



**Ushago Diani Investment Limited v Abdulwahab (Civil Appeal (Application)
E209 of 2024) [2026] KECA 85 (KLR) (30 January 2026) (Ruling)**

Neutral citation: [2026] KECA 85 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E209 OF 2024
AK MURGOR, GW NGENYE-MACHARIA & KI LAIBUTA, JJA
JANUARY 30, 2026**

BETWEEN

USHAGO DIANI INVESTMENT LIMITED APPLICANT

AND

JABEEN MANAN ABDULWAHAB RESPONDENT

*(Being an application for stay of execution and an injunction pending appeal
against the Ruling and Orders of the Environment and Land Court of Kenya at
Mombasa (L. L. Naikuni, J.) dated 15th October 2024 in E.L.C Case No. 12 of 2023)*

RULING

1. By a plaint dated 15th February 2023 filed in the Environment and Land Court (the ELC) at Mombasa in ELC Case No. 12 of 2023, the applicant, Ushago Diani Investment Limited, sued the respondent, Jabeen Manan Abdulwahab, claiming that it had invested in Kwale/Diani Beach Block/1463 (the suit property) owned by the respondent in the sum of Kshs. 37,500,000 by erecting a shopping complex thereon.
2. The applicant's case was that it undertook the investment aforesaid in consideration for the respondent subscribing for shares in the applicant company and transferring the suit property to it; and that, in breach of his contractual obligation, the respondent refused, failed or neglected to transfer the property to it. By reason of the matters aforesaid, the applicant prayed for:
 - “a) A permanent injunction restraining the Defendant by herself, her agents and/ or servants from selling, transferring, charging, leasing, alienating or in any way whatsoever and howsoever interfering with or dealing with the property known as Kwale/Diani Beach Block/1463.



- b. A declaration that the Defendant’s actions of refusing to transfer parcel no. Kwale/Diani Beach Block/1463 to the Plaintiff is a breach of her obligation as a shareholder of the Plaintiff and of its agreement with its co-shareholders in the Plaintiff.
 - c. A declaration that the parcel of land known as Kwale/Diani Beach Block/1463 is liable to be transferred to the Plaintiff in the alternative the Defendant to compensate the Plaintiff with the investment put towards the suit property worth a sum of Kenya Shillings Thirty Seven Million (Kshs. 37,000,000/=) with understanding that the property was ready for transfer in their favor.
 - d. In default, order directing the Defendant to effect transfer of the parcel of land known as Kwale/Diani Beach Block/1463 to the Plaintiff and in Default the Deputy Registrar of this Honorable court be authorized to execute all documents on her behalf to effect the said transfer.
 - e. Damages for fraud and/or misrepresentation as in Paragraphs 16,17,18,19, 20 and 21.
 - f. Costs of this suit and interest thereon.”
3. In his defence dated 7th June 2023, the respondent denied the applicant’s claim and averred that the suit offended the provisions of section 7 of the *Civil Procedure Act* (Cap. 21) in that it was res judicata Mombasa High Court Civil Case No. 157 of 2009 and Mombasa Civil Appeal No. 60 of 2018; and that the court lacked territorial jurisdiction given that the subject matter of the suit was situate in Kwale County where there is established an ELC. He prayed that the suit be struck out with costs.
 4. Along with the defence, the respondent filed a preliminary objection of even date seeking orders to have the applicant’s suit struck out on the ground that it offended section 7 of Cap. 21.
 5. By a ruling dated 27th September 2023, the learned Judge (L. L. Naikuni, J.) found that the applicant’s suit was res judicata and allowed the respondent’s preliminary objection as prayed.
 6. Dissatisfied with the learned Judge’s decision, the applicant filed a Notice of Motion dated 7th November 2023 seeking leave to file an appeal against the ruling out of time on the grounds that it was delivered without the applicant’s or its advocate’s knowledge; and that “it would be unjust to punish the applicant for the delay caused by the court”.
 7. In response to the applicant’s Motion, the respondent filed a notice of preliminary objection dated 15th May 2024 seeking to have the application struck out with costs on the grounds that the court had no jurisdiction to entertain the Motion as it had become functus officio.
 8. In its ruling dated 15th October 2024, the ELC (L. L. Naikuni, J.) allowed the respondent’s preliminary objection and struck out the applicant’s Motion with costs. As the learned Judge observed, the court was functus officio and had downed its tools.
 9. Further aggrieved, the applicant moved to this Court on appeal on 8 grounds set out in its memorandum of appeal dated 15th October 2024 faulting the learned Judge for: arriving at the conclusion that the subject matter of the dispute was on rent arrears and not compensation; drawing wrong inferences and making wrong conclusions on the pleadings, evidence and submissions; wrongfully applying the principle of res judicata; entertaining extraneous considerations; failing to



find that the respondent ought to compensate the applicant for the sums of money invested in the suit property; and for failing to appreciate the applicant's written submissions.

10. Pending determination of its intended appeal, the applicant moved this Court vide its Notice of Motion dated 16th October 2024 pursuant to rule 5(2) (b) of the Court of Appeal Rules, 2022 seeking orders to stay execution of the ruling dated 15th October 2024; and a temporary injunction to restrain the respondent from dealing with the suit property; and that costs of the application "be provided for".
11. The applicant's Motion is supported by the annexed affidavit of its learned counsel, S. M. Gioche, deposing to the grounds on which it is anchored, namely: that the applicant is in imminent danger of losing its Kshs. 37,500,000; that the applicant's written submissions dated 17th June 2023 and filed on 19th June 2023 were never considered by the court; and that the appeal is arguable with high chances of success.
12. In support of the Motion, counsel for the applicant filed written submissions dated 11th June 2025 citing 7 judicial authorities, which we have taken to mind.
13. It is noteworthy that the respondent did not file any affidavit in reply or submissions in rebuttal to the applicant's Motion. Neither did he or his counsel appear at the hearing of the Motion when it came up on the Court's virtual platform on 17th June 2025.
14. From the Notice of Appeal dated 15th October 2024, it is clear to our mind that the intended appeal is against the ruling of the learned Judge dated 15th October 2024 in which he allowed the respondent's preliminary objection dated 15th May 2024 and struck out the applicant's Notice of Motion dated 7th November 2023.
15. In so far as the impugned ruling is in the nature of a negative order, it is incapable of being stayed pursuant to rule 5(2) (b) of this Court's Rules as sought in the applicant's Motion. As this Court held in *Western College of Arts and Applied Sciences v E. P. Oranga & 3 Others* [1976] eKLR; and *Co-Operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR, negative orders are incapable of being stayed.
16. As for the temporary injunction sought pending appeal, the applicant must satisfy the Court that it has an arguable appeal; and that the appeal (or intended appeal) would be rendered nugatory if the injunctive 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. 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.
17. 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".
18. 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.
19. From a cursory look at the grounds of appeal advanced in the memorandum dated 15th October 2024, it is clear that none of those grounds relate to the impugned ruling of even date but, rather, to the previous decision dated 27th September 2023 in which the learned Judge held that the respondent's suit was *res judicata*. To our mind, the mainstay of his submissions before us is the complaint that his



submissions dated 17 June 2023 were not considered and that, therefore, he was denied the right to be heard. We fail to see what those submissions had to do with the impugned ruling dated 15th October 2023.

20. In view of the foregoing, the record as put to us does not disclose even a single ground on which the intended appeal is founded. Accordingly, we find that the applicant's intended appeal is not arguable and, therefore, find that no useful purpose would be served by an inquiry on the 2nd limb of the twin principle.
21. Having considered the record, the applicant's Motion dated 16th October 2024, the affidavit in support, the submissions by counsel, the cited authorities and the law, we reach the inescapable conclusion that the Motion fails and is hereby dismissed with no order as to costs.

DATED AND DELIVERED AT MOMBASA THIS 30TH DAY OF JANUARY 2026.

A. K. MURGOR

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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

