IN THE COURT OF APPEAL AT ELDORET

(CORAM: WARSAME, MATIVO & GACHOKA, JJ.A.) CIVIL APPLICATION NO. ELD E063 OF 2025 BETWEEN

VIPUL RATILAL DODHIA.....1ST APPLICANT
CHERANGANI INVESTMENTS COMPANY LIMITED.....2ND APPLICANT AND

PASCAL WAFULA *(Derivatively on behalf of Trans-Nzoia Investment Company Limited)*.....**...1ST RESPONDENT RONALD SAWENJA WALUBENGO.....2ND RESPONDENT PAUL SIMIYU WEKESA.....3RD RESPONDENT GEORGE IMBERA LUDISI.....4TH RESPONDENT KALORI ISOSO.....5TH RESPONDENT MUDEBE INVESTMENT CO. LIMITED.....6TH RESPONDENT CHERANGANI INVESTMENTS COMPANY LIMITED.....7TH RESPONDENT AND**
TRANS-NZOIA INVESTMENTS COMPANY LIMITED.....AFFECTED PARTY

(Being an application for stay of execution and/or implementation of the decree of the Environment and Land Court of Kenya at Kitale ***(C. K. Nzili, J.)*** *dated 18th June, 2025*

in

ELC No. 74 OF 2019).

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REASONS FOR DECISION

1. On 26th November 2025, we dismissed the applicants' application

dated 27th September 2025 and pursuant to Rule 34 (7) of the Court

of Appeal Rules 2022, we reserved the reasons for our decision to be rendered within 14 days. The application is brought under Articles 159 (2) (d), 164 of the Constitution, Sections 3 and 3A of the Appellate Jurisdiction Act, Rules 1 (2), 5 (2) (b) of the Court of Appeal Rules 2022. It is premised on the grounds listed on the face of the application and supported by the supporting affidavit sworn on 27th September 2025 by Manase Nyaga Njenga who is the 2nd applicant's director.

2. A brief factual background is necessary in order to properly contextualize the application and our reasons for dismissing it. The 1st respondent pursuant to leave granted on 1st October 2020 instituted a derivative suit on behalf of Trans Nzoia Investment Company Limited (the affected party) vide amended plaint dated 21st September 2023 seeking, *inter alia*, that Trans Nzoia Investment Company Limited to be declared as the owner of Land Parcel No. Kitale Municipality Block 4/494 measuring 0.6256 Ha. (the suit property) popularly known as Kitale Hotel. The 1st respondent also sought a declaration that the transfer of the suit property on 17th April 2006 to the 6th respondent was fraudulent,

null and void and a

declaration that the subsequent transfer of the suit property to 7th respondent on 4th September 2002 was unlawful, null and void and as a result the 6th and 7th respondent to hand over vacant possession of the suit property and in default eviction orders to issue.

3. The suit was vehemently opposed by the 2nd respondent vide statement of defence dated 14th January 2024. The 4th and 5th respondents opposed the suit vide statement of defence dated 2nd November 2020. They stated that initially they intended to subdivide the suit property and lease it out to generate more revenue but their intentions were abused behind their backs and they were not involved in the dealings complained about. The applicants also opposed the suit vide their amended statement of defence dated 28th September 2023 terming the suit as incompetent in law and an abuse of the Court process and maintained that the 2nd applicant was an innocent purchaser for value without notice of the alleged defect in title and the reliefs sought by the 1st respondent could not obtain in law and are not for the benefit of shareholders but for personal benefits of the 1st

respondent. The suit against the 3rd respondent was withdrawn by an order made on 3rd February 2020.

4. After considering the respective parties' case, the trial judge found that the 1st respondent had proved to the required standard that the 2nd to 5th respondents failed to exercise due care and hold their fiduciary duty to the 1st respondent and Trans Nzoia Investment Company Limited and that the 2nd respondent failed to disclose to Trans Nzoia Investment Company Limited and its shareholders how much was paid as rental income for 16 years. In the end, the learned judge allowed the 1st respondent's suit and issued the following reliefs: (a) declaration that the Company is the-rightful owner of Land Parcel No. Kitale Municipality Block 4/494, popularly known as Kitale Hotel measuring 0.6256 Ha; (b) declaration that the transfer on 17th April1996 of the Land Parcel No. Kitale Municipality Block 4/494, to the 5th defendant was fraudulent, null and void; (c) declaration that the sale and transfer on 4th September 2002 of the Land Parcel No. Kitale Municipality Block 4/494 to the 7th defendant was unlawful, null and void; (d) declaration that the 7th defendant holds Land Parcel No. Kitale Municipality Block 4/494, in trust for the affected party; (e) an order that the 7th defendants do transfer Land Parcel No. Kitale

