Okumu v Agricultural Development Corporation & 9 others (Civil Appeal (Application) E112 of 2025) [2026] KECA 23 (KLR) (23 January 2026) (Ruling)

Neutral citation: [2026] KECA 23 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL (APPLICATION) E112 OF 2025

MA WARSAME, JM MATIVO & PM GACHOKA, JJA

JANUARY 23, 2026

BETWEEN

JUMA OKUMU ..... APPLICANT

AND

AGRICULTURAL DEVELOPMENT CORPORATION ..... 1ST RESPONDENT

THE HONOURABLE ATTORNEY ..... 2ND RESPONDENT

THE CHIEF LAND REGISTRAR ..... 3RD RESPONDENT

PATRICK MUTINDA MULINGE AND JAMES MUTUA MULINGE (SUED AS THE ADMINISTRATORS OF THE ESTATE OF GENERAL JACKSON MULINGE) ..... 4TH RESPONDENT

CHEMUSIAN FARM LIMITED ..... 5TH RESPONDENT

SIAN ENTERPRISES LIMITED ..... 6TH RESPONDENT

MOHAMED HAJI MOHAMED ..... 7TH RESPONDENT

JOSHUA KULEI ..... 8TH RESPONDENT

THE NATIONAL LAND COMMISSION ..... 9TH RESPONDENT

THE CHIEF GOVERNMENT VALUER ..... 10TH RESPONDENT

(Being an application for stay of proceedings and all the consequential orders of the ruling of the Environment and Land Court of Kenya at Nakuru (A. Ombwayo, J.) dated 6th February, 2025inELC Petition No. E011 of 2024)

RULING

1. Juma Okumu (the applicant) has moved this Court by an application dated 3rd November 2025 seeking orders that pending the hearing and determination of Nakuru Civil Appeal Number E167 of 2025; Juma Okumu v Agricultural Development Corporation & 9 Others this Court suspends and/or stays further proceedings in Nakuru Environment and Land Court Petition No.11 of 2024; Juma Okumu v. Joshua Kulei & Others. The application is brought under sections 3A and 3B of the *Appellate Jurisdiction Act* and Rule 5 (2) (b), 20, 47 and 49 of the Court of Appeal Rules, 2022.

2. In order to contextualize the diametrically opposed arguments presented by the parties in support of their respective positions, it is necessary for us to briefly highlight the background to this application. By a Constitutional Petition dated 18th September 2024 filed before the Environment and Land Court (ELC) at Nakuru, the applicant prayed for cancellation of the 6th respondent's (Sian Enterprises Limited) titles in respect of Land Reference Nos. 13287/1, 13287/2, and 13287/88. The 1st respondent opposed the petition by an affidavit dated 15th May 2024 essentially stating that the petition is devoid of legal and factual merit. The 2nd and 3rd respondents filed grounds of opposition dated 11th October 2024 basically dismissing the petition as untenable and aimed at seeking to circumvent the statutory limitation of 12 years in recovery of land cases. The 4th respondent filed a replying affidavit dated 15th November 2024 vehemently disputing the contents of the petition. The 5th, 6th and 8th respondents filed a replying affidavit sworn on 11th October 2024 inter alia maintaining that the petition does not meet the threshold of a Constitutional Petition and disputing the contents of the petition.

3. On 14th October 2024, Ombwayo, J. suo motto directed that the said petition shall be determined by way of affidavit evidence despite objection by the applicant's advocates. Aggrieved by the said decision, the applicant filed an application dated 4th November 2025 seeking to review the said directions citing two grounds: (a) there existed sufficient cause to merit the variation; (b) there existed an error apparent on the face of the record because the directions contraved settled law that contentious land ownership disputes ought to be determined by way of viva voce evidence as opposed to affidavit evidence only.

4. By a ruling dated 6th February 2025, Ombwayo, J. dismissed the said application. Aggrieved by the said ruling, the applicant filed and served a notice of appeal dated 19th February 2025. The applicant also wrote a letter on 20thFebruary 2025 addressed to the Deputy Registrar bespeaking typed proceedings. The applicant instituted Nakuru Civil Appeal No. E167 of 2025 against the ruling.

5. In the instant application, the applicant is urging this Court to stay the proceedings in Nakuru ELC Petition No. E011 of 2024 pending the hearing and determination of the said appeal. The key grounds in support of the application are that:

    a. the applicant's appeal is arguable. In support of this ground, the applicant contends that the learned Judge erred in fact and in law in failing to review or vary the directions issued on 14th October, 2024 on grounds that there existed sufficient cause; (b) that there exists an error apparent on the face of the record, to wit, the trial court totally disregard binding Supreme Court and the Court of Appeal decisions which have settled the law that petitions which raise highly contested issues of fact, including allegations of fraud, forgery, and illegal acquisition of public land and title, cannot be adequately determined through affidavit evidence without the examination and cross-examination of the deponents.

