



**Koi v Hatimy Group Limited (Civil Application E055 of 2024)  
[2025] KECA 1811 (KLR) (7 November 2025) (Ruling)**

Neutral citation: [2025] KECA 1811 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E055 OF 2024  
AK MURGOR, KI LAIBUTA & GW NGENYE-MACHARIA, JJA  
NOVEMBER 7, 2025**

**BETWEEN**

**SALIM SAID KOI ..... APPLICANT**

**AND**

**HATIMY GROUP LIMITED ..... RESPONDENT**

*(Being an application for stay of execution pending hearing and determination of an appeal from the Judgment and Decree of the Environment and Land Court at Mombasa (S. M. Kibunja, J.) delivered on 8th November 2023 in Mombasa ELC No. 69 of 2007 consolidated with Mombasa ELC No. 76 of 2007)*

**RULING**

1. The application dated 13<sup>th</sup> May 2024 follows the Judgement and Decree (S. M. Kibunja, J.) dated and delivered on 8<sup>th</sup> November 2023 from consolidated suits, Mombasa ELC No. 69 of 2007 and ELC No. 76 of 2007 in which the learned Judge declared Hatimy Group Limited (the respondent) to be the registered proprietor of Plot Nos. 203, 204, 969 and 222/1/MN Kisauni (the suit property). The learned Judge further ordered Salim Said Koi (the applicant) together with 13 other persons named as the defendants before the trial court to demolish any buildings erected on the suit property and to pay general, punitive and aggravated damages for trespass on the suit property. The applicant and 13 others were also restrained by an order of perpetual injunction from dealing with the suit property in any manner.
2. Aggrieved by the decision, the applicant commenced the present appeal, but first seeks through the instant motion, which is brought under rule 5(2) (b) of this Court's Rules, 2022 (albeit that the applicants indicates that it is the 2010 Rules) orders that: "pending the hearing and determination of this appeal, the Court be pleased to issue temporary injunction restraining the respondent from evicting the appellant (applicant) from the suit property; pending the hearing and determination of



this appeal; that there be a stay of execution of the judgement and decree in Mombasa ELC No. 69 of 2007 as consolidated with Mombasa ELC No. 76 of 2007; and that costs be provided for.”

3. The application is predicated on the grounds on its face and is further supported by the applicant’s affidavit sworn on 15<sup>th</sup> May 2024. At this juncture, we make an observation that the applicant is interchangeably referring to ‘appellant’ in the intended appeal in plural, in stating that he and his co- appellants are the intended appellants. However, we note that, even in the draft memorandum of appeal which is annexed to the application, the appellant is one person, who is the applicant herein. We are then at a loss how and why the applicant refers to himself and the intended appellant in plural. That said, for good order, and taking to mind that the applicant was a defendant in the trial suit alongside 13 others, and although other than the draft memorandum of appeal we are seized of, the actual record of appeal has not been provided to us so as to appreciate who the actual appellants are, we shall use the applicant’s language which refers to himself and the intended appellant in plural where need be.
4. The applicant contends that he and his co-defendants in the trial are aggrieved by the decision of Kibunja, J. from which they have lodged an appeal in Mombasa Civil Appeal No. E118 of 2024; that the record of appeal was filed and served on 8<sup>th</sup> February 2024; that the appeal raises triable issues and has a high chance of success; that they are faced with imminent eviction from the suit property, which will render their families destitute; that, if the application is disallowed, the appeal will be rendered nugatory; and that the respondent will suffer no prejudice if the application is allowed.
5. Opposing the application, the respondent filed a replying affidavit sworn by Abdulrehman Mohamed Mohamed, a resident of Mombasa, on 3<sup>rd</sup> May 2025. He deposed that it is common ground that the plots comprising the suit property are all registered in the name of the respondent as attested by their title documents, which were adduced in evidence at the trial; that the applicant’s claim over the suit property by way of adverse possession was not backed by credible evidence; that the respondent applied for warrants of eviction in April 2024, and that the eviction process is still on-going; that the applicant together with others have been unlawfully selling portions of the suit property; that they have been convicted of their fraudulent actions, and hence this Court cannot grant the remedy sought; and that, in terms of the balance of convenience, the respondent having succeeded in the suit before the trial court, it ought to be allowed to enjoy the use of its properties.
6. In addition, the respondent raised a preliminary objection dated 3<sup>rd</sup> May 2025 premised on the following grounds:
  - i. That the applicant did not serve the respondent with the record of appeal or the judgement delivered in Mombasa ELC No. 69 of 2017 as consolidated with Mombasa ELC No. 76 of 2007, hence the appeal filed herein is incompetent for all purposes and cannot therefore form the foundation for an application for an order of stay of execution;
  - ii. That as no valid record of appeal has been filed, there is no arguable appeal and on the ground of arguability, the application herein is fatally incompetent; and
  - iii. That the application amounts to an abuse of court process.
7. At the hearing of this application on 6<sup>th</sup> May 2025, learned counsel Mr. Nyange appeared for the applicant while learned counsel Mr. Gikandi appeared for the respondent.
8. The applicant relied on written submissions dated 25<sup>th</sup> April 2025. Briefly, as to the arguability of the appeal, the applicant referred to the memorandum of appeal which he contends raises 13 grounds of appeal. Again, we note that the undated copy of the Memorandum of Appeal (SSK - 3) annexed to the application contains only 7 grounds of appeal. According to the applicant, the appeal is arguable



on the grounds that: the respondent instituted the suit without authority yet it is a limited liability company; the trial court erred in finding that the respondent's suit was not statute barred; some of the appellants were not afforded an opportunity to be heard since there was no evidence of service of hearing notices by the respondent, and despite the respondent admitting that it was not aware whether the appellants were in occupation; and that the trial court made a finding that they ought to be evicted in the absence of evidence of occupation.

