

**IN THE COURT OF APPEAL
AT MOMBASA**

(CORAM: MURGOR, LAIBUTA & NGENYE,

JJ.A.) CIVIL APPLICATION NO. E088 OF 2024

BETWEEN

BERNARD ATATI.....APPLICANT

AN

**D ETHICS AND ANTI-
CORRUPTION
COMMISSION.....**

RESPONDENT

AND

SAMMY SILAS KOMEN MWAITA.....1ST INTERESTED PARTY

SARAH MARIA LOBO &

**MYRTLE DESA (Sued as legal Representatives
of the Estate of PAUL LOBO)**

2ND INTERESTED

PARTY

*(Being an application for Stay of Proceedings pending hearing
and determination of the appeal against the Ruling of the
Environment and Land Court of Kenya at Mombasa (Naikuni, J.)
delivered on 30th May 2024 & 2nd July 2024*

in

ELC No. 175 of 2009)

RULING OF THE

COURT

1. This ruling relates to **the applicant**, Benard Atati's Notice of Motion dated 18th July 2024 brought pursuant to the provisions of **rule 5(2) (b)** of the **Court of Appeal Rules, 2022**. The applicant is seeking: *an order of stay of*

*proceedings before Mombasa Environment and Land Court
(the ELC) Case No. 175 of 2009 pending hearing and*

determination of intended appeal; and that costs do abide the outcome of the substantive appeal.

2. In brief, the background to the application is that the applicant's alleged ownership of **L.R. No. MN/1/1408 (the suit property)** was cancelled by Mombasa Land Registrar *vide* Gazette Notice No. 15570 dated 26th November 2010. The applicant successfully challenged the decision of the Land Registrar through a Judicial Review application in **Mombasa High Court Judicial Review Case No. 21 of 2010**. The application was adjudged in his favour and, as a consequence, the impugned Gazette Notice was quashed.
3. The Ethics and Anti-Corruption Commission (**the 1st respondent**) initiated separate proceedings, being Mombasa ELC Case No. 175 of 2009. At the hearing of this application on 26th May 2025, learned counsel for the applicant Mr. Rutto confirmed that the hearing of the main suit before Mombasa ELC was reserved for 21st September 2025.
4. The applicant objected to the proceedings before the ELC by filing a Preliminary Objection dated 18th March 2024 and a Notice of Motion dated 20th May 2024 seeking to strike out the 1st respondent's pleadings. The applicant's main contention was that the 1st respondent's suit offended the doctrine of *res judicata*, the dispute having been heard and determined in **Mombasa HC JR Case No. 21 of 2010**.

5. Opposing the Preliminary Objection, the 1st respondent stated that the grounds raised therein did not raise a pure

point of law, and that it was filed as an afterthought, coming 13 years after delivery of judgement in the Judicial Review proceedings and when the ELC matter was at the hearing stage; and that the intention was to frustrate and derail the expeditious disposal of the suit.

6. The learned Judge (**Naikuni, J.**) delivered two separate rulings dated 30th May 2024 and 2nd July 2024 disallowing the Preliminary Objection dated 18th March 2024 and the Notice of Motion dated 20th May 2024 respectively. In the ruling dated 30th May 2024, the trial court dismissed the applicant's Preliminary Objection on the basis that the issues raised therein were rather factual as opposed to being pure points of law, which could not be effectually determined through a Preliminary Objection; and that the available route for the applicant was to file a Motion accompanied by affidavits deposing to facts and attaching annexures in support thereof as provided for under **Orders 19** and **51** of the **Civil Procedure Rules**.
7. The learned Judge also held that the matter in contest before him was the alleged irregular, fraudulent and illegal transfer of the suit property and cancellation of the title to the suit property and all entries made on the land register; that Judicial Review proceedings are concerned with the decision-making process unlike the suit before the ELC which sought to challenge the legality of the title of the suit property; and that, therefore, the ELC case could not be considered to be *res judicata* the judicial review application.

8. In the ruling of 2nd July 2024, the learned Judge was still of the same view that the suit filed by the 1st respondent was not *res judicata* the judicial review application; that an oral hearing would be best suited to reconcile the diametrically opposed positions presented by each party; and that a judicial review process not being merit-based, cannot be used to resolve a land dispute. Accordingly, the applicant's Motion dated 20th May 2024 was dismissed.
9. Against the above backdrop, the applicant approached this Court seeking to appeal against the two decisions of the trial court by filing a Notice of Appeal dated 11th June 2024. Subsequently, he filed the instant application in which he seeks a stay of the proceedings before the trial court. In his supporting affidavit dated 18th July 2024, he deposed that the intended appeal has a high chance of success as it raises weighty jurisdictional issues. On the nugatory limb, it is deposed that, should this Court not stay the trial court proceedings, his appeal will be rendered nugatory.
10. The application was not opposed by any of the respondents. None also participated in the hearing despite due service with the application and the hearing notice.
11. At the virtual hearing, learned counsel **Mr. Rutto** was present on behalf of the applicant. He wholly relied on the applicant's written submissions dated 26th September 2024.

12. At the outset, we note that the submissions were a replica of the averments contained in the supporting affidavit and for this reason we need not restate them. We nonetheless add that counsel relied on this Court's decisions of **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others (2013) KECA 378 (KLR)**; and **University of Nairobi vs. Ricatti Business of East Africa Limited (2020) KECA 463 (KLR)**, highlighting the factors which the Court should consider in an application of this nature, namely that the applicant must demonstrate that he/she has an arguable appeal; and that, if stay is not granted, the appeal will be rendered nugatory.
13. We have considered the application, the supporting affidavit, the written submissions, the authorities cited in support thereof and the law. Our obligation is merely to consider whether the applicant has met the threshold for grant of stay of proceedings before the ELC pending the hearing and determination of the intended appeal.
14. In an application where the applicant seeks stay of proceedings under **rule 5(2) (b)** of this **Court's Rules, 2022** an applicant should demonstrate the twin principles that: the intended appeal is arguable and not frivolous; and that the intended appeal, if it succeeds, will be rendered nugatory if stay orders are not granted.
15. As to the arguability of an appeal or intended appeal, we have to consider whether there is at least a single *bona fide* arguable ground of appeal raised by the applicant to warrant ventilation before this Court as was held in the

case of

Stanley Kinyanjui (supra). The applicant has raised eight (8) grounds of appeal in the draft Memorandum of Appeal dated 18th July 2024. In a nutshell, the applicant seeks to challenge the decision of the trial Judge who found that the suit filed by the 1st respondent was not *res judicata* the judicial review application which had been earlier determined so as to oust his jurisdiction. The applicant also laments that the trial Judge was biased against him by not according him a fair hearing in determining the Motion dated 20th May 2024 against him.

16. Without making any definitive findings of either fact or law at this stage, we think that the above grounds are not frivolous, but are worthy of this Court's consideration at the main hearing. We need say no more under this limb lest we embarrass the bench that will hear the appeal.
17. As to whether the intended appeal will be rendered nugatory absent stay, the applicant needs to demonstrate that proceeding with the suit before the trial court will cause him substantial loss or irreparable harm which cannot be compensated by way of damages or costs if the appeal succeeds as was held by this Court in **David Morton Silverstein vs. Atsango Chesoni [2002] KECA 287 (KLR)** in which the Court observed:

“What will happen if we do not grant the stay sought is that the appeal in the High Court will be heard and may well be determined. But when the appeal already lodged is heard, determined and, if it succeeded, what would automatically

follow is that the proceedings in the High Court would have been rendered unnecessary, but an appropriate order for costs can be made to remedy that. However, the appeal in this Court would not have been rendered nugatory.”

18. This Court has also held that stay of proceedings should be granted only in the rarest of the cases and only when it is established that the failure to grant a stay will prejudice the applicant. See **Meta Platforms, Inc & another vs. Samasource Kenya EPZ Limited t/a Sama & another; Kenya National Humans Rights Equality Commission & 9 others (Interested Parties) (2023) KECA 996 (KLR)** where the Court delivered itself thus:

“Stay of court proceedings pending hearing and determination of an appeal against an interlocutory ruling should only be allowed if the circumstances are such that the impugned order will significantly prejudice the applicant if the matter proceeds. This court must ensure that justice is done to both parties.”

19. In this case, learned counsel Mr. Rutto informed the Court that the title to the suit property is already in the applicant’s name, and that the trial court ordered that status quo be maintained to the extent that it (the title) should not be transferred to third parties. It was also confirmed by the *status quo* order that the applicant would continue in occupation of the suit property until the issue of legality of the title is resolved. Therefore, the applicant is not faced with threat of eviction and, hence,

he stands to lose nothing. In short, failure to grant a stay will not prejudice him in any

way. The converse holds in that it is in the interest of justice that the ELC case be heard to its conclusion so that the issue in dispute of the legality of the title is determined on merit.

20. In view of the forgoing therefore, we find that the applicant has not surmounted the second limb under **rule 5(2)(b)** to warrant grant of the application in his favour. Consequently, the Notice of Motion dated 18th July 2024 is hereby dismissed with no order as to costs.

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

A. K. MURGOR

.....
JUDGE OF APPEAL

DR. K. I. LAIBUTA Carb, FCI Arb.

.....
JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....
JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY

REGISTRAR