6. The applicant also faulted the judge's decision that the impugned directions could only be appealed against, urging that the impugned directions were case management in nature, therefore, amenable for review, setting aside or variation at any stage of the proceedings depending on the interests of justice.

7. In support of the nugatory aspect, the applicant submitted that the Constitutional Petition before the ELC has been scheduled for mention on 10th November, 2025 (now past) to fix a date for highlighting submissions. Therefore, there is a risk that the applicant's right to a fair trial that envisage an opportunity to examine and cross-examine witnesses/deponents of affidavits shall be curtailed and violated before the appeal is heard and determined.

8. As at the time of writing this ruling, the 1st 2nd, 3rd, 4th and 7th respondents had not filed their response(s) to the application.

9. The 5th, 6th and 8th respondents opposed the application vide replying affidavit sworn on 22nd December 2025 by one Evans Langat, the 6th respondent's Principal Legal Officer. The salient averments are:

    i. The application is a gross abuse of court process brought by a stranger to a land transaction that took place more than twenty years ago seeking to usurp the mandate strictly reserved for the 1st respondent, a separate legal entity with the power to sue for any alleged non-payment of consideration.

    ii. The applicant seeks to advance a purely contractual claim by way of a petition, which fact was brought to the Court's attention vide a replying affidavit dated 11th October 2024, and asserted that any transaction between the 1st respondent and any party to whom it allotted land can be enforced only by the parties to the transaction and not a third party.

    iii. Regarding the reliance of the Supreme Court decision in Fanikiwa Limited and Others v Sirikwa Squatters Group and Others, in which the Court underscored the importance of viva voce evidence in matters relating to land, he stated that the applicant has neither laid a claim to the suit properties, nor does he allege to have a competing ownership interest to that of the 4th to 8th respondents as was the case in Fanikiwa Limited and Others v Sirikwa Squatters Group and Others (supra).

    iv. The applicant did not demonstrate to the Court the witnesses he intended to call, or that the evidence he wishes to adduce required an oral hearing or that the affidavits sworn by the respondents, especially the 1st, 4th, 7th and 8th respondents, contained contested issues of facts that would warrant clarification through examination and cross examination of witnesses.

10. During the hearing of this application, learned counsel Mr.Keaton together with Mr. Ndegwa represented the applicant. Learned counsel Mr. Davis Osiemo appeared for the 4th respondent. Prof. Ojienda SC together with Ms Misiati appeared for the 5th, 6th and 8th respondents. The 1st, 2nd, 3rd and 7th respondents did not participate in the application.

11. In support of the application, the applicant's counsel Mr.Keaton essentially reiterated the contents of the applicant's supporting affidavit and highlighted his written submissions dated 13th January 2026. Counsel dismissed the respondent's argument that the Fanikiwa case (supra) only applies to disputes where two parties are claiming ownership of the same property and maintained that a dispute on ownership does not arise only where there are competing titles, but it equally arises where the root of title is challenged, even where the person challenging does not seek to be registered as proprietor and that the present matter involves allegation of fraud and the legality or otherwise of the 6th respondent's acquisition of public land. Therefore, the applicant's case falls squarely within in the realm of the

Fanikiwa case, where it was held that allegations of fraud cannot be properly assessed on affidavit evidence.

12. Counsel further submitted that the question before the trial court was whether it should review, vary, or set aside the impugned directions, not whether the petition is merited, therefore, the argument that the intended appeal is not arguable because the 1st respondent has confirmed that all transactions are legal is without merit.

13. Mr. Keaton also submitted that the affidavits in support of the petition clearly identify the evidence and the witnesses the applicant seeks to call. Therefore, the allegation that the intended appeal is without merit because the applicant did not identify the issues in dispute, the witnesses he would call, or the evidence he would adduce is without merit. Further, the impugned orders were issued suo moto, despite protest by the applicant's advocates.

14. On whether the appellant's appeal will be rendered nugatory if the proceedings are not stayed, counsel maintained that the applicant's constitutional petition is coming up for highlighting of written submissions on 26th January, 2026, and if the judgment is pronounced, the appeal will be overtaken by events.

15. Counsel further submitted that there exists exceptional circumstances, to wit, the risk of the appeal being overtaken by events, and the appeal being heard in a manner that is in the breach of the rules of substantive and procedural justice, which will occasion an injustice that cannot be undone, therefore, the applicant has demonstrated the existence of exceptional circumstances.

16. Prof. Ojienda SC, on behalf of the 5th, 6th and 8th respondents opposed the application. He maintained that the appeal is not arguable since the applicant did not either in his petition, his application for viva voce hearing or the present application, disclose the witnesses he intends to call or the evidence he wishes to adduce that require a viva voce hearing. Instead, the applicant appears to demand an oral hearing simply to cross examine the respondents for reasons that the facts deponed to in their affidavits are contested. To buttress his submission, Prof. Ojienda SC. cited the case of Kibos Distillers Limited & 4 Others v. Benson Ambuti Adega & 3 Others [2020] KECA 875 (KLR) where this Court while determining whether or not viva voce evidence is necessary in a petition noted that where a party does not indicate the witnesses they intend to call, the evidence they wish to adduce, or at the very least, demonstrate that there are contested issues, they cannot demand a viva voce hearing.

17. On whether the appeal will be rendered nugatory if the orders of stay of proceedings are not granted, senior counsel submitted that this Court in Kibos Distillers Limited & 4 Other (Supra) held that the right to a fair hearing does not equate to an automatic right to an oral hearing. He maintained that in this case, there are no contested matters of fact or law nor has the applicant indicated what prejudice he shall suffer if hearing proceeds by way of affidavits. Counsel asserted that in any event, the Court is sufficiently equipped to determine the issues raised through the affidavits and the documents presented.

18. Mr. Osiemo, counsel for the 4th respondent did not file any response to the application or submissions but he fully associated himself with the submissions tendered by Prof. Ojienda.

19. We have considered the application, the grounds in support thereof, the replying affidavits, submissions by counsel and the law. For an applicant to succeed in an application under rule 5 (2) (b), he must satisfy the twin principles, namely: (a) that his appeal is arguable, that is, it is not frivolous; and, (b) that unless a stay or injunction is granted, the appeal or the intended appeal, if successful, would be rendered nugatory. (See Reliance Bank Ltd. v. Norlake Investments Ltd. [2002] 1EA 227, Peter Paul Mburu Ndururi v. James Macharia Njore [2009] eKLR and (No. 2) (1988) KLR 838).

20. It is settled law that in an application under Rule 5 (2) (b), we are precluded from making definitive findings of law or fact. Therefore, as for the importance of the viva voce evidence as repeatedly urged by the applicant while citing the Fanikiwa case is a direct invitation to us to venture into this prohibited zone which is the preserve of the bench that will hear the appeal. Our concern at this stage is to address our minds to the question whether the applicant has met the two prerequisites to merit the stay sought.

21. Regarding the first prerequisite, that is, whether the intended appeal is arguable, we note that the applicant has cited 3 grounds of appeal in his memorandum of appeal dated 28th August 2025. The issues raised in the said grounds include the question whether the trial Judge erred in fact and in law in failing to review or vary the impugned directions. In support of this ground, counsel argued that viva voce evidence to determine conflicting and contested affidavit evidence relating to ownership of Land Reference No.13287/1, 13287/2 and 13287/88 which will be subjected to cross-examination is necessary to test the veracity of the evidence. In order to satisfy the requirement of arguability, the applicant need only establish one arguable ground. We are satisfied that the grounds raised by the applicant are bona fide issues which are not frivolous meriting consideration by this Court. Therefore, the applicant has satisfied the first requirement under rule 5 (2) (b).

22. Turning to the second prerequisite, which is the nugatory aspect; that is, whether the appeal, if successful, would be rendered nugatory in the event we decline to grant the stay orders sought and the intended appeal succeeds, we are guided by the sentiments of this Court in Stanley Kang'ethe Kinyanjui v. Tony Kertter & 5 Others [2013] eKLR in which this Court defined the word nugatory as follows: (a) The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling, (b) Whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

23. There are numerous decisions of this Court emphasizing that under Court Rule 5(2)(b), the term "nugatory" is defined to mean that an appeal will be rendered worthless, futile, or invalid if the actions authorized by the lower court are allowed to proceed. Generally, courts use a two-part test to determine if an appeal is nugatory, assessing reversibility and the adequacy of damages if the action is not reversible. (See Makhanu v. Cheruiyot & Another (Civil Application E359 of 2022) [2023] KECA 328 (KLR) (17 March 2023) (Ruling)).

24. It is settled law that, that stay of proceedings is a radical, grave, and drastic remedy that interferes with a party's right to access justice. Consequently, it is generally granted only in exceptional circumstances, specifically when the proceedings are frivolous, vexatious, or an abuse of the Court process. Court decisions from various jurisdictions support this principle, highlighting the exceptional nature of granting a stay of proceedings. The foregoing statement of the law is well articulated in the often-cited paragraph from the Halsbury's Laws of England, 4th Edn. Vol. 37 page 330 and 332 which reads as follows:

> " 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 tobe 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."

