Braeburn Limited v Mboya & 4 others (Civil Application E654 of 2025) [2026] KECA 393 (KLR) (27 February 2026) (Ruling)

Neutral citation: [2026] KECA 393 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E654 OF 2025

DK MUSINGA, M NGUGI & GV ODUNGA, JJA

FEBRUARY 27, 2026

BETWEEN

BRAEBURN LIMITED ..... APPLICANT

AND

HABAKUK MBOYA ..... 1ST RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT ..... 2ND RESPONDENT

IVANA UNLUOVA ..... 3RD RESPONDENT

AMBOSELI LANE RESIDENTS ASSOCIATION (SUED THROUGH ITS OFFICIALS HABAKUK MOYA, ANGIE CHEKOKO & IVANA UNLUOVA) ..... 4TH RESPONDENT

ANGIE CHEKOKO ..... 5TH RESPONDENT

(Being an application for injunction pending the hearing and determination of the intended appeal against the Ruling of the Environment and Land Court at Nairobi (Kemei, J.) delivered on 9th October 2025)

RULING

1. Before this Court is a Notice of Motion dated 12th November 2025 which is brought under the provisions of section 3A and 3B of the *Appellate Jurisdiction Act* as well as rule 5(2)(b), 43, 47 and 55 of the Rules of this Court. The main order sought by the applicant is a temporary injunction to restrain the respondents, their servants, agents and/or other persons duly authorised by the respondents from denying the applicant, its servants, agents, and/or other persons duly authorised by the applicant access to all that property known as Land Reference Number 330/204, situate within Lavington Nairobi Block 14 (Hatheru) along Amboseli Lane through Amboseli Lane pending hearing and determination of an appeal that they have filed against the respondents.

2. The background to this application is that vide a notice of motion dated 18th December 2024 and filed in ELC Case No. E532 of 2024, Braeburn Limited (hereinafter referred to as "Braeburn") sought a temporary injunction to restrain the respondents, officials of the Amboseli Lane Residents Association from denying it access to LR No. 330/204 (the suit land) along Amboseli Lane pending determination of the suit. Braeburn asserted that it was the registered owner of the suit land which it acquired in 2003 and that it has historically used Amboseli Lane to access its school operations. It contended that the respondents unlawfully blocked access after disagreements over road repairs, contending that the lane was a public access road and that denial of access was discriminatory and caused disruption to school operations, safety concerns, and congestion on Gitanga Road.

3. The respondents opposed the application on the basis that Amboseli Lane is a residential cul-de-sac designed for low traffic and intended primarily for residents' ingress and egress. They maintained that the school is located on a separate parcel of land with four designated access gates along Gitanga Road and that Braeburn unlawfully created an access point to the school through Amboseli Lane by demolishing a boundary fence without the requisite approvals or change of user. The respondents further contended that the increased school traffic along the lane had caused congestion, environmental degradation and restricted residents' access and that following several meetings, a compromise had already been reached permitting only staff and service vehicles but not student drop-offs and pick-ups to use Amboseli Lane.

4. In its ruling, the trial court identified the sole issue as whether Braeburn had met the threshold for the grant of a temporary injunction as set out in Giella v Cassman Brown & Co Ltd [1973] EA 358. While it was not disputed that Braeburn is the registered owner of the suit land and that Amboseli Lane terminates at that property, the court observed that Braeburn also owns adjacent land on which it operates a commercial school and had not controverted the claim that it created access to Amboseli Lane without the requisite approvals. The court consequently found that Braeburn had failed to establish a prima facie case with a probability of success particularly in light of the availability of alternative access routes along Gitanga Road and the residential designation of Amboseli Lane as a low-traffic access road.

5. On the question of irreparable harm, the court held that the inconvenience occasioned by longer drop-off and pick-up times did not amount to harm incapable of compensation by an award of damages. In addressing the balance of convenience, the court underscored that although both parties are entitled to access Amboseli Lane, the respondents depend on it as their sole access route whereas Braeburn has alternative access options. The court accordingly declined to grant the injunction sought but ordered that the status quo be maintained by limiting Braeburn's use of Amboseli Lane to staff and service vehicles only, subject to Braeburn submitting a clear traffic management plan in collaboration with the respondents. Student drop-offs and pick- ups were therefore restricted to the four designated gates along Gitanga Road.

