IN THE COURT OF APPEAL AT NAIROBI

(CORAM: GATEMBU, MUMBI NGUGI & KORIR, JJ.A.) CIVIL APPEAL (APPLICATION) NO. E196 OF 2025

BETWEEN

PRAVIN GALOT (*Suing as administrator of the estate of* **G.P. GALOT)......................................APPLICANT**

AND

MOHAN GALOT .... 1ST RESPONDENT GALOT INDUSTRIES LTD .... 2ND RESPONDENT KING WOOLLEN MILLS LTD .... 3RD RESPONDENT KENYA NATIONAL CAPITAL CORPORATION LTD .... 4TH RESPONDENT

(Being an application for injunction pending appeal arising from the ruling and order of the High Court of Kenya (Commercial and Tax Division) at Nairobi (A. Mabeya, J.) dated 17th February 2025 and delivered on 25th February 2025

in

HCCOMM No. 2054 of 1993)

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RULING OF THE COURT

1. In a notice of motion dated 18th March 2025, the applicant sought the following orders:

"1. Spent.

2. An injunction be and is hereby issued restraining

the 1st Respondent from using, consuming, expending or in any way dissipating the decretal amount of Kshs 48,951,536.00 together with interest thereon at 19% p.a. with effect from 27th August, 2004 until

payment in full, in the total sum of Kshs 217,821,241.00 as at 19th October, 2022, pending the hearing and determination of Civil Appeal No E 196 of 2025, Pravin Galot (suing as the administrator of the Estate of G. P Galot) vs. Mohan Galot and 3 Others.

3. ***The 1st respondent be and is hereby directed to deposit the decretal amount of Kshs 48,951,536.00 together with interest thereon at 19% p.a. with effect from 27th August, 2004 until payment in full, in the total sum of Kshs 217,821,241.00 as at 19th October, 2022, in a joint interest-earning account, pending the hearing and determination of Civil Appeal No E 196 of 2025, Pravin Galot (suing as the administrator of the Estate of G.P Galot) v Mohan Galot and 3 Others.***

4. ***The costs of and incidental to this Application do abide the result of the Appeal."***

2. The application, which is supported by an affidavit sworn by Pravin Galot, is based on the grounds that the appeal is arguable and that, unless an order of injunction is issued, the appeal will be rendered nugatory. In order to buttress the assertion that the appeal is arguable, the applicant lists seven grounds of appeal, including alleged bias by the learned Judge and the erroneous finding that the applicant's challenge to the consent dated 16th August 2023, between the respondents, compromising the claim before the trial court, was *res judicata*. As to why the appeal will be rendered nugatory unless the orders sought are granted, the applicant avers that the 1st respondent will appropriate the entire

decretal sum of Kshs 217,821,241 for his own use, thus depriving

the applicant and the 2nd and 3rd respondents of their rightful share of the money. The applicant further avers that, despite the decretal sum being secured by a court order restraining the 1st respondent from expending any portion of it, the 1st respondent's actions post-judgment evidence the risk of imminent loss of the rightful shares of the applicant, and the 2nd and 3rd respondents.

3. The 1st respondent filed grounds of opposition dated 10th May 2025, terming the application misconceived and an abuse of the court process. He contends that the application and memorandum of appeal upon which it rests are fatally incompetent on account of the exclusion of some of the parties before the High Court; that the applicant has moved this Court with unclean hands and is guilty of concealment of material facts, having omitted the proceedings of the High Court that took place prior to 21st March 2022, which are relevant to the present application; that the application fails the test for the grant of an order of injunction; that the appeal is not arguable as the consent settling the dispute entered by the parties on 16th September 1996 has never been challenged, and the applicant is estopped from challenging that consent through this appeal; and that the appeal is not arguable as it seeks to revive issues already settled and not appealed against.

4. On their part, the 2nd and 3rd respondents opposed the application through a replying affidavit sworn by a director by the name Pushpinder Singh Mann. He gave a historical

perspective of the dispute before averring that the High Court had determined that

the decretal sum in dispute belonged to the 2nd and 3rd respondents. Further, that the High Court, through a ruling dated 26th November 2024, had preserved the decretal amount, and the instant application is made out of malice and is an abuse of the process of the Court. Additionally, it is deposed that the applicant has not demonstrated the irreparable harm he will suffer since the original litigant has since passed on and the applicant has only moved the Court in his representative capacity.

5. The 4th respondent opposes the application through the replying affidavit of its Company Secretary and Director of Legal Services, Samuel Wanjohi Mundia. Giving the historical context of the dispute, Mr. Mundia avers that the appeal arises from High Court Case No. 2054 of 1993, in which the applicant, together with the 1st, 2nd, and 3rd respondents, were the plaintiffs while the 4th respondent was the defendant. He avers that, upon adjudication, the High Court rendered judgment in favour of the plaintiffs against the defendant in the sum of Kshs. 48,951,536 with interest of 19% per annum from 27th August 2004 until payment in full.