9. On the nugatory limb, the applicant submitted that should the orders sought be denied, they (the intended appellants) will be evicted from the suit property, thereby rendering the appeal nugatory. In this regard, reference was made to this Court's decision in *Limited & 2 others (2021) KECA 65 (KLR)*.
10. On the other hand, the respondent relied on written submissions dated 3<sup>rd</sup> May 2025. It submitted that it was the registered owner of the suit properties, and therefore has the fundamental right to property as provided for in Article 40 of the Constitution to enjoy the use of its properties; that the trial court's judgement dated 8<sup>th</sup> November 2023 affirmed this right; that stay of execution is not a right but a privilege that should be granted sparingly, and only in deserving cases as was held in the High Court decisions in *James Wangalwa & Another vs. Agnes Naliaka Cheseto (2012) eKLR*; and *RWW vs. EKW (2019) eKLR*; that the right of a successful litigant cannot be equated to the right of a trespasser as the applicant is in the instant case; and that, therefore, the order of stay of execution is not merited.
11. We have considered the application, the Notice of Preliminary Objection, the submissions of both parties and the authorities cited. The applicant seeks both injunctive and stay of execution orders, both of which reliefs are premised on rule 5(2) (b) of this Court's Rules, 2022. The principles that guide this Court in determining an application under the rule are well settled and well summarized in *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others (supra)*. The twin test is that an applicant must demonstrate that the appeal or intended appeal is arguable; and that, unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory.
12. It is a long-standing principle that an arguable appeal is not one which must necessarily succeed, but one which is not frivolous. It is sufficient to establish a single bona fide ground of appeal. This Court in *R.F.S. vs. J.D.S (2013) eKLR* held that:

“Now an appeal is said to be arguable when it contains grounds, points or issues that can genuinely be asserted, on which there can be divergent legal or factual positions of some merit worthy of juridical investigation and determination. To succeed, it is enough that even a single, solitary ground of such description exists and the same need not be one that must necessarily succeed in an appeal.”
13. Further, in *Cleophas Wasike vs. Mucha Swala (1984) eKLR*, this Court held that an applicant need not show that his appeal has an overwhelming probability of success; an applicant just needs to show that there is merit in his appeal.
14. We start first by addressing the preliminary point raised by the respondent. The respondent's preliminary objection is primarily based on the argument that it was not served with the record of appeal. It should be noted that this Court's jurisdiction is invoked by filing of a notice of appeal. In *Pepco Construction Company Limited vs. Carter & Sons Limited Nairobi CA No. 80 of 1979 (UR)*, this Court held:

“A notice of appeal is what gives this court jurisdiction in any appeal. It is a primary document in terms of rule 85(1) of the Rules (now Rule 77(1)). A record of Appeal must contain a



valid copy of the notice of appeal. The omission to include a valid copy renders the appeal incompetent...”

15. Mr. Gikandi admitted during the hearing that he was served with a notice of appeal dated 20<sup>th</sup> November 2023 and filed in Court on 21<sup>st</sup> November 2023. The application before us being one seeking stay in the interim, pending the hearing of the appeal, the Court’s concern is only on the validity of the notice of appeal which gives it jurisdiction, and which validity has not been impeached.
16. The threshold for determining whether an appeal is arguable or not is low. A single arguable ground suffices to render an appeal arguable. As earlier observed, an appeal need not be one which must necessarily succeed, but that it should also not be frivolous. See Dennis Mogambi Mang’are vs. Attorney General & 3 others (2012) KECA 251 (KLR). We do not wish to restate the grounds of appeal upon which the appeal is hinged as we have made a summary of the salient grounds elsewhere in this ruling. All we can say is that we find that the proposed grounds of appeal are arguable. Whether or not the appeal will succeed is not for us to judge.
17. On the nugatory aspect, the applicant stated that together with other occupants of the suit property, they have put up structures on the respondent’s land which risks demolition and therefore loss of their homes. In Kang’ethe & Another vs. Muhia Muchiri Ng’ang’a (2017) KECA 30 (KLR), this Court held as follows:

“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.”
18. This Court in Construction Co Ltd & another (2025) KECA 1382 (KLR) rendered itself thus:

“An appeal would be rendered nugatory if damage of a great or irreversible character, prejudicial to or probably destructive of the substratum of the appeal, would have occurred in the intervening period.”
19. We observe that the applicant has not stated with specificity which area of the suit property he and his co-defendants are in occupation of. The applicant has not also alluded to the fact that the respondent would not be able to compensate him by way of damages if he is evicted or vacates from the suit property. In our view, whatever loss which will be suffered, can be compensated by way of damages.
20. In conclusion, we find and hold that the applicant has not demonstrated to our satisfaction that he deserves the prayers sought. Consequently, we find that the Notice of Motion dated 13<sup>th</sup> May 2024 is unmeritorious and the same is hereby dismissed. Costs shall be in the appeal.

**DATED AND DELIVERED AT MOMBASA THIS 7<sup>TH</sup> DAY OF NOVEMBER MOMBASA, 2025.**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA CARb, FCIArb.**

.....

**JUDGE OF APPEAL**

**G. W. NGENYE-MACHARIA**



.....

**JUDGE OF APPEAL**

I certify that this is the true copy of the original

Signed

**DEPUTY REGISTRAR**

