Epco Builders Limited v Kabuito Contractors Limited (Civil Appeal (Application) E629 of 2025) [2025] KECA 2252 (KLR) (19 December 2025) (Ruling)

Neutral citation: [2025] KECA 2252 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) E629 OF 2025

DK MUSINGA, JM NGUGI & GV ODUNGA, JJA

DECEMBER 19, 2025

BETWEEN

EPCO BUILDERS LIMITED ..... APPLICANT

AND

KABUITO CONTRACTORS LIMITED ..... RESPONDENT

(Being an application for stay of proceedings pending the hearing and determination of the appeal against the ruling of the High Court at Nairobi (H R.Namisi, J.) dated on 26{{^th}} June 2025 in HCCOMM No. 422 of 2009)

RULING

1. By a Notice of Motion dated 5th August 2025, the applicant seeks stay of proceedings in Nairobi HCCOMM No. 422 of 2009 – Epco Builders Limited v Kabuito Contractors Limited, pending the hearing and determination of this appeal.

2. From the material on record, the applicant's case was heard on 22nd October 2022 and the defence case adjourned to 1st March 2023 when the hearing was stood over to 19th June 2023. On that day, the applicant was not represented and the respondent tendered its evidence in opposing the claim as well as in support of its counterclaim. Upon learning of the proceedings of 19th June 2023, the applicant applied to have them set aside vide its application dated 28th June 2024 principally, on the ground that during the defence hearing, documents were irregularly produced by the respondent. In the alternative, the applicant sought to have the said documents expunged from the record. According to the applicant, on 1st March 2022, its advocate was indisposed and counsel instructed to hold brief in the matter did not convey the information regarding the next hearing date to its counsel on record, thus the non-appearance on 19th June 2023. The respondent, on the other hand, contends that the hearing date was fixed by consent.

3. The learned Judge, in the ruling dated 26th June 2025, found no merit in that application and dismissed it.

4. In this application, we are only concerned with whether or not we should stay proceedings before the trial court during the pendency of the present appeal. According to the applicant, the learned Judge failed to address herself to the weighty issues raised in the application, including the fact that documents were irregularly produced by the respondent without calling the makers thereof as required by the law. The applicant laments that notwithstanding that his appeal is arguable, the matter is active and ongoing before the trial court. The applicant's position is that should those proceedings be finalised, the outcome of this appeal, should it succeed, will be rendered nugatory since by then the applicant's right to fair hearing and access to justice shall have been extinguished. It is the applicant's position that since the appeal has already been lodged, no prejudice will be suffered by the respondent if the application is allowed. The interest of justice, according to the applicant, justifies the grant of the orders sought so as to give meaning to lis pendens doctrine.

5. The respondent opposed the application on the ground that the order for stay is a grave judicial action which implicates the respondent's constitutionally-entrenched rights to access justice and the expeditious conclusion of the legal dispute that has been pending since 2009. According to the respondent, there is no aspect of the decision by the learned Judge that can be impeached since there was no perverse exercise of discretion. The respondent noted that the draft memorandum of appeal was not attached in order to appreciate the merits of the intended appeal, hence the motion ought to be dismissed with costs.

6. When the matter was called out for virtual hearing before us on 10th November 2025, learned counsel, Mr. Noel Okwach, appeared for the applicant while learned counsel, Mr Harrison Kinyanjui, appeared for the respondent. Mr Okwach entirely relied on his written submissions while Mr Kinyanjui briefly highlighted his submissions.

7. The gist of the applicant's submissions was that based on the case of Stanley Kinyanjui v Tony Ketter & 5 Others (2013) KECA 378, the Notice of Appeal having been filed, this Court is seized of the jurisdiction to hear the application; that on the authority of the case of Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet (2018) eKLR, an arguable appeal is one that will not necessarily succeed and that in this case, the applicant has raised pertinent and weighty grounds regarding errors of law and fact which adversely limit the applicant's rights under Article 50 of *the Constitution*; that further, the learned Judge failed to consider the applicant's reasons for non-appearance on the date the defence case was heard and failed to address herself to the alternative prayer that sought to expunge the documents irregularly produced; that on the basis of Attorney General v Okiya Omtatah & Another (2019) eKLR, unless the stay is granted the case at the High Court, which is at an advanced stage of filing submissions, will be finalised and judgement entered, rendering the appeal nugatory.

