Rajani & another v Rajani & 2 others (Civil Application E108 of 2024) [2025] KECA 1823 (KLR) (7 November 2025) (Ruling)

Neutral citation: [2025] KECA 1823 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION E108 OF 2024

P NYAMWEYA, KI LAIBUTA & GW NGENYE-MACHARIA, JJA

NOVEMBER 7, 2025

BETWEEN

NITIN JAYANTILAL RAJANI .... 1ST APPLICANT

RAMAGAURY JAYANTILAL RAJANI .... 2ND APPLICANT

AND

SHAILESH JAYANTILAL RAJANI .... 1ST RESPONDENT

SIMOUN TRAVEL LIMITED .... 2ND RESPONDENT

JEREMY NJENGA, VICTORIA WAMBUA, VIVIANNE W WACHANGA & PHYLLIS KIRAGU T/A JM NJENGA & COMPANY ADVOCATES .... 3RD RESPONDENT

(Being an application for stay of proceedings pending appeal against the Ruling and Orders of the Environment and Land Court of Kenya at Mombasa (N. Matheka, J.) dated 31st January 2024 in E.L.C Cause No. 232 of 2019)

RULING

1. By a Notice of Motion dated 24th September 2024 and supported by the annexed affidavit of Nitin Jayantilal Rajani, the applicants seek orders to stay proceedings in ELC Cause No. 232 of 2019 pending appeal against the ruling and orders of N. Matheka, J. issued on 31st January 2024 in which she ordered discovery in terms that the respondents do avail the documents specified in paragraph 1 of the impugned ruling(the long list of which we need not replicate here), and which could be traced and are in their possession within 14 days from the date of the ruling, “save for those privileged documents”.

2. The applicants’ Motion was anchored on the grounds that the impugned ruling was “... ambiguous concerning the extent of the discovery obligations of the respondents”; that the ambiguity has “allowed the respondents to withhold critical documents further frustrating the applicants’ ability to present

their case”; that “the respondents have withheld critical transactional documents under the guise of privilege”; that they would suffer significant prejudice if the trial proceeds without full discovery of documents; that they have an arguable appeal; and that it is in the interest of justice that the proceedings be stayed.

3. The 9 grounds on which the intended appeal is founded are set out in the draft and undated memorandum of appeal. They are:

> “ 1. That the Learned Judge erred in law and fact by failing to compel the Respondents to provide full discovery of crucial transactional documents, thereby allowing the Respondents to selectively withhold vital information under the guise of privilege, despite the fact that the 3rd Respondent acted under a power of attorney where the instructing client was the Applicants.
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> 2. That the Learned Judge erred in finding that the Respondents were entitled to invoke privilege to withhold key documents, without properly considering the fact that the documents in question were created and controlled by the 3rd Respondent acting on behalf of the Applicants, and therefore such documents do not enjoy privilege against the Applicants.
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> 3. That the Honourable Judge misdirected herself by failing to recognize that, since the 3rd Respondent acted as an agent of the Applicants, any claims of privilege regarding communications or documents created in that capacity are improperly asserted by the Respondents and are detrimental to the Applicants' case.
>
> 4. That the Learned Judge’s failure to resolve the issue of privilege properly compromised the discovery process, preventing the Applicants from accessing crucial evidence and creating an imbalance in the trial process, in violation of the principles of natural justice.
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> 5. That the Learned Judge erred in law by allowing the Respondents to provide only "available" documents, without addressing the Respondents’ deliberate failure to disclose all documents within their possession, including those created by the 3rd Respondent under the power of attorney.
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> 6. That the Honourable Judge failed to appreciate that allowing the matter to proceed without full discovery irreparably prejudices the Applicants, as the Respondents continue to withhold material evidence under a faulty claim of privilege, despite the Applicants being the original principals in the underlying transactions.
>
> 7. That the Honourable Judge’s decision to proceed with the hearing without full discovery effectively endorsed the Respondents’ refusal to comply with discovery orders, leaving the Applicants without access to documents critical to the fair determination of the case.
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> 8. That the learned Judge erred by taking into consideration matters that she ought not have considered and failed to take into consideration matters that she ought to have so done.

9. That the Learned Judge failed to apply herself judicially and adequately consider the law and apply the principles governing the application before her therefore arriving at a wrong and erroneous conclusion."

4. In their written submissions dated 23rd April 2025, counsel for the applicants, M/s. Taib A. Taib, cited 3 judicial authorities, including this Court's decision in Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR, highlighting the twin principles for stay of execution or proceedings under rule 5(2) (b) of the Court of Appeal Rules. In the oral highlights of their submissions, learned counsel Miss. Taib contended that what they wanted was "the entire file" in the 3rd respondent's custody.

