



REPUBLIC OF KENYA



**TGEM v KSM (Civil Application E164 of 2025)
[2026] KECA 247 (KLR) (13 February 2026) (Ruling)**

Neutral citation: [2026] KECA 247 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E164 OF 2025
SG KAIRU, J MOHAMMED & WK KORIR, JJA
FEBRUARY 13, 2026**

BETWEEN

TGEM APPLICANT

AND

KSM RESPONDENT

(Being an application for stay of execution of judgment and decree of the High Court at Nairobi (E. K. Ogola J.) dated 13th February, 2025 in HC Civil Case No. 29 of 2016)

RULING

Background

1. TGEM (the applicant) filed a notice of motion dated 14th March 2025 brought pursuant to Rule 5(2) (b) of the Court of Appeal Rules seeking, inter alia, a stay of execution of the judgment and decree of the High Court (E.K. Ogola, J.) pending the hearing and determination of the intended appeal.
KSM is the respondent herein.
2. The application arises from the judgment of the High Court delivered on 13th February 2025, in which the High Court ordered that Property Title No. Kajiado/Kitengela/xxx (the suit property) situated in Kajiado be valued, sold and the proceeds therefrom shared between the parties in the ratio of 65:35 in favour of the applicant, to be complied with within ninety (90) days of the date of the impugned judgment.
3. Being dissatisfied with the said decision, the applicant lodged a notice of appeal dated 13th February 2025 and subsequently filed the instant application seeking stay of execution of the impugned judgment.
4. The applicant contends inter alia that the suit property was acquired prior to the solemnization of the marriage between the parties and that the respondent did not contribute to its acquisition. He



further contends that the High Court erred in law and fact by failing to distinguish the value of the land in respect of the suit property from alleged improvements, and by ordering the sale and distribution thereof without proper valuation.

5. The respondent opposed the application, contending that the suit property is matrimonial property developed during the subsistence of the marriage and that she made both direct and indirect contributions in respect of the same.

Submissions by Counsel

6. At the hearing of the application, the applicant was represented by learned counsel, Mr. Opundo, holding brief for learned counsel, Ms. Michuki while the respondent was represented by learned counsel, Ms. Mbugua. Counsel for both parties had filed written submissions. Mr. Opundo submitted that the applicant has an arguable appeal, inter alia on the ground that the suit property was registered in the name of the applicant on 4th January 1994 while the marriage between the parties was solemnized on 5th September 1997.
7. On the nugatory aspect, counsel submitted that the impugned judgment ordered that valuation, sale and distribution of proceeds of sale of the suit property be conducted and concluded within ninety (90) days from the date of the impugned judgment. Further, that the respondent has applied for the extraction of the decree to commence the execution process. Further, that the suit property is the substratum of the intended appeal and once disposed of, it would render the intended appeal nugatory. Counsel reiterated that the applicant lives on the suit property and has lived thereon for the past forty-one (41) years and damages would not be reasonable compensation were execution to proceed and the appeal succeeds. Counsel urged us to allow the application.
8. Ms. Mbugua opposed the appeal and submitted that the intended appeal is not arguable as it is merely an attempt to deprive the respondent the fruit of her judgment after nine (9) years of litigation. Counsel further submitted that the applicant has not denied the respondent's right to matrimonial property or her contribution to its development. Further, that the respondent has a constitutional right to property and this includes the property improved during the subsistence of the marriage between the parties. Counsel reiterated that the respondent contributed directly to the development of the suit property as well as indirect contribution of domestic work, child care including payment of school fees amounting to Kshs.31,518,468, companionship, farm work, and management of family business without pay for 18 years.
9. Counsel asserted that the intended appeal will not be rendered nugatory if the orders sought are declined. Counsel relied on the decision of *Chesikaw v Kenya Anti-Corruption Commission (2023) KECA 1357 (KLR)* where this Court found as follows:

“Even if execution had commenced, nugatory cannot mean the ordinary loss to which every judgment-debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. (See the Supreme Court of India decision in *Anandi Prashad v Govinda Bapu*, AIR 1934 Nag 160 (D). This is because execution is a lawful process. An applicant should go a step further to lay the basis upon which the court can make a finding that the appeal if successful will be rendered nugatory. It is not sufficient for the applicant to claim that the execution will adversely affect him. As this Court held in *Hassan Guyo Wakalo v Straman EA Ltd* [2013] eKLR the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory.” [Emphasis provided]



10. Counsel further submitted that the respondent will compensate the applicant if the appeal succeeds. That all the matrimonial properties are in possession of the applicant since the delivery of the impugned judgment and the respondent continues to be denied her right to property. Counsel further asserted that the respondent is of advanced age and she invested in the development of the suit property for over 25 years and it will be unjust to deprive her the right to property on unclear grounds. Counsel urged us to dismiss the application with costs.

Determination

11. We have considered the application, the reply, submissions and the law.
The jurisdiction under Rule 5(2)(b) of this Court's Rules is discretionary and guided by the interests of justice.
12. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2)(b) of this Court's Rules are well settled. This Court in the case of Trust Bank Limited and Another v. Investech Bank Limited & 3 Others [2000] eKLR delineated the jurisdiction of this Court in such an application as follows:

“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...”
13. In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this Court, both limbs must be demonstrated to the Court's satisfaction.
14. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicants in order to warrant ventilation before this Court. See: Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR where this Court described an arguable appeal in the following terms:

“vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.

viii) In considering an application brought under Rule 5 (2)

(b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”
15. We have considered the grounds set out in the motion. The applicant's argument is that the suit property and Property Title Number Kwale/Funzi Island/xx were acquired before solemnization of the marriage without any contribution by the respondent. Further, that the impugned decision of the High Court ordered division of the suit property on the basis of contribution by the respondent. In our view it is arguable inter alia whether the learned Judge erred in law and in fact in failing to find that all the assets constituting the subject matter of the suit were acquired before the solemnization of the marriage between the parties. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.



16. On the nugatory aspect, the position in law is that this depends on whether or not what is sought to be stayed if allowed to happen is irreversible; or if it is not reversible, whether damages will reasonably compensate the aggrieved party. See: Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others (supra).
17. On the question whether the intended appeal will be rendered nugatory, the impugned judgment awarded the respondent 35% of the suit property and further granted either party the option of buying out the other's share. The value of the property is ascertainable and monetary compensation would be an adequate remedy should the appeal succeed. We are therefore not persuaded that the appeal would be rendered nugatory if execution proceeds and the intended appeal succeeds. This limb of Rule 5 (2) (b) therefore fails.
18. As the applicant has to satisfy both limbs of Rule(5)(b), the Notice of Motion dated 14th March, 2025 lacks merit and is hereby dismissed with costs to the respondent.
19. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF FEBRUARY, 2026.

S. GATEMBU KAIRU, FCI Arb, C.Arb

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