Municipality Block 4/494 to the affected party;

and (f) an order that the 6th and 7th defendants do hand over vacant possession of all the premises comprised in Land Parcel Kitale Municipality Block 4/494, in default the 6th and 7th defendants, their agents, associates and workers be evicted from the premises, in line with the law. Aggrieved by the said judgment, the applicant lodged an amended notice of appeal dated 1st July 2025 and instituted this appeal against the said judgement together with this instant motion.

5. The applicant's motion, the subject of this ruling, seeks an order that pending the hearing and determination of the intended appeal, there be stay of execution of the Judgement and decree delivered by *Nzili,*

J. in Kitale ELC NO. 74 of 2019.

6. The applicants' case is grounded on the grounds contained in their draft memorandum of appeal marked- *"MNN4"* In a bid to elucidate the grounds, the applicant averred that the claim for recovery of land and the claim citing fraud were statute barred and therefore the Superior Court had no jurisdiction to determine the matter.

7. On whether the intended appeal would be rendered nugatory unless

the reliefs sought are granted, the applicants averred that the 1st respondent and the affected party will move to execute the eviction orders as allowed in the claim thereby extinguishing the substratum of the intended appeal before this Court determines the intended appeal. The applicants also averred that the 2nd applicant was in active occupation and leasing out the suit property to tenants since the year 2002 to date and has made massive developments and that the suit property is the applicants' source of income for the 1st applicant's livelihood medical treatment and will be unable to service a bank loan which stands at Kshs.51,000,000/= having charged the suit property to M-Oriental Bank.

8. The application is opposed by the 1st respondent vide grounds of opposition dated 9th October 2025 and a replying affidavit sworn on 9th October 2025 by Pascal Wafula who is the 1st respondent. The grounds are: (a) the intended appeal is not arguable because the issue of limitation of actions was raised by the applicants on 27th February 2020 and dismissed by ruling of 1st October 2020, therefore, the same is *res judicata*; (b) the intended appellants

have not demonstrated how the intended appeal would be rendered

nugatory if the non-monetary decree for possession and transfer of the suit property to the affected party is fully executed; (c) the affected party took possession and control of the suit property immediately after delivery of judgment and denial of stay orders; (d) the decree has been partially executed by its registration in the lands registry, the affected party's re-entry, possession and control of the premises and the affected party invoking its right to sue the charge Bank M- Oriental Bank Limited and the director of the 2nd applicant for the discharge of the legal charge registered *pendente lite;* (e) the intended appellants are merely driven by the desire to continue collecting rentals from the tenants to enable Manase Nyaga Njenga the director of the 2nd applicant to continue replying his personal loan to M- Oriental Bank Limited.

9. The 4th and 5th respondents opposed the application vide replying affidavit sworn on 21st October 2025 by George Imbera Ludisi (the 4th respondent). He deponed that: (a) the intended appeal is frivolous; (b) the applicant has not demonstrated how the intended appeal would be rendered nugatory should the prayers sought not issue; (c) the applicants have approached this Court

with unclean hands; (d) since

the subject matter is immovable property, should the intended appeal succeed, it would easily be reinstated back to the applicants;

(d) as regards the allegation of a massive loss as the property was charged to M/s Oriental Bank Limited, the 2nd applicant knowingly charged the suit property during the pendency of the suit and failed to disclose to the said bank and/or the bank did not do proper due diligence.

10. The 2nd 3rd and 6th respondents did not file any papers to the application.

11. When the matter came up for hearing, learned counsel, Mr. Onyancha was present for the 2nd applicant, Mr. Kraido appeared for the 1st respondents, Ms. Muhanda appeared for the 2nd and 6th respondents, Ms. Mukoya was present for the 4th and 5th respondent.