6. Mr. Mundia also avers that on 28th July 2022, the 4th respondent released the whole decretal sum to the 1st respondent, Mohan Galot, who was identified as the governing director of the 2nd and 3rd respondents. In order to safeguard its interests and those of the other claimants, the 4th respondent secured a "Deed of

Settlement and Indemnity" from the 1st respondent, wherein the 1st

respondent agreed to indemnify the 4th respondent against any

future claims arising from the settlement and the subsequent division of the funds. He maintains that at the time of payment and execution of the indemnity deed, there was no court order in place prohibiting the 4th respondent from releasing the decretal sum to the 1st respondent or entering into the aforementioned indemnity agreement. Mr. Mundia also states that the 4th respondent fully and strictly complied with the High Court judgment, in which its sole obligation was to pay the total decretal sum, which it fulfilled in good faith. Finally, the 4th respondent contends that, considering that the impugned High Court decision was made on 28th July 2022, the applicant has been "dilatory" in prosecuting his grievance.

7. When the matter came up for hearing, learned counsel, Ms. Ang'awa, appeared for the applicant, while learned counsel, Mr. Dan Nuthu, held brief for Mr. Kangethe for the 4th respondent. There was a slight confusion as to the appearances for the 1st, 2nd, and 3rd respondents, with both learned counsel Mr. Tiego and learned counsel Mr. George Gilbert indicating that they were appearing for the 2nd and 3rd respondents. The issue of representation was, however, sorted out after counsel agreed that Mr. Tiego actually represented the 1st respondent while Mr. Gilbert appeared for the 2nd and 3rd respondents. Pursuant to that clarification, Mr. Tiego sought, and was, by consent, allowed to amend the heading of the grounds of opposition and the submissions he had filed so that they could indicate that they had

been filed for the 1st respondent instead of the 2nd and 3rd respondents.

8. In support of the applicant's case, learned counsel Ms. Ang'awa submitted that the threshold for the grant of the order sought, as established in **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] KECA 378 (KLR)**, had been met as the applicant's appeal is arguable on account of the grounds contained in the memorandum of appeal annexed to the application. As regards the nugatory aspect, she submitted that the appeal will be rendered nugatory if an injunction order is not issued, as the 1st respondent will appropriate the entire decretal amount, depriving the applicant and the 2nd and 3rd respondents of their rightful share.

9. For the 1st respondent, learned counsel Mr. Tiego, relying on the decision of **Owino vs. Ogola & 2 Others [2023] KECA 1370 (KLR)**, argued that the applicant should not succeed as he seeks equitable remedies with unclean hands. Citing **Njenga vs. Republic & 3 Others [2018] KECA 632 (KLR)**, counsel submitted that a party who takes the pathway of misrepresentation should not secure discretionary orders. Urging us to dismiss the application, counsel submitted that the applicant intentionally declined to file the entire record of the proceedings before the High Court, thus concealing material information from the Court.

10. Turning to the merits of the application, Mr. Tiego, while relying

on the decision in **Luka & 3 Others vs. Chairman Land**

Adjudication Committee & Others [2023] KECA 1232 (KLR) submits that in order to secure an injunction, the applicant should demonstrate the existence of an arguable appeal that is likely to be rendered nugatory should the order sought not issue. According to counsel, the applicant has failed to meet the threshold. Specifically, on whether the applicant has an arguable appeal, counsel argued that he does not because his appeal seeks to upset previous decisions of the trial court, which have never been appealed. Reliance was placed on **Ephraim Miano Thamaini vs. Nancy Wanjiru Wangai & 2 Others [2022] eKLR** for the argument that an application such as the one before this Court is an abuse of the Court process. Still contending that the applicant's appeal is not arguable, counsel asserted that the holding by the learned Judge that distribution of the funds is to be guided by the 2nd and 3rd respondents' articles of association is in line with the holding of this Court in **Mwai Kibaki & Another vs. Mathingira Wholesalers Company Limited & 6 Others [2018] KECA 725 (KLR)**. We were therefore asked to dismiss the motion with costs to the 1st respondent.

11. The 2nd and 3rd respondents, through learned counsel, Mr. Gilbert, opposed the application through submissions dated 8th May 2025. Mr. Gilbert commenced by invoking **Giella vs. Cassman Brown & Co Ltd & Another [1973] EA 358** to highlight the principles for grant of an order of injunction. According to counsel, the applicant had not established a

prima facie case

which was defined in **Mrao Ltd vs. First American Bank of**

Kenya Ltd & 2 Others [2003] KECA 175 (KLR) to be ***"a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."*** Learned counsel also submitted that equitable remedies in the form of an injunction cannot issue where an award of damages would suffice to compensate a party. Further, that the money decree in question belongs to the 2nd and 3rd respondents, and the applicant has not demonstrated how the estate of the deceased G.

P. Galot would suffer irreparable damage. To buttress the argument that an injunction cannot issue where damages can adequately compensate the loss, counsel relied on **Macplan Engineering Services Ltd vs. Peter Grundhlehner [2013] eKLR** and **Wilson Keragita Moruri vs. Zakayo Maiko Mogaka [2010] eKLR**. Still pursuing the argument, counsel referred to **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] KECA 606 (KLR)** to argue that an injunction is issued solely to prevent grave and irreparable injury and that an irreparable injury or harm is of such a nature that monetary compensation of whatever amount will never be an adequate remedy. Finally, counsel submitted that since the application was *res judicata* and the disputed amount belonged to the 2nd and 3rd respondents, it cannot be said that the appeal will be rendered nugatory. Counsel therefore urged us to dismiss the application with costs.

12. On his part, counsel for the 4th respondent submitted that the 4th respondent distributed the decretal amount in compliance with the judgment of the High Court. According to him, the 4th respondent should not be involved in any dispute concerning the distribution of the funds among the decree holders. Reliance was placed on **<u>MN vs. TAN & Another</u> [2015] eKLR** for the proposition that a court order has to be obeyed or complied with regardless of the grievance of any party. Referring to **<u>Kenya Power & Lighting Company Limited vs. Water & Sewage Company Ltd</u> [2018] eKLR**, counsel submitted that the deed of indemnity executed by the 1st respondent on behalf of the plaintiffs in the primary suit is a legally binding agreement that absolves the 4th respondent from any claims or liabilities related to the distribution of the decretal sum. **<u>Ndege vs. Nyanza Provincial Hospital</u> [2014] eKLR** was cited for the argument that the distribution of the decretal sum was a matter to be resolved by the decree holders among themselves, and that the 4th respondent was not tasked with adjudicating the apportionment of the amount to them. Counsel termed the application flawed by reason of the lack of urgency by the applicant in pursuing his grievance. According to counsel, the impugned ruling having been delivered on 28th July 2022, the applicant ought to have moved with haste in filing the instant application. Counsel placed reliance on **<u>Republic vs. Judicial Service Commission & 7 Others</u> [2017] eKLR** for the proposition that filing applications after a significant period of delay violates

the Oxygen Principles. In conclusion, counsel submitted that we dismiss the application.

13. Since this is an application brought under **rule 5(2)(b)** of the **Court of Appeal Rules** for an order of injunction, the applicant is required to disclose an arguable appeal which will be rendered nugatory should the order sought be declined. What is an arguable appeal in the context of **rule 5(2)(b)**? The answer was provided in **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others** *(supra)* as follows:

    > **"An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous."**

14. In this application, we have considered the grounds of appeal raised by the applicant. As is required of us, we are, at this stage not expected to conduct a mini-trial of the grounds of appeal or make conclusive findings on them. All that is required of us is to assess whether the points raised by the applicant deserve their day in Court. Considering the grounds of appeal, for instance, the question of alleged bias and whether the principle of *res judicata* was properly invoked, we agree that these are issues deserving a hearing before the Court. We, therefore, without saying more, conclude that the applicant has an arguable appeal.

15. The next inquiry is whether the applicant has demonstrated that his appeal will be rendered nugatory should the injunction sought not be granted. In the matter before us, the assertion

by the 2nd,

3rd, and 4th respondents that the decretal amount had been disbursed as per the court order has not been challenged by the applicant. It would appear, therefore, that the event the applicant seeks to avert has already occurred. In that regard, we find appropriate the holding in **Eric V. J. Makokha & 4 Others vs. Lawrence Sagini & 2 Others [1994] KECA 60 (KLR)** that:

> **"There is one other reason on which the order of injunction granted in that case could be questioned. An application for injunction under Rule 5(2)(b) is an invocation of the equitable jurisdiction of the Court. So its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, "Equity, like nature, will do nothing in vain". On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the Court will decline to grant it."**

16. There is also the undisputed averment by the 2nd, 3rd, and 4th respondents that there is a valid court order directing the decretal sum to be apportioned between the 2nd and 3rd respondents. Since the disbursement has already taken place, there is nothing to injunct. Additionally, were the applicant's appeal to succeed, the applicant can recover the decretal amount from the 2nd and 3rd respondents. The applicant having not made an allegation of impecuniousness against the

respondents, we have no reason to further pursue the issue as to whether the respondents will be able
to refund the decretal amount should the applicant’s appeal

succeed. It is therefore, in the circumstances, reasonable to conclude that should the applicant's appeal succeed, it will not be rendered nugatory.

17. Having found that the applicant has not met the threshold for the grant of an injunction, we do not deem it necessary to address the other issues raised by the 4th respondent regarding the indemnity agreement and the delay in bringing this application.

18. The upshot of the foregoing is that the notice of motion dated 18th March 2025 is devoid of merit and is for dismissal. It is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 19th day of December 2025.

S. GATEMBU KAIRU, FCIArb, C.Arb.

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JUDGE OF APPEAL

MUMBI NGUGI

....
JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed
<u>DEPUTY REGISTRAR</u>