

**IN THE COURT OF  
APPEAL AT NAIROBI**

**(CORAM: GATEMBU, OCHIENG & MUCHELULE,  
JJ.A.) CIVIL APPLICATION NO. E079 OF 2025**

**BETWEEN**

**MOHAMED ADAN BARE.....APPLICANT**

**AND**

**AIMA ENTERPRISES LIMITED.....1<sup>ST</sup>  
RESPONDENT  
GULF AFRICAN BANK LIMITED.....2<sup>ND</sup>  
RESPONDENT AFRICAN BANKING  
CORPORATION LIMITED.....3<sup>RD</sup>  
RESPONDENT MAGAN & GABABA COMPANY  
LIMITED.....4<sup>TH</sup> RESPONDENT**

*(Being an application for stay of proceedings and execution pending the lodging, hearing and determination of an intended appeal from the Ruling of the High Court of Kenya at Nairobi (V.A. Alnashir, J.) dated 27<sup>th</sup> January 2025*

***in***

***HCCC No. E049 of 2020)***

***\*\*\*\*\****

**RULING OF THE COURT**

1. Aggrieved by a ruling of the High Court (**V. A. Alnashir, J.**) delivered on 27<sup>th</sup> January 2025 striking out his suit which had apparently been transferred to the High Court from the Environment and Land Court, the appellant filed a Notice of Appeal dated 28<sup>th</sup> January 2025. Subsequently, the applicant filed the present application dated 12<sup>th</sup> February 2025, seeking orders under Rule 5(2)(b) of the Court of Appeal Rules for stay of taxation proceedings before the

High Court; a temporary injunction to restrain the 3<sup>rd</sup> respondent from

selling or disposing or otherwise dealing with the property known as LR No. 209/11095/95 (IR 79735) pending the hearing and determination of his intended appeal.

2. It appears from the record of the application that the applicant had initially instituted suit before the ELC. In that suit he complained that the 3<sup>rd</sup> respondent had unlawfully created a charge over his properties and encumbered the same beyond the maximum permissible liability. That suit was transferred to the High Court where the applicant sought, through an application dated 8<sup>th</sup> January 2024, an order to restrain the 3<sup>rd</sup> respondent from selling the charged properties in purported exercise of its statutory power of sale. Objection was taken to the competence of that suit which the High Court in its ruling the subject of the intended appeal upheld, and in doing so, stated:

***“...I am persuaded that because the ELC court determined it had no jurisdiction to hear the matter, it could not then, in the same breath, go on to transfer the same to the High Court. No competent suit existed before the court, and therefore there was nothing for it to transfer.”***

3. With that the High Court struck out the suit and discharged an earlier interim injunction it had granted.
4. One of the complaints by the applicant is that the impugned ruling of the High Court was delivered on a date when the application was supposed to be heard, and the parties had not therefore addressed the court on the application.
5. We heard the application dated 12<sup>th</sup> February 2025 on 29<sup>th</sup>

April 2025. Learned counsel **Mr. Mbatai** held brief for **Mr.**

**Issa Mansur** for the applicant; **Mr. Kiplangat** appeared for the 3<sup>rd</sup> respondent while **Mr. Gikunda** appeared for the 4<sup>th</sup> respondent and indicated that the 4<sup>th</sup> respondent would not participate in the application.

6. We have considered the application, the rival affidavits and submissions against the applicable principles. See **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] KECA 378 (KLR)**. As to whether the intended appeal is arguable, the draft memorandum of appeal contains 12 grounds of appeal, amongst them, that the Judge erred in striking out his suit on the basis of a preliminary objection without a formal application and without according the applicant an opportunity to respond; that the parties were not heard; that the Judge wrongly pre-empted this Court from determining the issue of jurisdiction; and that the Judge disregarded the oxygen principle, among other complaints. Appreciating, as we do, that an arguable appeal is not one that will necessarily succeed, we are prepared to say that the intended appeal is not frivolous.
7. On the nugatory aspect, the applicant asserts that the property in question is worth Kshs. 100 million and he stands to be dispossessed of it by fraudulent actions of the respondents and would “have to incur additional costs in pursuing damages.” For the 3<sup>rd</sup> respondent it is contended that Section 99(4) of the Land Act prescribes damages as the remedy for wrongful auction. The applicant tacitly acknowledges the remedy of damages. It is asserted by the 3<sup>rd</sup> respondent, and this has not been controverted, that

the

3<sup>rd</sup> respondent is a regulated financial institution capable of defraying an award of damages. In the circumstances, we are not persuaded that the applicant has demonstrated that the appeal will be rendered nugatory if we decline to grant the orders sought.

8. In as far as the prayer for stay of taxation proceedings is concerned, we are also not persuaded that the application meets the high threshold as stated in **Katangi Developers Limited vs. Prafula Enterprises Limited & Another [2018] KECA 695(KLR)**. See also the decision of this Court in **Lalita Devi Lalchand Galot vs. Mohan Galot [2020] eKLR**.
9. In the end, the application dated 12<sup>th</sup> February 2025 fails. Accordingly, it is dismissed with costs to the 3<sup>rd</sup> respondent.
10. Following the untimely death of the Hon. Mr. Justice Fred Ochieng, JA prior to delivery of this judgment, and the remaining members of the Court being unanimous, this decision is delivered in accordance with Rule 34(4) of the Court of Appeal Rules.

**Dated and delivered at Nairobi this 21<sup>st</sup> day of November 2025.**

**S. GATEMBU KAIRU, FCI Arb, C.Arb.**

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**JUDGE OF APPEAL**

**A.O. MUCHELULE**

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**JUDGE OF APPEAL**

*I certify that this is*

*a true copy of the  
original.*

*Signed*

**DEPUTY REGISTRAR**