

**IN THE COURT OF
APPEAL AT
NAIROBI
(CORAM: MUSINGA (P), JOEL NGUGI & ODUNGA
JJ.A.) CIVIL APPEAL (APPLICATION) NO. E689
OF 2025**

BETWEEN

GEORGE KIBUCHI GATHUNGU (Suing as the personal representative of the Estate of Newton *Gathungu Kibuchi*)

.....
APPLICANT

AND

**EMBAKASI RANCHING COMPANY LIMITED.....1ST
RESPONDENT BARNABAS MUTURI C. MWANGI.....
....2ND RESPONDENT PURITY KARURI MWANIKI.
.....3RD RESPONDENT STEPHEN MWANIKI
MACHARIA.....4TH RESPONDENT**

(Being an application for stay of proceedings pending the hearing and determination of the appeal against the ruling and order of the Environment and Land Court at Nairobi (A. Omollo, J.) dated on 30th April 2025

in

ELC Case No. 2 of 2022)

RULING OF THE COURT

1. Before the Court is the applicant's Notice of Motion dated 19th September, 2025 seeking orders that pending the hearing and determination of the appeal, this Court be pleased to issue an order staying all and further proceedings in Milimani

ELC Case No. 2 of 2022.

2. A brief synopsis of the case is that vide the Notice of Motion dated 15th October 2024, the applicant sought, from the Environment

and Land Court, leave to file additional documents, being computation files and authentication slips from the Survey of Kenya maps FR 251/67, FR 251/26 and FR 267/22 and any other documents from Survey of Kenya regarding the said maps. That application was dismissed by the trial court on 30th April 2025 on the ground that there was no explanation given why the said documents had not been requested for at the time of filing the suit and/or the subsequent amendment of pleadings. It was the trial court's view that the application had been brought after undue delay yet the information was readily available to the applicant, had he been diligent. In addition, it was observed that copies of the documents requested to be introduced were not annexed to the application, hence there was no basis upon which the court could consider granting the order.

3. The application before us is premised on the grounds that the appeal is arguable and has high chances of success as it raises triable issues involving a clear misapplication of the law apparent on the face of the ruling. According to the applicant, the learned Judge failed to uphold his right to fair trial under Articles 50(1) and 159 2(d) of the Constitution. He

was apprehensive that in the absence of an order staying the trial

court's proceedings, this appeal will be rendered nugatory as the hearing in the matter in ELC No. 2 of 2022 was slated for 12th November 2025 and that the commencement of the hearing would fatally defeat his rights under Articles 47 and 50 of the Constitution. On the other hand, it was averred, the respondents will not suffer any prejudice if the orders sought are granted since upon determination of this appeal, the proceedings in the Environment and Land Court will just set down the matter for hearing from where it was left. The applicant reiterated that it is necessary to stay the proceedings in ELC 2 of 2022 to preserve the substratum of the appeal otherwise this appeal will be rendered nugatory if the appeal eventually succeeds.

4. The application was opposed by a replying affidavit sworn, on behalf of the 3rd and 4th respondents, by the 4th respondent. It was averred that: the case was instituted by the applicant way back in 2018 when the applicant filed all documents he considered relevant; that the applicant had been notorious in filing additional documents and similarly sought to amend his pleadings severally; that although the applicant sought leave to file additional documents, the said documents were not

annexed to the application; that the applicant has not established any

error on the part of the trial court in declining to exercise its discretion in his favour, particularly after benefitting severally from the exercise of that discretion prior to 9th October 2024; that in the circumstances, the appeal is not arguable; that the applicant has failed to demonstrate that if the stay is declined, the appeal would be rendered nugatory as the applicant had all the documents and did not explain why he did not adduce them; that the applicant, without any explanation, took nearly 6 months before making the application.

5. The plenary hearing of this application took place on 12th November 2025 when learned counsel, **Mr Mburugu**, appeared for the applicant while learned counsel, **Mr Kenvine Ouma**, appeared for the 3rd and 4th respondents. There was no appearance for the 1st and 2nd respondents despite due service on them of the hearing notice. Learned counsel relied on their written submissions which they briefly highlighted.

6. On behalf of the applicant, reference was made to rule 5(2) (b) of this Court's Rules that an applicant has to establish that the appeal is arguable and that unless an order of stay is granted, its success would be rendered nugatory. According

to the

applicant, he was not able to procure the letter earlier as the file in the Survey of Kenya had been missing, and that filing of the letter was necessary as it would assist the court in determining the issues in dispute. He also stated that although he had requested for computation and authentication slips from the Survey of Kenya, the said office informed him that these documents were not available to the public and thereby issued him with the letter of 14th November 2024. It was submitted that the evidence sought to be adduced would not alter the character of the case and would not prejudice the respondents for the reason that it was not bulky, the hearing of the main suit had not commenced and that the respondents could also be given leave to file additional documents in rebuttal thereof. The applicant asserted that the right to fair hearing is paramount and ought to be accorded to all parties fairly without undue regard to procedural technicalities, thus the appeal herein is arguable with high chances of success.

7. As to whether the appeal will be rendered nugatory in the absence of the orders sought, the applicant submitted that the hearing of the suit is likely to result in waste of valuable

judicial time if the appeal were to succeed thus the appeal would be

rendered nugatory. In his view, it is necessary and just to stay the proceedings in ELC 2 of 2022 to preserve the substratum of the appeal.

8. On behalf of the 3rd and 4th respondents, it was submitted: that the applicant failed to establish the legal requirements for the grant of stay of proceedings as set out in **Trust Bank Limited and Another v Investech Bank Limited & 3 Others [2000] eKLR**; that the dismissal of the application was justified due to the applicant's notoriety in filing documents out of time which eventually led to his being restrained vide an order of 9th October 2024 from filing additional documents before the court; that on the authority of the case of **Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Others [2013] eKLR**, the court should not be sympathetic to parties who fail to comply with the rules; that as held in **Zacharia Okoth Obado v Edward Akongó Oyugi & 2 Others [2014] eKLR**, Article 159(2)(d) is not a panacea for all procedural shortfalls; that the ruling declining to grant the applicant leave to adduce additional document being an interlocutory ruling, the applicant is at liberty to challenge it on appeal after the final judgement is delivered; that delaying the substantive

proceedings merely to address the interlocutory issue

would constitute an abuse of the appeal mechanism and cause greater prejudice to the respondents; that the applicant did not promptly move the Court as this application was brought 6 months after the ruling by the trial court and is only intended to stall the hearing of the case that was scheduled for 12th November 2025; that granting the application would unfairly prejudice the respondents, leading to delay of justice, increase costs arising from protracted litigation, frustration of finality and the orderly progression of judicial proceedings.

9. We have considered the application, the affidavits in support of and in opposition to the application as well as the submissions made.
10. In application under rule 5(2)(b) of the Rules of this Court, under which the present application was brought, the applicant is required to satisfy the Court that he has an arguable appeal, or one that is not frivolous. In addition, the applicant must demonstrate that the appeal, if successful, would be rendered nugatory absent stay. Both conditions must be satisfied if the stay is to be granted. However, in applications where the stay sought is to suspend the

proceedings before the trial court, the

threshold is slightly higher than in applications for stay of execution pending appeals. This must be so since staying proceedings has the effect of derailing the pending proceedings before a final determination is made in the suit. It interferes with the hearing schedules of the trial court and may lead to injustice being occasioned to the respondent whose constitutional right under Article 159(2)(b) may thereby be curtailed.

11. Therefore, in determining whether or not to stay proceedings, the Court must 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***. The Court must consider the principle of proportionality in the exercise of the discretion. This was appreciated in ***African Safari Club Limited v Safe Rentals Limited [2010] eKLR***, where this Court stated 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.”

12. This Court further noted 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:

“...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.’”

13. ***Halsbury's Laws of England***, 4th Edn. Vol. 37 page 330
and

332 cautions that:

“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.”

- 14.** In this case, on 9th October 2024 the trial court barred the applicant from filing further documents. Without purporting to determine the appeal, we form a dim view of the prospects of the appeal succeeding. Apart from that, there are clearly no exceptional circumstances that would warrant staying proceedings. The order being appealed against was made in an interlocutory application in exercise of judicial discretion. The proceedings are still in their infancy in so far as the hearing is concerned. As held by this Court in **David Morton Silverstein v Atsango Chesoni [2002] 1 KLR 867; [2002] 1 EA 296,**

“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.”

15. We have said enough to show that this application is unmerited.

It is dismissed with costs to the 3rd and 4th respondents.

16. 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

G. V. ODUNGA

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.