5. In his replying affidavit sworn on 8th October 2024, the 1st respondent, Shailesh J. Rajani, avers that "in compliance with the court ruling and order of 31st January 2024 the 1st respondent filed an affidavit as to discovery of documents sworn on 14th February 2024 providing copies of documents as ordered by the court".

6. On its part, the 2nd respondent filed a replying affidavit of its director, Sukhminder Kaur Chima, sworn on 24th April 2025, stating that "in February 2024, [he] produced the documents that were in [his] possession by way of a replying affidavit"; and that, "on 5th November 2024, the applicants proceeded with the hearing of the main suit and the 1st applicant comfortably concluded giving his testimony on that day".

7. Likewise, the 3rd respondent filed a replying affidavit of Jeremy Njenga sworn on 7th November 2024 stating that "... the applicants have not met the legal threshold to warrant grant of the stay sought". He prayed that their application be dismissed.

8. Counsel for the 1st respondent, M/s. Mituga & Company, filed written submissions and list of authorities dated 24th April 2025. So did counsel for the 2nd respondent, M/s. LJA Associates LLP, who filed their written submissions, list of authorities and case digest dated 29th April 2025. Then followed written submissions and copies of authorities dated 29th April 2025 filed by counsel for the 3rd respondent, M/s. J. M. Njenga & Company. Altogether, counsel cited 11 judicial authorities. Relevant among them with regard to the principles to be met for grant of orders under rule 5(2) (b) are, inter alia: the cases of Retreat Villas Limited v Equitorial Commercial Bank Ltd & 2 Others [2006] eKLR; Trust Bank Limited & Another v Investec Bank Limited & 3 Others [2000] eKLR; and Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others (supra).

9. With regard to stay of proceedings pending appeal, counsel for the 3rd respondent cited the case of Re: Global Tours and Travel Limited (2001) 1 EA 195; and Halsbury's Laws of England (4th Edn.) Vol. 37 p.330 & 332 where it was observed:

> " The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue. This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.
>
> It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not,

or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case."

10. To our mind, the applicants are approbating and reprobating, which is an unacceptable conduct. Such conduct was considered in Evans v Bartlam (1937) 2 ALL ER 649 at page 652 where Lord Russel of Killowen said:

> " The doctrine of approbation and reprobation requires for its foundation, inconsistency of conduct, as where a man, having accepted a benefit given him by a judgment cannot allege the invalidity of the judgment which conferred the benefit." (See also Behan & Okero Advocates v National Bank of Kenya [2007] eKLR)

11. The respondent unequivocally deposed to their compliance with the order for discovery. The applicants do not deny that the documents specified in the respective affidavits by which they were forwarded were indeed shared. Their willful participation in the proceedings, including case management and commencement of hearing goes a long way to show that they had no grievance with regard to discovery. The hearing dates were taken before the trial court with the consent of the parties. To turn around and claim that the order for discovery was ambiguous with reference to "privileged" documents defeats reason. Moreover, counsel are expected to have basic knowledge of what constitutes privileged documents or communication between them and their clients or other parties. Accordingly, the applicants cannot on the one hand reap the benefits of discovery and, at the same time, challenge the order directing such discovery.

12. Be that as it may, counsel for the applicants, who are undoubtedly versed with legal practice and procedure, know what steps to take in the event that the trial court's orders for discovery were disobeyed in any way by any of the respondents. In any event, the applicants have recourse to the trial court for further orders, including clarification as to what "privileged documents" mean at law, as well as enforcement orders to guarantee obedience. Put differently, this Court has no role to play in the enforcement of orders of the nature in issue, and cannot possibly stay proceedings already underway in the court below pending appeal to this Court merely to interpret the impugned ruling and pronounce itself on what the applicants view as ambiguity in the order for discovery.

13. With regard to the twin principles for grant of orders under rule 5(2) (b), it goes without saying that the applicant must establish that he or she has an arguable appeal; and that the appeal (or intended appeal), if successful, would be rendered nugatory absent stay (se: Reliance Bank Limited v Norlake Investments Limited (2001) 1 EA 227; and David Morton Silverstein v Atsango Chesoni [2002] eKLR.

14. A cursory look at the grounds of appeal founded on the contention that the learned Judge's order for discovery of evidential documents in the respondents' possession other than "privileged documents" is ambiguous is, in our respectful view, not arguable.

15. Having concluded that the applicants have no arguable appeal, we need not pronounce ourselves on the 2nd limb of the twin principle as to whether the intended appeal would be rendered nugatory.

    Consequently, the applicants' Notice of Motion dated 24th September 2024 fails and is hereby dismissed with costs to the respondents. Orders accordingly.

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

P. NYAMWEYA

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR