



**Unifresh Exotics (K) Limited v Rimber (Civil Application
E010 of 2025) [2025] KECA 1812 (KLR) (7 November 2025) (Ruling)**

Neutral citation: [2025] KECA 1812 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E010 OF 2025
AK MURGOR, P NYAMWEYA & GW NGENYE-MACHARIA, JJA
NOVEMBER 7, 2025**

BETWEEN

UNIFRESH EXOTICS (K) LIMITED APPLICANT

AND

DENNIS MATANO GONA RIMBER RESPONDENT

(An application for stay of proceedings in Environment and Land Case No. 427 of 2017 pending the hearing and determination of an intended appeal against the Ruling (S. Kibunja, J.) delivered 12th February 2025 in Environment and Land Case No. 427 of 2017)

RULING

1. By a Notice of Motion dated 13th February 2025, brought pursuant to Sections 3A and 3B of the *Appellate Jurisdiction Act*, Rules 5 (2) (b), 1 (3) and 47 of the Court of Appeal Rules, 2022 and the Court of Appeal Practice Directions, the Applicant, Unifresh Exotics (K) Limited seeks a stay of further proceedings in Environment and Land Court Case No. 427 of 2017 pending hearing and determination of this application and the intended appeal against the Ruling of 12th February 2025. The application is supported by an affidavit of Benson Nzuka, the legal officer of the Applicant sworn on 13th February 2025 and a further affidavit sworn on 25th March 2025, and is brought on grounds that: on 6th November 2024, the suit mentioned virtually in court before Kibunja, J. was allotted time for further defence hearing between 10:30 and 11:00 a.m; and that the Applicant's counsel was 15 minutes late having arrived in court at 10:45 a.m. due to a tyre burst along the Dongo-Kundo bypass. It was contended that the hearing proceeded in his absence with the Applicant's witness, one Patricia Nguto, who the Applicant had secured from KALRO, being cross examined; that thereafter, the defence case was closed with final submissions fixed for 19th February 2025; that when the Applicant's counsel addressed the court thereafter and explained the reason for non-attendance, they were advised to file an application to set aside the ex-parte proceedings, which they did the following day; that in a ruling delivered on 12th February 2025, the trial Judge declined to issue a temporary stay of proceedings,



- and directed that the matter proceed to final submissions; that, as a consequence, the Applicant is apprehensive that a judgment will be rendered without it being afforded an opportunity to fully ventilate its defence; and that further, in the event a judgment is rendered, the intended appeal seeking to set aside the ex-parte proceedings and reopen the defence will be rendered nugatory and an academic exercise.
2. It was asserted that in the interest of justice and fairness, the application seeking to stay further proceedings be granted; and that the intended appeal is meritorious, in view of the grounds of appeal which in summary are that: the trial Judge failed to appreciate that the 15 minute delay in arriving in court was an excusable mistake and for this reason, the Applicant should have been given an opportunity to be heard, more particularly since the matter is in respect of an emotive land dispute between the parties. It was also contended that the Applicant has not engaged in tactics to delay the conclusion of the case.
 3. By an affidavit in reply sworn by Rose Ngina Musyoka, the Respondent's counsel on 20th February 2025, the Respondent deponed that the application was an abuse of the court process and only intended to delay the conclusion of the trial; that the Applicant had already called three key expert witnesses after which the court allowed the Applicant an adjournment to enable it to substitute the legal officer who had left the Respondent's employment and also to issue further witness summons to an officer from KALRO. And in addition, that the last hearing of the defence case was on 20th April 2023. It was deponed that the Applicant was aware of the hearing date and had appeared virtually in court and confirmed their preparedness to proceed with the hearing; that, as a result, time was allocated for the hearing and the court allocated 10:30 a.m. for the defence hearing; that the Applicant's counsel did not disclose to the court during the call over that he was at Ukunda; that had he done so, the court would have factored in the distance the Applicant's counsel would have had to cover when allocating time for commencement of the hearing; that furthermore, he did not inform either the court or the deponent that he had suffered a tyre burst on his way to the court; and that as a result, the court proceeded to allow the Respondent's counsel to cross examine the defence witness and for the Applicant's case to be closed.
 4. Both parties filed written submissions, which learned counsel Mr. Njiru appearing for the Applicant, and Ms. Ngina who appeared for the Respondent briefly highlighted on a virtual platform during the hearing. Counsel for the Applicant reiterated the contents of its motion and affidavits in support, and submitted that the mistakes of the counsel ought not to have been visited on the Applicant; and that the trial court ought to have issued an order for throw away costs instead.
 5. For her part, counsel for the Respondent urged us to dismiss the application for the reasons that the Judge had considered the circumstances of the case, the history of delays in the proceedings and the Applicant's conduct of frustrating the proceedings; that the case was filed in 2017 and to this day, had yet to be concluded; that further, on the nugatory aspect, the question of eviction did not arise as the Applicant had already vacated the property; and that in any event, no eviction orders had been issued.
 6. As set out above, the Applicant is seeking a stay of proceedings of the lower court under rule 5(2)(b) of this Court's rules. The principles that guide this Court in determination of an application under rule 5 (2)(b) of this Court's Rules are well settled. These principles are summarised in Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others [2013] eKLR to wit: 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.



7. And as restated in the case of Trust Bank Limited and Another v Investech Bank Limited & 3 Others [2000] eKLR:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay, the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”

8. In addition, it is settled that granting of stay of proceedings is a discretionary power that should be exercised sparingly as it interrupts the normal court process, and is a serious remedy that should only be granted in exceptional circumstances. See the Supreme Court decision in James Nthuku Kithinji vs The Director of Public Prosecutions & The Chief Magistrate’s Court at Nairobi Kibera Law Courts, Petition (Application) No. 29 (E033) of 2022.

9. As to whether the intended appeal is arguable, the Applicant’s assertion is that the learned Judge ought to have considered that the reason for the delay in attending court was due to an unfortunate mistake of counsel, and that in closing the Applicant’s case, it was denied the right to be heard.

10. It cannot be gain said that the decision declining to set aside the ex parte proceedings, was as exercise of discretion of which this Court is disinclined to interfere with. But having said that, a solitary ground of appeal is sufficient to satisfy the first limb regarding whether the intended appeal is arguable. As to whether or not the appeal will succeed is another matter. As such, we find the intended appeal arguable, and need say no more on the issue lest we embarrass the bench that will be designated to hear the appeal.

11. As to whether the appeal will be rendered nugatory, the Applicant’s case is that if the proceedings in the trial court are not stayed, the learned Judge will render a judgment without it having been given an opportunity to be heard; that if the appeal were to succeed, it would be rendered nugatory by a final decision by the trial court. In determining whether the Applicant’s apprehensions are justifiable, a review of the materials placed before us by the Applicant do not disclose what further evidence, if any, the Applicant had yet to adduce before the trial Judge, or how the absence of such evidence was detrimental to its case.

12. In our view, even were the suit to be finalized, and the appeal against the ruling were to succeed, the Judgment of the trial Judge could always be set aside, and the ex-parte proceedings expunged from the record. In effect, the appeal would not be rendered nugatory, with the result that the Applicant has not satisfied the second limb.

13. In sum, the Applicant has failed to satisfy the threshold requirements necessary for the grant of the orders of stay of proceedings under Rule 5(2) (b). The Notice of Motion dated 13th February 2025 lacks merit and is hereby dismissed. Costs in the intended appeal.

It is so ordered.

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

A. K. MURGOR

JUDGE OF APPEAL

.....

P. NYAMWEYA



JUDGE OF APPEAL

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G. W. NGENYE-MACHARIA

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

