

**IN THE COURT OF
APPEAL AT
NAIROBI**

(CORAM: W. KARANJA, M'INOTI, & NYAMWEYA, JJ.A.)

CIVIL APPLICATION NO. NAI E638 OF 2024

BETWEEN

AGNES WAMBUI MANJERU.....APPLICANT

AND

**MAHESH SHAH.....1ST
RESPONDENT CHIEF LAND REGISTRAR.....
....2ND RESPONDENT THE INSPECTOR GENERAL OF
POLICE.....3RD RESPONDENT DIRECTOR OF CRIMINAL
INVESTIGATION.....4TH RESPONDENT THE NATIONAL LAND
COMMISSION.....5TH RESPONDENT THE ATTORNEY
GENERAL.....6TH RESPONDENT**

*(Being an application for stay of proceedings pending the hearing and
determination of an intended appeal against the ruling of the
Environment and Land Court at Nairobi (L. Mbugua, J.) delivered on
18th July 2024*

in

ELC Case No. 593 of 2016)

RULING OF THE COURT

1. Vide an Amended Plaintiff dated 2nd June 2016, the 1st respondent lodged a claim in the Environment and Land Court at Nairobi (ELC) against the applicant and the 2nd to 6th respondents seeking:-

- i. A declaration that the 1st respondent is the proprietor of Title Number Ruiru Township/660;
- ii. An order of cancellation nullifying or revoking the Certificate of Lease dated 19th May 2016 and issued

to the applicant for LR No. Ruiru Township/660;

iii. An order of cancellation nullifying, quashing or revoking the Gazette Notice No. 6865 of 17/07/2017, the 4th respondent's letter dated 29/2/2016, and report dated 11/2/2016 in so far as the said Gazette Notice No. 6865 dated 29/2/2016 and report dated 11/2/2016 recommend, direct or otherwise hold that

the certificate of title issued to the 1st respondent over

LR No. Ruiru Township/660 is revoked;

iv. A permanent injunction restraining the applicant and 2nd - 6th respondents themselves, employees, servants, agents and/or any other person claiming through them from entering, remaining thereon, disposing, trespassing, charging or in any way whatsoever from dealing with the suit property namely LR No. Ruiru Township/660;

v. A permanent injunction restraining the applicant and the 2nd - 6th respondents jointly and severally either by themselves, servants, employees and or agents or otherwise from harassing the 1st respondent or otherwise interfering with his enjoyment and

occupation of LR No. Ruiru Township/660;

vi. Costs of the suit.

2. By an application dated 6th May 2024 expressed to be brought under **sections 1, 1A, 3, 3A, 22, 23, 63(E)** of the **Civil Procedure Act, Order 18 Rule 10** and **Order 51** of the **Civil Procedure Rules, Section 146(4)** of the **Evidence Act** and **Articles 21, 22(1), 23(1), 27, 40, 47, 50(1)** and **159(2)(D)** of the **Constitution**, the applicant sought that the ELC admits her second further list of documents and that upon the grant of that order the court be pleased to recall in court the applicant for further examination in chief, cross examination and re-examination for purposes of adducing the evidence marked as annexure AWM2.
3. In her ruling delivered on 18th July 2024, the learned trial Judge, in dismissing the application, found that the matter was at an advanced stage of the hearing, and that taking into account that pretrial directions had been taken on several occasions and that there was no disclosure as to when the new evidence was discovered the application was without merit.
4. Aggrieved, the applicant lodged a Notice of Appeal dated 19th July 2024. Subsequently, she filed the Notice of Motion application dated 25th November 2024 under **Rule 5(2)(b)** of this Court's **Rules** seeking, in substance, that the proceedings in ***Nairobi ELC No. 593 of 2016 - Mahesh Shah -vs- Chief***

Lands Registrar &

5 others, be stayed pending the hearing and determination of
an

intended appeal against the said ruling. That application is the subject of this ruling.