25. This Court in Co-operative Bank of Kenya Limited v Mwangi [2023] KECA 590 (KLR) had the following to say:

> "...Whilst this Court has unfettered jurisdiction to issue an order of stay of proceedings, it must be satisfied that there are genuine and compelling grounds to justify such an order, whose effect may be to undermine one of the fundamental constitutional principles, namely that justice shall not be delayed ...And as was observed in the case of David Morton Silverstein v Atsango Chesoni (supra), in exercising its discretion to stay proceedings, each case must be considered on its own merits. The grant of stay of proceedings before this Court must be considered within the parameters of rule 5(2) (b) of this Court's Rules."

26. Similarly, in investigate the conduct of the Honourable Lady Justice Lucy Njoki Waithaka & another; Kenya Magistrates & Judges Association (Interested Party) (Civil Application 8 of 2020) [2020] KECA 571 (KLR) this Court stated as follows:

"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...."

27. From the above excerpts, it is evident that the following principles apply to stay of proceedings: (a) a stay is recognized as a drastic step that interferes with the trial process. (b) it must be reserved for exceptional cases, not granted as a matter of course. (c) any order of stay of proceedings must be accompanied by a reasoned order justifying why the stay is necessary. (d) a delay in a trial has a deleterious effect on the administration of justice, and prolonged stays can lead to witnesses turning hostile or evidence being lost. (e). in determining whether or not to stay proceedings, the peculiar circumstances of each case must be considered. (f) grant or refusal to grant an order of stay of proceedings entails exercise of Court's discretion.

28. This application turns on the question whether the applicant has satisfied the nugatory aspect. The applicant asserts that the appeal will be overtaken by events and the petition will be heard in a manner that is in the breach of the rules of substantive and procedural justice, which injustice cannot be undone. In our view, in the event the applicant fails to succeed before the trial court, he has a right to challenge the decision by way of an appeal. This means that his appeal cannot be rendered nugatory because the decision can be reversed on appeal.

29. Stay being an exceptional remedy, it is a requirement is that the applicant demonstrates the existence of exceptional circumstances. "Exceptional circumstances" generally mean rare, extraordinary situations where standard procedures fail, leading to grave injustice or leaving a party remediless, requiring deviation from normal rules for justice. Key precedents emphasize preventing abuse of court processes, and ensuring substantial justice, highlighting situations like gross miscarriage of justice or where no other remedy exists, rather than mere inconvenience. (See the Supreme Court of South Africa decision in Tyte Security Services v. Royal Security [SCA, 2024] that emphasized that "exceptional circumstances" are not just "unusual" but must be linked to the potential for irreparable harm). No exceptional circumstances have been demonstrated in this case.

30. Stay is a drastic remedy only to be permitted in extremely rare and compelling and exceptional circumstances. Therefore, the other question is whether the applicant has demonstrated genuine and compelling grounds to justify such an order,namely, if the stay is refused the effect will be to undermine one of the fundamental constitutional principles, namely that justice shall not be delayed? We do not

think so. The applicant will be heard on affidavit evidence. He may win. He may not. If he loses, as stated earlier, he is not precluded from raising the same grounds on appeal.

31. In summation, the following may constitute exceptional circumstances: (a) Rendering an Appeal Nugatory: It has not been demonstrated that if the proceedings continue, the judgment will destroy the subject matter of the case making a future appeal meaningless. As mentioned above, the applicant will have a right to appeal if his case does not succeed. (b) Grave Injustice: It has not been demonstrated that the proceeding will be tainted by compounding errors that make the final decision wrong and manifestly unjust. (c) Irreparable Financial Harm: The applicant has not shown that he will suffer damage that cannot be reversed if he wins the appeal.

32. Arising from our above analysis of the facts and the law and guided by the decisions cited, we are unpersuaded that the applicant has satisfied the nugatory aspect. In fact, declining the application does not mean that the doors of justice will forever be shut for the applicant. Because it is a requirement that both prerequires must be satisfied, we find that this application must fail. For the foregoing reasons, the notice of motion dated 3rd November 2025 is devoid of merit and is hereby dismissed with costs to the 5th, 6th and 8th respondents. Dated and delivered at Eldoret this 23rd day of January, 2026.

M. WARSAME

JUDGE OF APPEAL

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J. MATIVO

JUDGE OF APPEAL

.....

M. GACHOKA C.Arb, FCIArb.

JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR.