



**Kang'ara alias Mary Nyambura Paul v Mayaka (Civil Application
E698 of 2024) [2025] KECA 1829 (KLR) (7 November 2025) (Ruling)**

Neutral citation: [2025] KECA 1829 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E698 OF 2024
AO MUCHELULE & J MOHAMMED, JJA
NOVEMBER 7, 2025**

BETWEEN

**MARY NYAMBURA KANG'ARA ALIAS MARY NYAMBURA
PAUL APPLICANT**

AND

PAUL OGARI MAYAKA RESPONDENT

*(Being an application for stay of execution pending the hearing and determination
of an appeal from the judgment and decree of the High Court at Nairobi
(H. Chemitei J.) dated 5th December, 2024 in Civil Case No. 6 of 2012 (O.S))*

RULING

Background

1. Before us is a Notice of Motion dated 16th December, 2024 by Mary Nyambura Kang'ara alias Mary Nyambura Paul expressed to be brought under Rules 41, 47, 49, 51, 84, and 88 of the Court of Appeal Rules, 2010, and all other enabling provisions of the law. The application seeks, in the main, the following orders:
 - a. That this Court be pleased to grant an order of stay of execution of the ruling and orders of the High Court pending the hearing and determination of the intended appeal;
 - b. That this Court be pleased to issue such further or other orders and/or directions as it may deem just and expedient in the circumstances; and
 - c. That costs of this application do abide the outcome of the intended appeal.Paul Ogari Mayaka is the respondent herein.



2. The application is supported by grounds on its face and by a supporting affidavit. The applicant contends that the High Court, in a ruling delivered on 5th December 2024, erred in law and fact by modifying the judgment of the Supreme Court delivered on 27th January 2023 and granting orders for rent collection, including retroactive rent, contrary to the Supreme Court decree. It is the applicant's position that the High Court lacked jurisdiction to entertain issues of rent and went beyond the scope of execution proceedings under Section 34 of the [Civil Procedure Act](#).
3. The applicant contends that unless stay is granted, the intended appeal will be rendered nugatory as the respondent will have executed the impugned orders of the High Court in a manner inconsistent with the Supreme Court judgment. The applicant maintains that no prejudice will be occasioned to the respondent if the stay sought is granted.
4. In the supporting affidavit, the applicant deposes that the Supreme Court determined the dispute and ordered that Plot No. 29 within L. R. No. Dagoretti/Riruta/168 (the suit property) be shared between the parties in the ratio of 70 (to the applicant):30 (to the respondent), but made no order on rental income. The applicant argues that the High Court, being an executing court, could not introduce new terms to a judgment that had already been conclusively pronounced by the Apex court.
5. By a further affidavit sworn on 8th August 2025, the applicant reiterated that the issue of rental income had been raised and determined up to the Supreme Court but was not awarded. Therefore, the High Court lacked jurisdiction to entertain it during enforcement. The applicant maintained that unless stay is granted, the High Court ruling will effectively vary the Supreme Court judgment.
6. The application was opposed through a replying affidavit sworn by the respondent on 27th December 2024. The respondent asserts that he moved the High Court solely to enforce the Supreme Court decree as the applicant had denied him access to the suit property and its rental income since 2011. The respondent asserts that the High Court did not vary the Supreme Court decision but merely gave effect to it by issuing directions that would allow both parties to benefit from the suit property in the interim.
7. According to the respondent, the High Court had jurisdiction under Section 34 of the [Civil Procedure Act](#) to supervise execution of a decree, and no issue of jurisdiction arises. He further urges that the applicant should not be heard by this Court while continuing to enjoy 100% of the rental income at his expense.
8. The respondent contends that the intended appeal is not arguable and that the application for stay is merely an attempt to delay the enforcement of a lawful decree. He therefore prays that the application be dismissed with costs.
9. A brief background will help place the application in context. The dispute originates from a suit filed by the respondent in the High Court seeking division of alleged matrimonial property, being Plot No. 29 and the developments thereon. The High Court dismissed the suit on the ground that no presumption of marriage existed between the parties.
10. On appeal, this Court reversed that decision, holding that there was a presumption of marriage, and ordered equal division of the property at 50% each. Dissatisfied, the applicant appealed to the Supreme Court, which in its judgment dated 27th January 2023 held that while there was no presumption of marriage, both parties had made joint contributions to the acquisition and development of the property and were entitled to shares of 70% to the applicant and 30% to the respondent, respectively.
11. Subsequently, the respondent moved the High Court by a motion dated 26th June 2023 seeking enforcement of the Supreme Court decree, including orders for rent collection and accounting.



The High Court allowed the application and ordered the sharing of rental income at a 70:30 ratio, appointment of an estate agent in default, and joint access to the suit property for implementation. Submissions by Counsel

12. At the hearing of the application, both parties were represented by counsel and had filed written submissions. Learned counsel, Mr. Gathuthi represented the applicant while learned counsel, Mr. Moses N. Siagi represented the respondent. Learned counsel Mr. Gathuthi, highlighted his submissions and relied on the decision of *Pauline Yebei & Another v Estate of Kiprotich Letting* [2017] eKLR, where the Court held that for an applicant to succeed under Rule 5(2)(b), they must demonstrate that the appeal is arguable and that its success would be rendered nugatory if stay is not granted.
13. Counsel submitted that the High Court, in purporting to award rent and appoint an agent, exceeded its jurisdiction under Section 34 of the *Civil Procedure Act* and effectively modified the Supreme Court judgment. Counsel urged us to allow the application.
14. Learned counsel, Mr. Siagi submitted that there was no modification of the Supreme Court judgment by the High Court in the impugned ruling. Counsel asserted that the High Court merely ensured compliance by directing that rent be shared in line with the 70:30 ratio. Counsel maintained that the High Court had jurisdiction under Section 34 of the *Civil Procedure Act*, and that the applicant had been unjustly enjoying the entire rental income to the respondent's prejudice. Counsel urged us to dismiss the application.

Determination

15. We have considered the motion, the affidavits, the submissions by counsel, the authorities cited, and the applicable law. Our jurisdiction under Rule 5(2)(b) is discretionary and is exercised on well-established principles. An applicant must demonstrate: (i) that the appeal is arguable, and (ii) that unless stay is granted, the appeal or intended appeal would be rendered nugatory. Both limbs must be satisfied. (*Trust Bank Limited & Another v Investech Bank Limited & 3 Others* [2000] eKLR).
16. On arguability, an arguable appeal is not one that must ultimately succeed, but one that raises at least a bona fide point worthy of consideration and not frivolous. We have considered the draft memorandum of appeal and the grounds raised. The gravamen of the applicant's complaint is that the High Court exceeded its jurisdiction by issuing orders on rental income during execution.
17. However, it is not disputed that the Supreme Court found both parties to have a beneficial interest in the suit property. It is also not disputed that the applicant has, for many years, enjoyed rental income to the exclusion of the respondent. On the material before us, without saying more lest we embarrass the bench that will be seized of the main appeal, we are not persuaded that the intended appeal is arguable.
18. On the second limb, we must consider whether the intended appeal would be rendered nugatory if stay is not granted. The rental income in question is a monetary benefit, and the applicant has not shown that the respondent would be unable to refund any sums due should the appeal eventually succeed. The applicant has also not demonstrated that compliance with the High Court orders would irreparably affect or extinguish the subject matter of the intended appeal. Further, counsel for the applicant conceded at the hearing of the application that the suit property is pending confirmation in the succession court and that the title to the suit property is yet to be issued. We therefore find that in the circumstances of this case, the intended appeal will not be rendered nugatory if the orders sought are not granted and the intended appeal succeeds.
19. Having failed to satisfy both limbs under Rule 5(2)(b), the application cannot succeed.



- 20. In the premises, we find that the Notice of Motion dated 16th December 2024 lacks merit and is hereby dismissed with costs to the respondent.
- 21. The ruling is delivered under Rule 34(4) of this Court’s Rules as the same was delivered after the passing on of Judge Ochieng, JA.
- 22. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF NOVEMBER, 2025.

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