6. Braeburn being aggrieved and dissatisfied with part of the ruling of the trial court intends to lodge an appeal to this Court as evinced by the Notice of Appeal dated 22nd October 2025.

7. This application is supported by the grounds appearing on the face thereof and in the affidavit in support sworn by Mafrick Munene, Braeburn's Chief Legal Officer. Braeburn asserts that its intended appeal raises serious legal issues deserving the intervention and consideration by this Court.

8. In the draft memorandum of appeal annexed to the affidavit in support of the application, Braeburn contends that the learned judge erred in law and in fact by holding that it had not controverted the respondents' claim that it demolished its school fence to create access to Amboseli Lane without the requisite approvals; by placing undue and erroneous reliance on the evidence of the Interested Party

(Nairobi City County Government); by failing to consider or properly appreciate that Amboseli Lane is a public road; by failing to consider that Amboseli Lane falls under Class UL as an urban local road; by misapplying the principles on irreparable harm and balance of convenience while simultaneously directing restriction of Braeburn's access to staff and service vehicles, yet finding that the balance of convenience favoured both parties' use of the lane; by restricting student drop- offs and pick-ups to four gates along Gitanga Road pending determination of the suit; and by ordering that the restricted access constituted the status quo, notwithstanding that the position prior to the dispute was Braeburn's unrestricted access to Amboseli Lane.

9. On the nugatory aspect, it is contended that unless the application is heard and the interim relief granted, the intended appeal will be rendered nugatory and reduced to an academic exercise. Braeburn asserts that continued restriction of access through Amboseli Lane has already resulted in significant traffic congestion along Gitanga Road causing delays and disruption to the school's operations, the children's education programme, and the movement of parents and other road users. It maintains that these consequences are ongoing and irreversible in nature and that prolonged congestion and delays impose tremendous strain on children travelling to and from the suit property. It is therefore asserted that without urgent intervention, the practical effects of the impugned orders will persist throughout the pendency of the appeal occasioning harm that cannot be adequately remedied even if the appeal ultimately succeeds.

10. The application is opposed by the respondents vide a replying affidavit sworn by Habakuk Mboya, the 1st respondent and Chairperson of the 4th respondent. The respondents contend from the onset that the application does not satisfy the principles for the grant of an injunction pending appeal under rule 5(2)(b) of the Rules of this Court and that the intended appeal does not raise any arguable points deserving this Court's intervention.

11. The respondents aver that Braeburn has mischaracterized the factual position by alleging long-standing access through Amboseli Lane. They depone that the suit property is residential in nature and was approved strictly for residential use under section 30 of the Physical Planning Act, and that it is separate from the parcel on which the school stands. According to the respondents, Braeburn has never amalgamated the two parcels nor sought or obtained any change of user for LR No. 330/204, and therefore has no legal right of access to the school through Amboseli Lane. They further deny that Braeburn accessed the school through Amboseli Lane since 2003, asserting instead, that any such access only began around 2015 when the school expanded into the adjacent commercial parcel, and that the school has at all material times had four approved access gates along Gitanga Road.

12. The respondents also depose that Amboseli Lane is a nine-metre- wide residential cul-de-sac designed to handle low traffic volumes and intended strictly for residential use and not for heavy commercial or school traffic. They contend that following complaints by residents, a multi-stakeholder meeting was held on 14th October 2024 at which it was resolved that Amboseli Lane should remain a residential access road and that students must use Gitanga Road, while only staff and service vehicles would be permitted to use Amboseli Lane. They state that, despite this resolution and subsequent correspondence, Braeburn continued to pursue unrestricted access through the lane, demonstrating what the respondents characterize as lack of good faith in resolving the dispute.