12. Regarding the issue whether the applicants intended appeal was arguable, Mr. Onyancha relied on the grounds raised in the 2nd applicant's draft memorandum of appeal and submitted that a single arguable point is sufficient to order stay of execution.

13. On whether the intended appeal would be rendered nugatory if the

orders sought are not granted, the 2nd applicant maintained that it had done substantial renovations to the suit property since the year 2002 when it was transferred and it is in public interest that a stay of execution be granted since the suit property is a commercial property operating various business in Kitale's Central Business District.

14. Mr. Kraido in opposing the application maintained that the intended appeal is not arguable since all the points of law raised are all *res judicata* and the grounds raised on the points of facts are all an afterthought being raised for the first time after judgment and the application for stay.

15. Counsel also maintained that the intended appeal would not be rendered nugatory since the applicants themselves have not complained of any credible injury they will suffer if the execution proceeds. Nevertheless, the affected party has no intention of disposing of the suit property any time sooner, except to use it for revenue for its members.

16. At the time of writing these reasons for our determination, there were

no submissions on record by Ms. Mukoya and Ms. Muhanda.

17. We have considered the application and the grounds urged by both parties in support of their respective positions. To succeed in an application for stay of execution, an applicant must satisfy the following twin conjunctive principles under Rule 5 (2) (b) of this Court's Rules; the appeal is arguable; and would be rendered nugatory if stay is not granted. (See **Republic vs. Kenya Anti-Corruption Commission & 2 Others** **[2009] KLR 31**; **Reliance Bank Ltd vs. Norlake investments Ltd** **[2002] I EA 227** and **Githunguri vs. Jimba Credit Corporation No (2)** **[1988] KLR 838)**. In addition, this Court exercises original jurisdiction under Rule 5 (2)

(b) as held in **Ruben & 9 Others vs. Nderitu & Another** **[1989] KLR**

459 and **Trust Bank Limited & Another vs. Investech Bank Limited and 3 Others** **[2000] eKLR.**

18. In satisfaction of the first prerequisite, we note that based on the 14 grounds set out in the draft memorandum of appeal, it is contended that the learned judge erred in law and fact when he

found that the 1st respondent proved fraud against the 1st and 2nd

appellants to the

required standard which is higher than the standard required in Civil

Cases. Bearing in mind that an arguable appeal is not one that will necessarily succeed, we are not prepared to say that it is frivolous. (See **Kenya Tea Growers Association & Another vs. Kenya Planters Agricultural Workers Union, Civil Application No. Nai. 72 of 2011 UR)**

19. Turning to the second prerequisite, which is the nugatory aspect; that is, whether the appeal if successful, would be rendered nugatory in the event we decline to grant the orders sought and the intended appeal succeeds, we are guided by the sentiments of this court in ***Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 others*** **[2013] eKLR** this Court stated that: cursory

> ***"ix). The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling***
>
> ***reversible; or if it is not reversible whether compensate the party aggrieved."***

20. From the impugned judgment annexed to the application before us, and having looked at the prayers granted reproduced earlier

in these reasons at paragraph, looking at the prayers sought against the

orders made by the trial court, coupled with the arguments before this Court, we have not been persuaded by the applicants that the appeal will be rendered nugatory if stay is not granted. This is because the applicants are in essence inviting us to reverse the orders of the trial court at this interlocutory stage of the proceedings. If allowed to stand, the appeal would in actuality, be determined substantively without hearing both sides on the issues raised in the appeal.

21. A cursory look at the issues and the judgment shows that nothing will be rendered nugatory, as whatever action is taken by the affected party is reversible if the appeal succeeds since Mr. Kraido has indicated that the affected party has no intention of disposing the suit property. We therefore agree with the 1st, 4th & 5th respondents that the applicants have not satisfied the second prerequisite of the twin principles. We say so cognizant of the fact that in exercising our discretionary jurisdiction the bigger picture we should focus on is to preserve the ends of justice which includes letting a deservedly winning party enjoy the fruits of their judgment.

22. In view of the above, we have come to the inescapable conclusion that

the Notice of Motion dated 27th September 2025 lacks merit. It is hereby dismissed with costs to the 1st, 4th, and 5th respondents.

Dated and delivered at Nakuru this 10th day of December, 2025.

M. WARSAME

.....
JUDGE OF APPEAL

J. MATIVO

.....
JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

.....
JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR.