

**IN THE COURT OF
APPEAL AT MOMBASA**

(CORAM: MURGOR, LAIBUTA & NGENYE, JJ.A.)
CIVIL APPEAL (APPLICATION) NO. E220 OF
2024

BETWEEN

KENYA RAILWAYS CORPORATION.....APPLICANT

AND

JIHAN FREIGHTERS LIMITED.....RESPONDENT

*(Being an application for stay of execution and proceedings
pending appeal against the Ruling and Orders of the
Environment and Land Court of Kenya at Mombasa (S.
Kibunja, J.) dated 19th October 2024*

in

***Petition No. E013 of
2023)***

RULING OF THE
COURT

1. The respondent, Jihan Freighters Limited, were at all material times in occupation as tenants in the applicant's premises known as Goodshed measuring 35,167 square feet (the demised premises) where it carried on the business of freighters and warehousemen with effect from 1st June 2022 for an agreed term of 9 years on the terms and conditions contained in the applicant's letter of offer dated 10th January

2022, and in acceptance of which the respondent entered into and took possession of the premises.

2. A dispute arose between the applicant, Kenya Railways Corporation and the respondent over and concerning the applicant's alleged breach of the contract of lease by, *inter alia*, purporting to terminate the lease by notice vide a letter dated 24th January 2023, pursuant to which they evicted the respondent. Aggrieved, the respondent petitioned the Environment and Land Court (the ELC) at Mombasa on 6th November 2023 in ELC petition No. E013 of 2023 seeking the following orders against the applicant:

"a) A declaration that the Respondent's [the applicant herein] actions of forceful eviction of the Petitioner [the respondent herein] and closure of the Lease/Tenancy premises known as BC - MOMBASA GOODSSHED [PART] - MOMBASA RAILWAYS STATION measuring 35,167 square feet is in breach of Articles 10, 27, 40 & 47 of the Constitution.

b) A declaration that the Petitioner's occupation of the subject property at Kenya Railways GOODSSHED measuring 35,167 square feet situate along Machakos Road, Mombasa Railway Station unless terminated through due process in compliance with the rule of law and not otherwise.

c) An order of mandatory injunction directing the Respondent's to reopen and handover to the Petitioner the Kenya Railways

GOODSSHED measuring 35,167 square feet situate along Machakos Road, Mombasa Railway Station.

d) An order for compensation by way of damages for the violation of Articles 10, 27 & 40 of the Constitution.

e) Costs of the Petition be provided.”

3. Along with its petition, which is still pending hearing and determination in the ELC, the respondent filed a Notice of Motion of even date praying for an order of injunction to restrain the applicant from interfering or preventing the respondent's access, occupation and operations in the demised premises. They also prayed for costs.

4. The respondent's Motion was supported by the affidavit of Abdalla Salim Omar Abubakar, a Director of the respondent company sworn on 6th November 2023, essentially deposing to the grounds on which the Motion was anchored, namely: that the respondent was the applicant's tenant in respect of the demised premises for a term of 9 years from 1st June 2022; that, by a letter dated 24th January 2023, the applicant purported to terminate the tenancy for the reason that the Government of Kenya required space to facilitate the

movement and storage of fertilizer from the

port of Mombasa by rail for distribution to farmers; and that the respondent declined to comply, and was consequently evicted.

5. The applicant filed its replying affidavit sworn on 24th November 2023 by its Security Services Manager, Mark Murkomen, who alleged that the respondent had committed material breaches by, *inter alia*: change of user of the demised premises; subletting the premises to third parties without the applicant's consent; and by carrying out construction works thereon without the applicant's consent. According to the deponent, the applicant did not evict the respondent but, instead, the respondent "... voluntarily began vacating the suit property ... on 27th October 2023".

6. By its ruling dated 9th October 2024, the ELC (S. M. Kibunja, J.) allowed the respondent's Motion as prayed.

7. Dissatisfied with the learned Judge's decision, the applicant moved to this Court on appeal on 8 needlessly argumentative grounds set out in its memorandum of appeal dated 14th November 2024 essentially faulting the learned Judge for: failing to consider

the applicant's submissions; misapplying the principles governing interlocutory injunctions; concluding that the respondent was likely to suffer irreparable harm without proof of such harm; ordering the respondent's reinstatement to the demised premises; failing to acknowledge that the respondent had breached the lease agreement; and for holding that the suit property was vacant, and that there were no ongoing activities thereon.

8. By a Notice of Motion dated 14th November 2024 filed pursuant to rule 5(2) (b) of the Court of Appeal Rules, 2022, the applicant sought for orders:

i) That pending the hearing and determination of this Appeal, this Court be pleased to grant an order of stay of execution of the Ruling and Order in Environment and Land Court in Mombasa ELC Pet. E013 of 2023 (Kibunja, J) dated 9th October 2024.

ii) That pending the hearing and determination of this Appeal, this Court be pleased to issue an order of stay of proceedings in ELC Pet. No. E013 of 2023.

iii) That this Court do issue such directions and or orders as the

Court may deem just and expedient to grant

iv) Costs of this application be in the cause.

9. The applicant's Motion is supported by the annexed affidavit of Kennedy Mbulo, its Senior Property Management Officer, sworn on 14th November 2024 deposing to 13 grounds on which its Motion is anchored. Those directly relevant to the interlocutory application before us are, namely: that the appeal is arguable; that it would be rendered nugatory if the orders sought are not granted; that the applicant has already taken possession of the suit property and that, ordering the applicant to reinstate the respondent is disruptive of government operations; and that the respondent would suffer no prejudice if the orders sought are granted.

10. In support of the Motion, counsel for the applicant, M/s. Mwaniki Gachoka & Company, filed written submissions, a list of authorities and case digest dated 10th June 2025 citing the cases of **Achachi v Richu** [2025] KECA 306 (KLR); and **Tropicana Hotels Limited v SMB Bank Kenya Limited** [2021] KECA 249 (KLR), highlighting the immutable twin principles to be satisfied for grant of orders under rule 5(2) (b) of this Court's

Rules.

11. On their part, the respondent filed a replying affidavit of Abdalla Salim Omar Abubakar sworn on 9th December 2024 stating that the applicant's appeal would not be rendered nugatory if its Motion is not granted; that the appeal is against an interlocutory ruling, and not on the main petition; that the appeal does not raise any arguable point of fact or law; and that it should be dismissed with costs.

12. Learned counsel for the respondent, M/s. Aboubakar, Mwanakitina & Company, filed written submissions dated 3rd June 2025, submitting that the applicant has not shown that it has an arguable appeal; that it has failed to demonstrate what loss it would suffer if it allows the respondent back to the premises; and that the applicant has no right of appeal by virtue of section 67(2) of the Civil Procedure Act, Cap. 21.

13. To merit the orders sought to stay execution of the impugned ruling as well as stay of proceedings in the ELC pending appeal, the applicant must satisfy the Court that it has an arguable appeal; and that the appeal, if successful, would be rendered

nugatory if the orders sought are not granted. This twin principle has time and again been enunciated in, *inter alia*, the cases of

Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others

[2013] eKLR; and **Anne Wanjiku Kibeh v Clement Kungu**

Waibara &

IEBC [2020] eKLR.

14. With regard to the 1st limb of the twin principle aforesaid, this Court held in **University of Nairobi v Ricatti Business of East**

Africa [2020] eKLR that even a single arguable ground would suffice; and that it need not be one that must necessarily succeed, but one which is not frivolous and merits to be argued fully.

15. In our considered view, more than one of the grounds of appeal advanced in the applicant's memorandum are arguable. Be that as it may, it is not for us to determine whether the appeal will succeed.

16. With regard to the 2nd limb of the twin principle, the term "nugatory" was defined by the Court in **Reliance Bank Ltd v**

Norlake Investments Ltd [2002] 1 EA 227 as “worthless, futile or invalid. It also means trifling”.

17. To our mind, the impugned ruling and orders of injunction were only meant to maintain the *status quo* pending hearing of the petition. To stay execution of the interim injunction would amount to premature determination of the applicant's appeal in its favour. Put differently, stay of those orders would effectively allow what the applicant seeks in the substantive appeal. Moreover, the applicant has not demonstrated how its appeal, if successful, would be rendered nugatory. To the contrary, it would vindicate its actions currently under restraint and grant it the leeway to take vacant possession of the demised premises.

18. We take this view in the face of the disputed fact as to whether the respondent vacated the demised premises as alleged by the applicant, or that the applicant is in vacant possession thereof.

19. The pertinent question is whether the applicant has satisfied the conjunctive limbs of the twin principle to merit grant of the temporary injunction pending appeal. In our considered view, it has not.

20. Turning to the applicant's prayer that we stay proceedings in the ELC pending appeal, we hasten to observe that the Court's power to grant stay of proceedings in the trial court pending appeal is not exercisable in its favour in the circumstances of the instant case, and that such orders do not avail in the face of failure on the applicant's part to satisfy the conjunctive twin principles for the grant of orders under rule 5(2) (b) of the Rules of this Court.

21. Be that as it may, it would be remiss of us not to point out that this is a discretionary power exercisable by the Court upon consideration of the facts and circumstances of each case. As stated by this Court in **David Morton Silverstein v Atsango**

Chesoni [2002] eKLR:

“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”

22. In the same vein, the High Court of Kenya at Meru

(Gikonyo, J.) in **Kenya Wildlife Service v James Mutembei**

[2019] eKLR persuasively held that:

“Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent”

23. As observed in Halsbury’s Laws of England, 4th Edition. Vol. 37 pp.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 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”.

(See also **Mugo v Festus** [2024] KEHC 4095 (KLR) and **Global**

Tours & Travels Limited; Nairobi HC Winding Up Cause No.

43 of 2000)

24. Having considered the applicant’s Motion dated 14th November 2024, the affidavits in support and in reply, the rival submissions of learned counsel, the cited authorities and the law, we reach the inescapable conclusion that the applicant’s Motion fails and is hereby dismissed with costs to the respondent.

Dated and delivered at Mombasa this 30th day of January 2026

A. K. MURGOR

.....
JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

.....
JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....
JUDGE OF APPEAL

***I certify that this is a
True copy of the
original***

Signed

DEPUTY REGISTRAR