13. The respondents further maintain that they have never denied Braeburn access to the suit property as such, but have only resisted the conversion of a low-traffic residential cul-de-sac into a major access route for hundreds of vehicles daily. They aver that Braeburn's attempt to channel approximately 400 vehicles through Amboseli Lane has caused severe congestion, pollution, and interference with residents' constitutional right to quiet enjoyment of their property.

14. On the nugatory aspect, it is averred that Braeburn has failed to demonstrate that the intended appeal would be rendered nugatory if the orders sought are not granted. The respondents maintain that the school continues to operate normally and efficiently using the four designated access gates along Gitanga Road which have safely served the school for decades and that any inconvenience alleged is exaggerated, temporary, and manageable. Conversely, the respondents contend that granting the injunction would itself occasion irreparable harm by reinstating heavy school traffic along Amboseli Lane, a residential cul-de-sac, thereby violating residents' right to quiet enjoyment through congestion, pollution, and safety risks that could not be reversed even if the appeal were to fail. On this basis, they argue that the application is unmerited and should be dismissed with costs.

15. At the hearing of this application, learned counsel Ms. Mwaniki appeared for Braeburn, while the respondents were represented by learned counsel, Mr. Mbatia, who held brief for Mr. Mansur. Both counsel made brief oral highlights of their respective clients' written submissions, which was reiteration of the positions articulated hereinabove. It therefore serves no useful purpose for us to rehash the oral arguments.

16. We have considered the application, the submissions, as well as the applicable law. It is trite law that in an application of this nature, an applicant must satisfy this Court that the appeal or the intended appeal is arguable, and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. See Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR.

17. On arguability, we have considered the draft memorandum of appeal and without making any definitive pronouncement on the merits of the intended appeal, we are satisfied that Braeburn has disclosed at least one bona fide arguable issue warranting the consideration of this Court. In particular, the questions as to whether Amboseli Lane constitutes a public road, its proper statutory classification, and whether the learned judge correctly appreciated and applied the principles governing status quo, balance of convenience and access rights raise matters that cannot be dismissed as frivolous. It is well settled that an arguable appeal is not one that must ultimately succeed, but one that merits judicial interrogation on appeal. On this basis, Braeburn has satisfied the first limb of the test under rule 5(2)(b).

18. Turning to the nugatory aspect, this Court stated in Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others (supra) that whether or not an appeal will be rendered nugatory depends on whether or not 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. In this respect, the burden lay squarely on Braeburn to demonstrate that unless the orders sought are granted, the intended appeal, even if successful, would be rendered nugatory. Having considered the material placed before us, we are not so persuaded. It is common ground that the school continues to operate through four designated access gates along Gitanga Road which have long served as its primary points of ingress and egress. Although Braeburn complains of inconvenience, congestion, and disruption to school operations, these concerns, while not trivial, have not been shown to be irreversible or incapable of adequate redress should the appeal ultimately succeed.

19. We further note that the orders made by the trial court do not shut down Braeburn's operations or completely block access to the suit property. Instead, they merely regulate how access is to be made pending the determination of the substantive dispute before the trial court. Braeburn remains in occupation of the suit land and continues to operate its school. In these circumstances, the inconvenience alleged does not meet the threshold of the nugatory principle which requires proof that the success of the appeal would be rendered meaningless or of no practical value.

20. On the other hand, we are persuaded that granting the orders sought would disrupt the current situation in a way that could cause lasting harm to the respondents who rely on Amboseli Lane as their only access road to their homes. We are of the view that allowing unrestricted school traffic back onto a residential cul-de- sac, even temporarily, would upset the balance established by the trial court and could lead to consequences that would be difficult to undo. In the end, we are not persuaded that Braeburn has satisfied the second limb under rule 5(2)(b) of the Rules of this Court.

21. As Braeburn has satisfied only one of the requisite limbs for the grant of a stay under rule 5(2)(b), this application fails and is accordingly dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2026.

D. K. MUSINGA (PRESIDENT)

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JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

Deputy Registrar.