

**IN THE COURT OF  
APPEAL AT NAKURU  
(CORAM: WARSAME, MATIVO & GACHOKA,  
JJ.A.) CIVIL APPLICATION NO. NAK E108 OF  
2025 BETWEEN**

**JOHN CHEPKOROS MOINDI  
t/a SINENDE WHOLESALERS.....APPLICANT  
AND**

**TRANS NATIONAL BANK LIMITED.....1<sup>ST</sup> RESPONDENT  
SARAH NJOKI MUNGE  
t/a SANJOMU AUCTIONEERS.....2<sup>ND</sup>  
RESPONDENT**

*(Being an application for injunction from the ruling and orders of the High Court of Kenya at Narok (C. Kariuki, J.) dated 26<sup>th</sup> June, 2025*

**in**

**HCCC No.12 of 2018**

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**REASONS FOR DECISION**

1. On 3<sup>rd</sup> December 2025, this Court dismissed the applicant's application dated 23<sup>rd</sup> October 2025 and reserved our reasons pursuant to Rule 34 (7) of the Court of Appeal Rules, 2022. The application is brought under Rule 5 (2) (b) of this Court's rules. It is premised on the grounds listed on the face of the application and supported by the supporting affidavit sworn on 23<sup>rd</sup> October 2025 by Abdirizak Roba Duba, the applicant's advocate.

2. A brief factual background is necessary in order to properly contextualize the application and our reasons for dismissing the application. The applicant vide plaint dated 11<sup>th</sup> October 2018 moved the High Court, in HCCC No. 12 of 2018, seeking, *inter-alia*, orders of injunction against the 1<sup>st</sup> respondent and a declaration that the purported sale of land parcel Cismara/Ololulunga/4150, Cismara/Ololulunga/14681 and Cismara/Ololulunga/12784 was illegal and void.
3. Before the suit could be set down for hearing, a consent judgment was entered into on 7<sup>th</sup> March 2019, wherein, the applicant through its counsel on record acknowledged indebtedness of Kshs.31,715,191.00 to the 1<sup>st</sup> respondent which amount was in arrears for a loan advanced to him.
4. Subsequently, vide application dated 16<sup>th</sup> June 2023, the applicant approached the Superior Court seeking to set aside the consent order dated 8<sup>th</sup> March 2019 for being irregular, illegal and fraudulent. The 1<sup>st</sup> respondent opposed the application vide replying affidavit sworn on 30<sup>th</sup> April 2024 by its Legal Officer.

5. Vide ruling delivered on 26<sup>th</sup> June 2025, *Kariuki, J.* dismissed the applicant's application dated 16<sup>th</sup> June 2023 by holding that it was not contested that applicant filed HCCCOMM E063/2023 and filed similar application in same case. The same were under same subject matter. The subject matter of the two applications dated 16<sup>th</sup> June 2023 and 22<sup>nd</sup> February 2023 respectively both filed in HCCMM E064/2023 was Cismara/Ololulungn/468l. The applications were determined. The applicant sought similar orders in the said applications, which were injunction to stop sale of same subject matter. *Majanja, J.* (as he then was), in a ruling dated 30<sup>th</sup> June 2023 delivered in HCCCOMM E064/2023 held that the matter is *res-judicata*, and struck out both the application and the suit.
6. Aggrieved by the said ruling, the applicant lodged a notice of appeal dated 1<sup>st</sup> July 2025 and instituted this instant motion seeking two substantial orders:

**a) Pending the hearing and determination of Civil Appeal No. COACA/E168/2025, this Court be pleased to issue a temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents, their agents, servants, or assigns from selling, transferring disposing of or dealing with the appellant's properties L.R No. Cismara/Ololunga/14681 and L.R. No.**

***Cismara/Ololunga/12782.***

**b) Pending the hearing and determination of Civil Appeal No. COACA/E168/2025, this Court be pleased to grant a stay of execution of the consent order/judgment consent order dated 8<sup>th</sup> March 2019 adopted in HCCC NO. 12 of 2018, together with all consequential orders emanating therefrom.**

7. Regarding the arguability of the appeal, the applicant has filed a memorandum of appeal dated 25<sup>th</sup> August 2025 raising 7 grounds of appeal and maintained that the appeal is arguable with a high likelihood of success, since it is challenging the High Court's erroneous order striking out of the appellant's application and suit on grounds of *res judicata*, failure to address the invalidity of the consent order dated 8<sup>th</sup> March 2019, and breaches of constitutional rights under Article 48 and 50 (1) of the Constitution.
8. On whether the appeal would be rendered nugatory, if the orders sought in the application are not granted, it was the applicant's case that the 2<sup>nd</sup> respondent have scheduled the sale of the properties for the 9<sup>th</sup> December 2025 without serving statutory notices under Section 90 of the Land Act, 2012. The properties being the applicant's sole residence and source of livelihood, their alienation will cause irreparable loss not compensable by damages

9. The application was opposed by the 1<sup>st</sup> respondent vide grounds of opposition dated 7<sup>th</sup> November 2025 and a replying affidavit sworn on 11<sup>th</sup> November 2025 by Elisha Nyikuli who is the 1<sup>st</sup> respondent's Head of Legal and Company Secretary. The grounds in opposition of the instant application are that:

- (a) there exists no valid notice of appeal filed and served in accordance with Section 77 of the Court of Appeal Rules;
- (b) this Court has no jurisdiction under Rule 5 (2) (b) to stay the execution of a consent order that has not been specifically appealed against;
- (c) the applicant has not demonstrated an arguable appeal with realistic prospect of success since a consent being a binding compromise is not appealable unless vitiated by fraud, coercion, or mistake and none of which have been pleaded or substantiated;
- (d) an application filed in COACAPPL No. E104 of 2025 for leave to serve a notice of appeal dated 1<sup>st</sup> July 2025 and record of appeal dated 25<sup>th</sup> August 2025 out of time is still pending;
- (e) the applicant has not demonstrated that the sale of the charged property would occasion irreparable harm incapable of being remedied by damages;
- (f) there has been inordinate and unexplained delay in seeking equitable

reliefs; (g) there has been non-disclosure

of material facts, particularly the partial enforcement of the consent order to its benefit. Therefore, the applicant has approached this Court with unclean hands.

10. When the matter came up for hearing, learned counsel, Ms.

Atieno was present for the applicant, while Mr. Atudo together with Ms. Achola appeared for the 1<sup>st</sup> respondent.

11. Regarding the issue of whether the applicants intended appeal was arguable, Ms. Atieno cited the case of **Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2013]**

**eKLR** in submitting that the grounds of appeal raised in their memorandum of appeal are neither fanciful nor illusory since they disclose triable, substantial errors that compel the conclusion that the appeal is arguable.

12. On whether the appeal would be rendered nugatory unless the orders sought are granted, the applicant maintained that the charged properties are ancestral which face irreversible alienation thereby rendering the appeal nugatory and there is a violation of Section 90 of the Land Act, 2012 for want of service of mandatory statutory notices and the applicant's right to property guaranteed

under Article 40 of the

Constitution is also threatened.

13. Mr. Atudo in opposing the application cited the case of **Patrick Kiruja Kithinji vs. Victor Mugira Marete [2015] KECA 872 (KLR)** in contending that the jurisdiction to stay execution under Rule 5 (2) (b) can only be exercised if there is a valid notice appeal before this Court and there being no valid appeal on record, this Court lacks the requisite jurisdiction to even entertain the instant application.
14. On whether the appeal would be rendered nugatory if stay of execution is not granted, the 1<sup>st</sup> respondent maintained that the issue of the charged properties being ancestral land was an afterthought since the same was never raised before the Superior Court. Be that as it may, in event that appeal succeeds, damages will be a sufficient remedy and the 1<sup>st</sup> respondent is capable of compensating the applicant.
15. The 1<sup>st</sup> respondent further urged that the applicant has been sitting on stay orders for almost three years and benefiting from the consent order dated 7<sup>th</sup> March 2019 yet he has not made any attempt to repay the loan.

16. We have considered the application and the grounds urged by both parties in support of their respective positions. 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 & 3 Others [2000] eKLR.**

17. We start first by addressing the preliminary point raised by the 1<sup>st</sup> respondent in its grounds of appeal dated 7<sup>th</sup> November 2025. The 1<sup>st</sup> respondent's preliminary objection is primarily based on the argument that it was not served with a notice of appeal with 7 days from the date it was filed. It should be noted that this Court's jurisdiction is invoked by filing a valid notice of appeal. Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in **Adero & Another vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577**, as follows;

- "1) ...**
- 2) The jurisdiction either exists or does not ab initio ...**
- 3) Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.**

**4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings**

***even on appeal.”***

18. As was stated by the Court in **Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 Others [2004] eKLR**, a valid Notice of Appeal is a primary document that gives a court jurisdiction. Similar sentiments were expressed by this Court in **Abok James Odera T/A A. J. Odera & Associates vs. John Patrick Machira T/A Machira & Co Advocates [2013] eKLR** whilst citing the holding in **PePco Construction Company Limited vs. Carter & Sons Limited Nairobi CA No. 80 of 1979 (UR)** that:

***“A notice of appeal is what gives this Court jurisdiction in any appeal. It is a primary document in terms of Rule 85 (1) of the Rules. A record of appeal must contain a valid copy of the notice of appeal. The omission to include a valid copy renders the appeal***

19. Ms. Atieno has admitted to the fact that the notice of appeal on record was served upon a wrong email address and as a result the applicant failed to comply with Rule 79 of the Court of Appeal Rules that required the notice of appeal to be served within 7 days. The applicant’s counsel also admitted that the applicant has already applied for leave under Rule 4 of this Court’s rules to serve the notice of appeal dated 1<sup>st</sup> July, 2025 and record of appeal dated

25<sup>th</sup> August, 2025 out of time. This

confirms that as at now there is no valid notice of appeal before this Court. Therefore, the applicant's application stands on quick sand. With the foregoing background in mind, the inevitable conclusion is an invalid notice of appeal cannot confer jurisdiction upon this Court. The upshot of the foregoing is that the instant application is incompetent for want of a valid notice of appeal, consequently, the motion dated 23<sup>rd</sup> October 2025 is dismissed with costs to the 1<sup>st</sup> respondent.

**Dated and delivered at Nakuru this 10<sup>th</sup> 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.**