

IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MURGOR, LAIBUTA & NGENYE, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. E170 OF 2024

BETWEEN

SEALINE LIMITED.....APPLICANT

AND

NEETA NAKER & PALLAVI MAHESHCHANDRA NAKER

(Suing in their capacity as the legal representatives of the

Estate of KANTABEN RAMNIKLAL NAKER)....1ST
RESPONDENT

LIBEY NJOKI MUNENE *(As legal representative of the Estate*
of

JAMES FLAVIAN CHEGE MUNENE).....2ND
RESPONDENT

THE LAND REGISTRAR, MOMBASA.....3RD
RESPONDENT

THE ATTORNEY GENERAL.....4TH
RESPONDENT

(An application for stay of proceedings under Rule 5(2)b
of the Court of Appeal Rules pending hearing and
determination of an appeal from the Ruling and Orders of
the Environment and Land Court at Mombasa (Kibunja, J.)
delivered on 24th
July

2024
in
Mombasa ELC CASE NO. E030 OF 2023)

RULING OF THE COURT

The suit was brought by the late Kantaben Ramniklal Naker (deceased) who is the widow of the late Ramniklal Manishanker Naker (deceased), who died intestate on 10th April 1999. The late Kantaben Ramniklal Naker claimed that her late husband and the late James Flavian Chege Munene (deceased) were business partners who had jointly purchased the property known as Land Reference Number 503 (*original number 378/2*) Section V Mainland North (*the suit property*) the subject of this dispute; that the suit property was registered in the name of the late James James Flavian Chege Munene to hold in trust for the two partners in equal shares. It is alleged that this was agreed in writing in a partnership agreement where each partner was at liberty to sell or transfer their share of the suit property to any person, including the co-owner. On 12th June 1998, the late Ramniklal Manishanker Naker registered a caveat against the title to the suit property but, according to the late Kantaben Ramniklal Naker, the caveat was, without her knowledge, fraudulently removed from the title and the property transferred to ***Sealine Limited, the Applicant.***

Fast forward to the Notice of Motion dated 30th August 2024 brought pursuant to **Rules 5(2) (b), 42** and **47** of the **Court of Appeal Rules, 2022**. In the application filed against **the 1st Respondent, Neeta Naker & Pallavi Maheshchandra**

Naker (Suing in their capacity as the legal representatives of the Estate of Kantaben Ramniklal Naker), the Applicant, sought an order of stay of proceedings to be issued in *Mombasa Environment & Land Court Case No ELC E030 OF 2023* pending the hearing and determination of the Applicant's appeal against the Ruling and Orders of the Environment and Land Court dated 24th July 2024 and for costs to abide the outcome of the appeal.

The Motion was brought pursuant to the grounds on its face and the supporting affidavit sworn by ***Dharmesh Chandulal Shah***, a director of the Applicant, in which he deposed that, by a Ruling dated 24th July 2024 arising from the Applicant's Notice of Motion dated 30th January 2024, the Environment and Land Court dismissed the Motion wherein it had sought for the suit to be struck out for being time barred under ***Section 7*** of the ***Limitation of Actions Act***, and also because the 1st Respondent was guilty of laches.

It was contended that the Applicant was dissatisfied with the Ruling, and had lodged a Notice of Appeal on 25th July 2024, and by a letter dated 26th July 2024, it applied for typed proceedings, and confirmed having filed its appeal, being *Mombasa Civil Appeal*

No E170 of 2024. It was further contended that the appeal raises arguable issues of limitation of time which is a statutory defence and the doctrine of laches which is a common law defence arising from

unreasonable delay in instituting the suit; that the appeal has a high chance of success, and in the event the orders sought are not granted, it was contended the Applicant's appeal will be rendered nugatory as the suit in the trial court will proceed to full trial, whereupon a Judgment will be rendered thereby causing the appeal which seeks to set aside the Ruling of 24th July 2024 nugatory. It was also deponed that a pre-trial conference was scheduled for 26th October 2024.

Annexed to the application was a Notice of Appeal lodged on 25th July 2024 and a Memorandum of Appeal setting out the grounds of appeal, which were that: the learned Judge was in error in failing to hold that the suit is time barred under **Section 7** of the **Limitation of Actions Act** despite the uncontested fact that the suit property was registered in favour of the late James Flavian Chege Munene on 8th May 1975, a period of 48 years ago; that the learned Judge failed to appreciate that the 1st Respondent's cause of action in the Plaint dated 11th October 2023 is alleged to have arisen upon acquisition of the suit property by the late James Flavian Chege Munene in 1975; that, furthermore, the learned Judge failed to appreciate that the suit

was time barred for having been filed 32 years after the impugned sale agreement dated 14th August 1991 was entered into, and after the late Ramniklal Naker, under whom the 1st Respondent purports to institute the suit, had passed away on 10th April 1999, 25 years earlier, and without having lodged any claim over the suit property in court; that

the learned Judge erroneously took into account the 1st Respondent's allegations of discovery of fraud in 2016 when no such cause of action was pleaded in the Plaint, and also allowed the suit to proceed to trial in the absence of letters of administration for the estate of the late Ramniklal Naker, which meant that the 1st Respondent lacked the necessary *locus standi* in the suit.

It was further contended that the learned Judge failed to appreciate that the suit was also liable to be struck out for laches, an independent defence under common law to the effect that on account of the 1st Respondent's laches and that of their alleged predecessor in title of the late Ramniklal Naker, there are presently no witnesses alive who can testify firsthand on the manner of acquisition of the property in 1975 by the late Munene since both gentlemen passed on in 1999 and 2007 respectively, among other grounds.

On their part, the 1st Respondent opposed the application by way of a Replying Affidavit sworn on 11th September 2024 by **Neeta Naker**, who deponed that the Applicant had failed to demonstrate any exceptional circumstances to justify the grant of

a stay of proceedings. It was her contention that the interests of justice would be better served by allowing the matter to proceed to conclusion so that all grievances could be addressed in a single substantive appeal, rather than through piecemeal litigation. It was further deponed that the application had not met the mandatory conditions set out under **Order 42 Rule 6(2)** of the

Civil Procedure Rules, 2010, particularly the requirement to demonstrate substantial loss. In that regard, she averred that the Applicant had not shown any prejudice that would be suffered if the proceedings were to continue and that, since the Respondents were not in possession or in custody of the title to the suit property, they were incapable of dealing with it in a manner prejudicial to the Applicant.

The 1st Respondent further averred that the Applicant had failed to demonstrate that the intended appeal was arguable or that, if stay of proceedings sought was not granted, the appeal would be rendered nugatory. On the contrary, she deponed that the intended appeal lacked plausible or persuasive grounds capable of upsetting the learned Judge's decision, and that the application for stay was merely a tactic intended to delay the expeditious determination of the proceedings.

When the application came up for hearing on a virtual platform, learned counsel **Mr. Sheth** appeared for the Applicant, learned counsel **Ms. Nzisa** holding brief for Ms. Ongaki appeared for the 1st Respondent, and learned counsel **Mr. Otwal** appeared for the 2nd Respondent. There was no appearance for the 3rd and

4th Respondents although they were served with the hearing notice.

In their written submissions, counsel for the Applicant reiterated the contents of the Motion and the affidavit in support, as well as the grounds of appeal. In summary, counsel submitted that the suit property was registered in the sole name of the late James Flavian Chege Munene on 8th May 1975, yet the suit was instituted 48 years later allegedly on behalf of Ramniklal Naker, claiming a half share as a co-purchaser; that, therefore, the cause of action as pleaded in the Plaint dated 11th October 2023 is alleged to have arisen at the time of acquisition of the property in 1975 and, as a consequence, the suit was time barred.

Counsel further submitted that the learned Judge was in error in failing to consider the prayer for striking out the suit on account of laches notwithstanding that the issue had been expressly pleaded and extensively submitted on. It was submitted that, as a direct consequence of the 1st Respondent's laches, the Applicant purchased the suit property in 2013 from the estate of the late Munene for a consideration of Kshs. 90,000,000, and was duly registered as proprietor without notice of the 1st Respondent's claim. Counsel contends that the Applicant is therefore gravely prejudiced by the Respondents' prolonged

inaction. Additionally, it is submitted that, due to the lapse of time, the two principal actors involved in the original acquisition of the property are no longer alive, thereby depriving the Applicant—an innocent purchaser for value without

notice—of the opportunity to obtain direct evidence on the circumstances of acquisition in 1975.

In their written submissions, counsel for the 1st Respondent submitted that the Applicant has failed to meet the legal threshold for the grant of a stay of proceedings in *Mombasa ELC Case No. E030 of 2023* pending the hearing and determination of the intended appeal. Counsel argued that the application does not satisfy the mandatory requirements under **Order 42 Rule 6(2)** of the **Civil Procedure Rules, 2010** particularly the requirement to demonstrate substantial loss, absence of unreasonable delay and provision of security.

It was submitted that the Applicant has not demonstrated any prejudice or substantial loss that would be suffered if the proceedings are allowed to continue, noting that the Respondents are not custodians of the title to the suit property, and are therefore incapable of dealing with it in a manner that would prejudice the Applicant; that no exceptional or peculiar circumstances have been shown to justify the drastic order of stay of proceedings, and that allowing the matter to proceed to conclusion would better serve the interests of justice by enabling

all issues to be resolved in an appeal.

Counsel emphasized that stay of proceedings is a grave and discretionary remedy which should be granted sparingly; that such orders often delay or defeat

the expeditious disposal of cases, and may undermine the overriding objectives set out under **Sections 1A, 1B** and **3A** of the **Civil Procedure Act**. Counsel submits that the Applicant has failed to establish the requisite ingredients to warrant the exercise of such discretion in its favour.

On whether the appeal would be rendered nugatory, counsel submitted that the Applicant has not discharged the burden of demonstrating that continuation of the trial would render the intended appeal worthless. It was argued that the mere fact that proceedings may culminate in a judgment does not render an appeal nugatory, as any such judgment is capable of being set aside. In support of this position, reliance was placed on the case of **David**

Morton Silverstein vs Atsango Chesoni [2002] eKLR, that the onus lies on the

applicant to prove the nugatory aspect, and that each case must be determined on its own facts. Counsel further submitted that the application amounts to a misuse of judicial time and is devoid of merit having failed to demonstrate any just cause for stay of proceedings.

For their part, counsel for the 2nd Respondent associated

themselves with the Applicant's submissions that, since the 1st Respondent had slept on its rights, the suit should not be allowed to proceed unnecessarily.

The question for determination is whether the Applicant has met the threshold for the grant of an order of stay of proceeding. This Court has consistently held that the principles applicable to applications for injunctions, stay of execution and stay of proceedings under **Rule 5(2)(b)** of this Court's rules are the same. To succeed, an applicant must satisfy two cumulative requirements: first, that the intended appeal is arguable; and, secondly, that unless the stay sought is granted, the appeal, if successful, would be rendered nugatory. And as restated in the case of **Trust Bank Limited and Another vs Investech Bank Limited & 3 Others [2000] eKLR**:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”

Furthermore, it is settled that granting of stay of proceedings is a discretionary power that should be exercised sparingly as it interrupts the normal court process, and is a grave and serious remedy that should only be granted in exceptional

circumstances. See ***Karsan Ramji & Sons Limited vs Athuman & Another (Suing for and on behalf of Wamwanyundo Clan & 6 Others (Civil Application No. E034 of 2023 [2024] KECA 563 (KLR))*** as well as this Court's

decision in **Zenith Pharmaceuticals Limited & 2 Others vs Sidian Bank Limited [2025] eKLR**.

With respect to the first limb, it is trite that an arguable appeal need not be one that will necessarily succeed, but rather one that raises at least a single *bona fide* issue deserving consideration by the Court. In the case of **Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 Others [2013] eKLR**, this Court emphasized that, in determining arguability, it must refrain from making definitive findings of fact or law so as not to prejudice the eventual hearing of the appeal. In the case of **Attorney General vs Okiya Omtata & Anor [2019] eKLR**, this Court held that such an appeal need not necessarily succeed, provided that the Appeal is not idle or frivolous.

Upon consideration of the grounds raised in the Applicant's Motion and the Memorandum of Appeal, the Applicant contends that the learned Judge failed to consider that the suit was time barred since the cause of action arose when the parties entered into the sale agreement for the suit property in 1975, and further that the learned Judge failed to address the issue of laches on the part of the 1st Respondent. In our view, we consider these to be

substantive issues warranting interrogation by this Court, with the result that the first limb has been satisfied.

As concerns the second limb on whether the appeal would be rendered nugatory if the stay sought is not granted, in the

case of **Reliance Bank Limited**

vs Norlake Investment Limited [2002] 1 EA 227, this Court held that what would

render an appeal nugatory depends on the circumstances of each case and requires a careful balancing of the competing interests

of the parties. Whilst, in the case of **African Safari Club Limited**

vs Safe Rentals Limited [2010] eKLR, the

Court underscored the need to weigh the respective hardships likely to be suffered by each party, guided by the overriding objective of fairness and equality.

In the present Motion, the Applicant argues that, unless the proceedings in *Mombasa ELC Case No. E030 of 2023* are stayed, the appeal will be rendered nugatory because the suit may proceed to full trial, following which a judgment will be rendered.

In applying the above principles to the present case, we are not persuaded that the appeal would indeed be rendered nugatory if the proceedings are not stayed. This is because the Applicant's right of appeal is not extinguished, negated, or rendered illusory, by continuation of the proceedings, nor does it create an

irreversible situation incapable of being remedied. In other words, even were the suit to be finalized in the trial court, and the appeal against the ruling were to succeed, the Judgment of the trial Judge could always be set

aside. Consequently, the appeal would not be rendered nugatory, with the result that the Applicant has not satisfied the second limb.

In sum, the Applicant has failed to fulfil the threshold requirements necessary for the grant of the orders of stay of proceedings under **Rule 5 (2) (b)**. The Notice of Motion dated 30th August 2024 lacks merit and is hereby dismissed. Costs in the intended appeal.

It is so ordered.

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

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 a
True copy of the original***

Signed

DEPUTY REGISTRAR