8. On the part of the respondent, it was submitted: that the application is grossly incompetent for failure by the applicant to paginate the same and to mark the 10th line in violation of rule 13(4) of the Court of Appeal Rules; that the application for setting aside the orders having been declined, the proceedings ought not to be stayed; that on the authority of the cases of David Morton Silverstein v Atsango Chesoni (2002) eKLR, and Kenya Wildlife Service v James Mutembei (2019) eKLR, stay ought not to be granted since it impinges on the rights to access justice and to be heard without delay; that on the authority of Water Painters International v Benjamin Ko'goo t/a Group of Women in Agriculture Kochieng (Gwako) Ministries [2014] eKLR, the respondent ought not to be made to shoulder the consequences of negligence of the respondent's advocate since there is a remedy is against the advocate; that no perverse exercise of discretion has been demonstrated hence on the authority of the cases of

Mbogo & Another v Shah [1968] EA 98 and Riyat Trading Co. Ltd v Bank of Baroda & Tetezi House Ltd [2018] eKLR, the stay ought not to be granted in line with the principle that justice delayed is justice denied; and that without the memorandum of appeal being attached, there is no way the Court can speculate as to the merits of the appeal.

9. We have considered the application, the affidavits in support of and in opposition to the application, as well as the submissions made. Before delving into the merits of the application, the respondent has raised two preliminary issues. The first one is that the application is incompetent for of non-compliance with rule 13(4) of the Rules of this Court which provides that:

> " The pages of each application and, the record of appeal in a criminal appeal, and the memorandum of appeal and the record of appeal in a civil appeal, shall be numbered consecutively."

10. Whereas the respondent contends that the failure to comply with the said rule renders the application incompetent, the respondent has not referred to any particular rule that supports that position. To the contrary rule 14(1) of the Rules provides that:

The Registrar or the registrar of a superior court, as the case may be, may refuse to accept any document which does not comply with the requirements of rule 13.

11. The sanction provided under the Rules is the discretionary power given to the Registrar to decline to accept a document that does not comply with rule 13. While we ought not to be understood to water down the importance of rule 13, we are of the view that non-compliance with it should not be elevated to a fetish. On occasion, non-compliance with purely procedural requirements may be sanctioned by way of penalty in costs rather than disallowance of the application, unless they are contumelious and make it difficult for the other side to adequately present its case. We are not persuaded that it is the position in this instance.

12. The second objection was the omission to attach a draft memorandum of appeal to the supporting affidavit. In an application such as the present one, the applicant is required to show that the appeal or the intended appeal is arguable, hence the need to bring to the Court's attention the nature of the appeal or intended appeal. There is no requirement that the draft memorandum of appeal be attached. Once the grounds or intended grounds are brought to the attention of the Court, by way of an affidavit or otherwise, it suffices for the purposes of determination of arguability of the appeal. We must however emphasise that the applicant ought to expound, without going into the details of the appeal, in what way the grounds are arguable. It does not suffice to simply state that the grounds are arguable. In this case, the grounds were set out in the supporting affidavit and they were explained. We find no problem with the manner in which the applicant posited its grounds of appeal.

13. The principles that guide this Court when considering applications of this nature are now well settled. For an applicant to succeed, it must be demonstrated that the appeal is arguable, or as is often put, not frivolous. The applicant must, in addition, show that the appeal, if successful, would be rendered nugatory absent stay. The two conditions are considered conjunctively so that failure to satisfy either leads to dismissal of the application.

14. Regarding the first principle on arguability of the appeal, this Court holds the view that 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 but deserving of consideration by the Court and warrants a response from the opposite party. It is not necessary that the applicant demonstrates a multiplicity of arguable issues since a single bona fide arguable ground of appeal is sufficient for the purposes of the first condition. See Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] KECA 378 (KLR).

15. In this case, the applicant intends to argue, amongst other grounds, that the learned Judge erred in admitting documents in evidence when their makers were not called and that the learned Judge, in her ruling, only dealt with the failure by the applicant to explain the reason for non-attendance at the hearing. This Court in National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR held that:

> " It is to be remembered that in an application such as this the grounds are not to be argued; all an applicant is required to do is to point out to the Court the ground or grounds which he believes are arguable and leave it to the Court to decide on the issue of whether or not the matters raised are arguable."

16. While the applicant may well fail to persuade the Court at the hearing that its appeal is merited, we find, without saying more, lest we embarrass the bench that will be seized of the main appeal, that the appeal is not frivolous.

17. On the nugatory aspect, which an applicant must also demonstrate, this Court in Reliance Bank Limited v Norlake Investments Ltd [2002] 1 E.A. 227 held that:

> " ..... what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term 'nugatory' has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling."

18. As to what amounts to trifling, the Court in the case of Permanent Secretary Ministry of Roads & another v Fleur Investments Limited [2014] eKLR it was held that:

> " A trifling appeal is one of very little importance, one whose determination is of little or no legal consequence because of a past event(s) or an earlier finding by a court of law."

19. In this case, the applicants' argument is that should stay of proceedings be denied, the hearing of the matter will proceed in the court below, rendering he present appeal worthless. Whereas the considerations for granting stay of execution pending appeal are the same as those for stay of proceedings pending appeal, when it comes to the nugatory aspect, in the latter case, a higher threshold is required to be met than in the former. This must be so because an order staying proceedings has the effect of derailing the pending proceedings before a final determination is made therein. It interferes with the hearing schedules of the trial court and may lead to injustice being occasioned to the respondent whose constitutional right under Articles 159(2)(d) may thereby be curtailed. In deciding whether an appeal will be rendered nugatory, the Court has to go further and weigh the conflicting claims of both parties while considering each case on its own merits in line with the overriding objective in sections 3A and 3B of the *Appellate Jurisdiction Act* and the need to ensure that, when exercising discretion, the principle of proportionality is taken into account. This position was restated in the case of African Safari Club Limited v Safe Rentals Limited [2010] eKLR, where this Court held that:

> " ...with the above scenario of almost equal hardship by the parties, it is incumbent upon the Court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... We think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable."

20. We bear in mind this Court position in Lucy Njoki Waithaka v Tribunal Appointed to Investigate the Conduct of the Honourable Lady Justice Lucy Njoki Waithaka & Judicial Service Commission; Kenya Magistrates & Judges Association (Interested Party) [2020] eKLR that:

> " We note that stay of proceedings is a serious, grave and fundamental judicial action which interferes with the right of any party to conduct litigation. (See: Francis N. Githiari v Njama Limited [2006] eKLR). It impinges on the right of access to justice, right to be heard without delay and the right to a fair trial. While addressing the issue of stay of proceedings in the persuasive case of Global Tours & Travels Limited (supra), Ringera, J as he then was stated thus:
>
> As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal in the sense of whether or not the intended appeal will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.'"

21. According to Halsbury's Laws of England, 4th Edn. Vol.37 page 330 and 332:

> " The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue...This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases...It will not be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case."

22. We bear in mind the pronouncement by the Court in Stanley Kangethe Kinyanjui v Tony Ketter & others (supra) that:

> " Whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved."

23. This Court in David Morton Silverstein v Atsango Chesoni [2002] 1 KLR 867; [2002] 1 EA 296 expressed itself as follows:

> " On this aspect of the matter we think we must follow the decision of this Court in the case of KENYA COMMERCIAL BANK LTD VS BENJOH AMALGAMATED LTD & ANOTHER, Civil Application No. NAI 50 of 2001 (29/2001 UR), (Unreported). That was also an application to stay the proceedings in the High Court pending the hearing and determination of an intended appeal to this Court. In its ruling regarding whether the

intended appeal's success would be rendered nugatory if a stay was not granted, the Court stated as follows:

'... The onus of satisfying us on the second condition, that un less stay is granted, the intended appeal would be rendered nugatory, is also upon the applicant. In our view, it has unfortunately failed to discharge this onus. We remind ourselves that each case depends on its own facts and we find it difficult to be persuaded that the appeal on the facts of the present case would be rendered nugatory if stay is not granted. The appeal may be heard and, if successful, the proceedings in the superior court would be determined in accordance therewith. The hearing in the superior court might have been unnecessary for which appropriate costs can be ordered but the appeal will not have been worthless.'

These remarks aptly apply to the application before us. 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.

The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5(2)(b) of the Court's own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay."

24. In this case, the applicants are appealing against an exercise of discretion by the learned Judge in dismissing their application to set aside proceedings. Should the suit in the court below be finalised before this appeal is heard, we are not persuaded that the applicants' appeal would be worthless. Nothing bars this Court, upon hearing the appeal, from setting aside the decision being appealed against together with consequential orders

25. In the premises, we are not persuaded that there exists exceptional circumstances that justify the stay of proceedings in the court below. The intended appeal, if successful, will not be rendered nugatory absent stay of proceedings. As the applicant has failed to surmount the second hurdle, this Motion fails and is hereby dismissed with costs.

26. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF DECEMBER, 2025.

D. K. MUSINGA (PRESIDENT)

JUDGE OF APPEAL

.....

JOEL NGUGI

JUDGE OF APPEAL

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G. V. ODUNGA

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR