

IN THE COURT OF APPEAL
AT NAKURU
(CORAM: MATIVO, GACHOKA & OKELLO, JJ. A)
CIVIL APPEAL (APPLICATION) NO. E006 OF
2026

BETWEEN

MARTIN GATHOGO NDUMBI.....1ST
APPLICANT GABRIEL MWENDIA KAMAU.....
....2ND APPLICANT AND
LUCY WANJIRU MUTURI.....1ST RESPONDENT
WORKERS UNION..... 2ND
RESPONDENT

(Being an application for stay of contempt proceedings pending hearing and determination of an appeal arising from the ruling and order of the Environment and Land Court at Naivasha (M.C. Oundo, J.) delivered on 23rd October, 2025

in
ELC Appeal No. E001 of 2025)

REASONS FOR THE
ORDER

1. On 9th February 2026, the applicants filed a Notice of Motion dated 9th February 2026 seeking the following orders:

- 1)Spent;
- 2) *THAT there be a stay of further contempt proceedings, including stay of mitigation and sentencing of the appellants/applicants for contempt of court, in Naivasha Environment and Land Court Appeal No. E001 of 2025 pending the hearing and determination of the appeal herein;*

- 3) *THAT such further or other order be granted as this court may deem just and expedient in the circumstances of this application;*
- 4) *THAT costs of this application be provided for.*

2. The application came up for hearing before us on 25th February 2026. Mr. Amuga advocate, appeared for the applicants and Mr. Kimani advocate, appeared for the respondent. The parties relied on their respective written submissions which were orally highlighted. After a brief conference, we dismissed the application under rule 34 of the Court of Appeal Rules, 2022 and reserved our reasons to be given within 7 days. We shall now give the reasons for the dismissal of the application.
3. To put the application in context, we shall give the background, albeit in a summary way. The main issue in dispute is the finding of the applicants to be in contempt of court and save as to whether the order was served, the facts are not contested.
4. From the record, the applicants filed a land dispute in the Naivasha Chief Magistrate's Court, **MC ELC No. 33 of 2018**, seeking various declarations in respect of several properties known as **Gilgil/Gilgil Block 1/21840, 21841, 21842, 21843 (Kikopey), Gilgil/Gilgil Block 1/214844 (Kikopey), Gilgil/Gilgil Block 1/533 and Gilgil/Gilgil Block 1/21850, 21851 (Kikopey)** which parcels of land were excised from the parcel land known as **Gilgil/Gilgil Block 1/553 (Kikopey)**. In

a

judgement dated 15th August 2024, the learned magistrate (Y.M. Barasa, PM.) entered judgement in favour of the applicants. On 11th March 2025, Hon A. Toweett, PM. issued eviction orders against the respondent which on the face of it indicates that the order was to be enforced by the Officer Commanding Station, Gilgil Police Station.

5. The record also shows that the respondent filed an application dated 28th March 2025 under a certificate of urgency before the Environment and Land Court (ELC) Naivasha, the subject of the intended appeal. Amongst other orders, the learned Judge (*Oundo, J.*) issued an order for *status quo* that was currently obtaining on the ground. It is not denied that the applicants or their agents demolished buildings and structures on the suit land. What the parties differ sharply on is whether the order was served or not before the demolition, but that is not an issue for determination before us at the moment.

6. On 23rd October 2025, the learned Judge found the applicants to be in contempt of court and fixed the case for mitigation and sentencing on 4th November 2025. On 29th October 2025, the applicants filed an application before this Court seeking orders of

stay. The application was certified urgent and fixed for hearing on 5th November 2025 before this Court, albeit differently constituted. It is not contested that on that day, the applicants withdrew their application for stay of the proceedings and elected to submit themselves to the jurisdiction of the Naivasha ELC for mitigation and sentencing.

7. On 7th November 2025, the applicants filed another application before the ELC seeking a stay of the ruling dated 23rd March 2025 pending the hearing of their intended appeal. In a considered ruling, the learned Judge dismissed that application with costs. This is what triggered the filing of the application that was before us on 25th February 2026.

8. Having succinctly set out the background, we wish to remind the parties that we are considering an application for stay of proceedings under rule 5 (2) (b) of the Rules of this Court. The parties are walking on a well-trodden path and the applicable principles have been repeatedly stated in a plethora of cases. Simply stated, for a party to succeed, it must satisfy two conjunctive principles namely: that the appeal is arguable; and secondly, would be rendered nugatory if stay is not granted

[See

Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others

[2013] KECA 378 (KLR)].

9. The applicants have filed written submissions dated 16th February 2026, and the main ground raised is that the order of the Court was brought to their attention after the execution of the order of the lower court that authorized the demolition. It is also submitted that the intended appeal will be rendered nugatory unless an order for stay of execution is granted. In opposition, the respondent filed submissions dated 18th February 2026 arguing that the intended appeal is not arguable, and that it will not be rendered nugatory absent stay.
10. Before addressing the question whether the applicants have an arguable appeal, it is important to point out to the parties that the granting of orders under rule 5(2) (b) is an exercise of discretion and the conduct of the party may affect the exercise of the discretion. We say so as the conduct of the applicants before the judge in the ELC raises questions as we shall demonstrate shortly.
11. It is trite that for a party to invoke the jurisdiction of this Court under rule 5(2)(b) it must file a notice of appeal against the

decision that is being appealed against. That is the fulcrum
of

applications under rule 5 (2) (b) of the Court of Appeal Rules 2022. Absent that this Court lacks the requisite jurisdiction to entertain the matter.

12. At the risk of repetition, it is important to note that the applicants lodged a notice of appeal against the ruling that was delivered on 23rd October 2025. Having done so, the applicant filed an application dated 29th October 2025, which was fixed for hearing on 5th November 2025. The applicants withdrew that application and subjected themselves to the jurisdiction of the ELC. The applicants having withdrawn the application, the issue of the committal and sentence was left to the trial judge.

13. At the hearing of the present application, the applicants admitted that on 7th November 2025 they filed an application before the ELC seeking stay of the orders dated 23rd October 2025. That application was argued and dismissed with costs on 5th February 2026.

14. When brought to question by the Court on whether they had filed a notice of appeal against the order dismissing the application dated 7th November 2025, the applicants stated that they were relying on the notice of appeal in the record of appeal. In essence,

the applicant had now abandoned the application dated 7th November 2025 which they had filed in the ELC and reverted to the same position that they were in when they withdrew the application dated 29th October 2025. In the circumstances, it is clear that the present application before us is an attempt to revive that withdrawn application through the back door. The applicants cannot approbate and reprobate at the same time.

15. To demonstrate that the applicants are also relying on the ruling dated 5th February 2026, we note that in ground No. 3 in support of the certificate of urgency, Mr. Paul Amuga, Advocate states as follows:

“The Appellants filed an application before the ELC for stay of further contempt proceedings which was dismissed on 5th February 2026 by a ruling in which the ELC held that the application for stay was premature,.....”

16. Further, ground no.(d) of the grounds in support of the application, the applicants state as follows;

“In the meantime, the appellants application before the ELC seeking stay of further proceedings pending appeal was dismissed by that court on 5th February, 2026.”

17. Finally in his supporting affidavit, Mr. Martin Gathogo Ndumbi sworn on 9th February 2026, states as follows:

“18. THAT in the meantime, the ELC intends to proceed with the taking of the applicants' mitigation and sentence them on 25th February, 2026.

19. THAT the applicants' application before the ELC for stay of mitigation and sentencing was dismissed by that court on 5th February, 2026.”

18. A party approaching this Court for a discretionary remedy must come with clean hands. The applicants filed an application for stay of proceedings before the ELC that was dismissed on 5th February 2026. The applicants ought to have filed a notice of appeal impugning that ruling since it was challenging that decision and not the earlier one that they elected to withdraw their application.

19. In the case of **Ruben & 9 others vs. Nderito & another** [1989] KLR 459, the Court said as follows regarding applications filed under Rule 5 (2) (b):

“At the stage of determining an application under Rule 5 (2) (b) there may or there may be no actual appeal. Where there is no actual appeal already lodged there nevertheless must be an intention of appeal which is manifested by lodging a notice of appeal. If there is no notice of appeal lodged, one cannot get an order under Rule 5 (2) (b) because

..... the jurisdiction of the Court of Appeal is invited to hearing appeals from the High Court

and if there is no appeal or no intention to appeal as manifested by lodgment of the notice of appeal, the Court of Appeal would have no business to meddle in the business of the High Court.”

20. Similarly, in **Equity Bank Limited vs. West Link Mbo Limited** [2013] KECA 320 (KLR), *Kiage, JA.* held as follows:

“The jurisdiction exercised under Rule 5(a) (b) is anchored and founded on Rule 74. Without a Notice of Appeal having been filed, this Court cannot issue any of the orders under Rule (5) (2)

(b). The jurisdiction has no existence apart and independent of an appeal and the orders issued thereunder are incidental to and inextricably linked to an appeal or intended appeal. In exercising that jurisdiction, this Court does not rove or maraud outside the four corners of the appellate jurisdiction recognized, declared and donated by the Constitution.”

21. Having failed to file a notice of appeal against the orders dismissing the later application, it is clear that the applicants are litigating in installments and abusing the Court process. In the circumstances, we are unable to proceed to determine the application on the two principles enunciated as the jurisdiction of this Court has not been invoked. We cannot operate in a vacuum and cannot accordingly determine the application on its merits as it is clearly an abuse of the Court process. It is in light of these reasons that we dismissed the Notice of Motion dated 9th February 2026.

22. In view of the reasons given above, it is not necessary to consider whether the applicants satisfied the twin principles for grant of the orders for stay of proceedings. We therefore dismiss the application dated 9th February 2026 with no order as to costs.

Dated and delivered at Nakuru this 6th day of March, 2026.

J. MATIVO

.....
JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

.....
**JUDGE OF
APPEAL (DR.) J.O.
OKELLO**

.....
JUDGE OF APEAL

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

Signed

DEPUTY REGISTRAR