEAL

P. NYAMWEYA

JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

JUDGE OF APPEAL