5. In support of the application, the applicant avers: that in the said ruling she was denied a chance to adduce additional evidence that she considers critical in proving ownership of the property under dispute; that she has an arguable appeal with high chances of success as seen in her draft memorandum of appeal; that her intended appeal will be rendered nugatory as pursuant to the said ruling the suit will proceed and new and/or important evidence will be ignored, and that the said evidence is pertinent to proving her ownership of the suit property; that if she loses the case due to the failure to adduce the additional documentary evidence, she will suffer great financial loss and irreparable damage as she will lose her investments; and that only two of a possible seven witnesses have testified and, therefore, that the matter has not progressed far.
6. The 1st respondent has opposed the application through a replying affidavit sworn on 16th December, 2024 in which it was averred: that the trial court delivered a ruling on 18th July, 2024 dismissing the applicant's application; that the applicant's application fails to meet the threshold for stay of proceedings; that the orders sought impede the 1st

respondent's right to access to justice, right to be heard
without delay and overall right to fair

trial; that the trial court delivered its ruling on 18th July 2024 and despite knowledge of the hearing of the case on 6th December 2024 and 10th December 2024, the applicant chose to file her application on 25th November 2024 after sitting on her rights for four months post the ruling; that it is in the interest of justice to have the suit at the trial court which was filed in 2016 heard and determined expeditiously; that it has not been shown that there is an arguable appeal which will be rendered nugatory if the orders are denied; and that it is only just and fair that the application be dismissed with costs to the 1st respondent.

7. When the application came up for hearing before us on 28th January 2025, learned counsel **Ms. Wangui** and **Ms. Anyango** appeared for the applicant and the 1st respondent respectively. Both parties relied on their respective written submissions which they briefly highlighted.
8. In support of the application, the applicant's counsel submitted that her intended appeal is not only arguable but one with high probability of success since the learned Judge misdirected herself, and consequently erred in law and fact in making several findings in her ruling dated 18th July 2024. In support of this ground, the applicant attached an undated Memorandum of Appeal in which twelve (12) grounds of appeal have been

identified.

9. According to the applicant, she will be deprived of her constitutional right to protect her property and her lifetime investments. She asserts that should stay of proceedings be denied, the hearing of the matter shall proceed in the court below, rendering the present appeal worthless as the substratum of the intended appeal will disappear. In her view, that course would occasion her irreparable harm.
10. In opposing the application the 1st respondent submitted: that the applicant's intended appeal is not arguable as the possible outcome of the trial court's judgement is indeterminate and it is premature to pre-empt the possible outcome or influence of the additional documents; that the intended appeal will not be rendered nugatory if the orders are denied as there are other seven credible witnesses yet to testify in the applicant's case and whose testimonies are capable of determining the case in the applicant's favour; that the applicant has already closed her case; and no sufficient reasons have been given as to why the additional documents were not adduced during the pre-trial conference and during the hearing.
- 11.** We have carefully considered the application and the grounds urged by both parties in support of their respective positions. The application before us is brought under **Rule 5(2)(b)** of the **Court of Appeal Rules, 2022.**

12. This Court in **Trust Bank Limited & Ano. -vs- Investech Bank**

Limited & 3 Others [2000] eKLR described the jurisdiction of this Court under **Rule 5(2)(b)** as original and discretionary. This discretion is wide and unfettered.

13. In **Kenya National Union of Teachers and 3 Others, Civil**

Application No. 16 of 2015, the Supreme Court considering the nature and scope of this Court's jurisdiction under **Rule 5(2)(b)** of the **Court of Appeal Rules** stated:

“(23) It is clear to us that Rule 5(2)(b) is essentially a tool of preservation. It safeguards the substratum of an appeal, if invoked by an intending appellant, in consonance with principles developed by that Court over the years....(27) Rule 5(2)(b) of the Court of Appeal Rules of 2010 is derived from Article 164 (3) of the Constitution. It illuminates the Court of Appeal's inherent discretionary jurisdiction to preserve the substratum of an appeal, or an intended appeal. Although we would not go as far as describing such discretionary jurisdiction as ‘original’ (the term ‘inherent’ more accurately in our view captures the nature of that jurisdiction), the Court of Appeal has nonetheless defined the contours of this discretion succinctly and consistently and has employed it effectively to aid the conduct of its appellate jurisdiction.”

14. In order to succeed in an application under **Rule 5(2)(b)** an applicant must first demonstrate that the intended appeal is arguable and not frivolous, and that the intended appeal, if it eventually succeeds, will be rendered nugatory if the stay

orders are not granted. In **Chris Munga N. Bichage -vs- Richard**

Nyagaka Tongi, Independent Electoral & Boundaries

Commission & Robert K. Ngeny [2013] KECA 141 (KLR) it was

held that:

“The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.”

- 15.** As to whether or not the appeal is arguable, we have to consider whether there is at least a single *bona fide* arguable ground that has been raised by the applicants in order to warrant ventilation before this Court. In **Stanley Kang’ethe Kinyanjui -vs- Tony Ketter & 5 Others [2013] eKLR** this Court described an arguable appeal as one which must not necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous, and this Court must not make definitive or final findings of either fact or law at this stage because doing so may embarrass the ultimate hearing of the main appeal.
- 16.** On the first twin principle, on arguability of the intended

appeal, we observe that whether or not to grant an application to adduce further evidence is at the discretion of the trial Judge and it

depends on the circumstances of each case. The gravamen of the intended appeal in this matter is whether in declining the applicant's application to adduce further evidence in the circumstances of the case, the learned Judge exercised her discretion judiciously and not on a whim. As to whether this Court will interfere with that exercise of discretion will be for the bench hearing the appeal to determine, and not for us. We are, nonetheless, persuaded that the said point is arguable, bearing in mind that an arguable appeal is not necessarily one that will succeed.

- 17.** The next question is whether the applicant has demonstrated that her intended appeal will be rendered nugatory should her application to stay further proceedings in **Nairobi ELC No. 593 of 2016** be declined. As was stated by this Court in **David**

Morton Silverstein -vs- Atsango Chesoni [2002] eKLR:

“The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5(2)(b) of the Court's own rules. But as the Court pointed out in the case we have already cited; each case must depend on its own facts...”

- 18.** The applicant typically needs to show that proceeding with the case would cause her substantial loss or irreparable harm, which could render her appeal, if successful, nugatory, as was

held by this Court in **Kenya Commercial Bank Ltd. -vs- Benjoh**

Amalgamated Ltd. Civil Application No. NAI. 50 of 2001

(unreported).

19. We note that the it is conceded that the defence case before the trial court has not reached an advanced stage and there are about 7 witnesses yet to testify. The applicant will have an opportunity to fully participate in the proceedings and even introduce her documents to the said witnesses in cross examination and the relevance of the documents will be brought to the fore. The applicant cannot speculate at this point what the court's findings on the said documents will be. According to learned counsel for the 1st respondent, the said documents can still be adduced by the owner of the property. Furthermore, if the case is eventually determined against her and the applicant files an appeal against the substantive decision, she can still move this Court pursuant to **Rule 31(1)(b)** of the rules of this Court to be allowed to adduce further evidence.
20. Third, the Court needs to balance the applicant's right to exercise her right of appeal and the potential for irreparable harm against the respondents' right to have their case heard, determined and potentially benefit from a favourable judgment. (See **Meta Platforms, Inc & Ano. -vs- Samasource Kenya EPZ**

Limited (supra)). We also note that the applicant filed this

application 4 months after delivery of the impugned ruling, and that delay has not been explained.

21. Consequently, for the reasons stated above, we are not persuaded that the applicant has demonstrated that the intended appeal will be rendered nugatory. In view of the foregoing, we find that the applicant has failed to satisfy the twin principles for grant of the orders sought pursuant to **Rule 5(2)(b)** of the **Rules** of this Court. Accordingly, the Notice of Motion dated 25th November 2024 fails and is hereby dismissed with costs to the 1st respondent, as the other respondents did not respond to the application.

Dated and delivered at Nairobi this 7th day of November 2025.

W. KARANJA

.....
JUDGE OF APPEAL

K. M'INOTI

.....
JUDGE OF APPEAL

P. NYAMWEYA

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.