

**IN THE COURT OF APPEAL
AT KISUMU**

(CORAM: OMONDI, KIMARU & ACHODE,
JJ.A) CIVIL APPLICATION NUMBER E209 OF
2024

BETWEEN

ABIDHA NICHOLUS.....APPLICANT

AND

THE ATTORNEY GENERAL1ST

RESPONDENT JOSEPH ANDEERE NYAANGA.....

2ND RESPONDENT OWANG' ISAACK

OGWEYO.....3RD RESPONDENT CABINET

SECRETARY MINISTRY

OF PETROLEUM AND MINING..... 4TH

RESPONDENT CABINET SECRETARY ENVIRONMENT

AND FORESTRY..... 5TH

RESPONDENT NATIONAL ENVIRONMENTAL

MANAGEMENT AUTHORITY..... 6TH

RESPONDENT COUNTY COMMISSIONER, SIAYA COUNTY.....

7TH RESPONDENT THE NATIONAL ENVIRONMENTAL

COMPLAINTS COMMITTEE (NECC) 8TH

RESPONDENT AND

KENYA POWER & LIGHTING COMPANY LIMITED 1ST INT

PARTY COMMISSION ON ADMINISTRATIVE JUSTICE..... 2ND

INT PARTY KATIBA INSTITUTE 3RD INT PARTY

3RD INT PARTY

KITUO CHA SHERIA..... 4TH INT

PARTY ACACIA EXPLORATION KENYA LIMITED..... 5TH

INT PARTY MEMBER OF COUNTY ASSEMBLY

EAST ASEMBO WARD.....6TH INT.

PARTY

(Being an application for injunction arising from the ruling/Order

(Koross J) dated 13th June 2024)

in

**ELC No. ELCPET 2 OF
2021)**

RULING OF THE COURT

1. The applicant's notice of motion dated 11th October 2024 was brought under **sections 3A** and **3B** of the **Appellate Jurisdiction Act** and **rule 5(2)(b)** of this **Court's Rules 2022** seeking for an order of injunction restraining and/or barring the 2nd and 3rd respondents from carrying out illegal mining activities within San Matin/Ramba Area in Rarieda Sub County, specifically on L. R Nos. Siaya/Ramba/705, 711 and 714 pending the hearing and determination of Court of Appeal Civil Appeal No. E209 of 2024 and that costs of the application be provided for.
2. The application alleges that the 2nd and 3rd respondents are conducting illegal mining on specific parcels of land being, Siaya/Ramba/705, 711, and 714 respectively and that the 4th to 8th respondents have permitted or failed to prevent these activities.
3. A brief background of the application is that the applicant filed an application dated 1st September 2020 in the Environment and Land Court at Siaya, seeking conservatory orders pending the hearing of the main petition. This application was dismissed in a ruling dated 13th June 2024 by Koross J. This precipitated the applicant to file the Notice of Appeal dated 25th June 2025, and the instant application.
4. The application is predicated on the grounds on its face, and is supported by an affidavit of even date sworn by the applicant.

5. The grounds are that the mining operations by the 2nd and 3rd respondents on the suit property involve dangerous chemicals, contravene the Environmental Management and Co-ordination Act (EMCA), and have caused pollution and environmental degradation, thereby violating the constitutional right to a clean and healthy environment.
6. The applicant avers that the 2nd and 3rd respondents have been conducting illegal mining activities in the San Martin/Ramba area. Specifically, on land parcel numbers Siaya/Ramba/705, 711, and 714, relying on documents purportedly issued by various government agencies. These activities, he avers, have caused pollution and environmental degradation, a fact that was acknowledged by the Court.
7. He further deposes that on 13th June 2024, the court nonetheless ruled that the continuation of the illegal mining activities was in the public interest, despite also finding that those activities had adverse effects on the environment and the general public. That following that decision, investigations by the Regional Mines Officer established that the 3rd respondent was indeed engaging in illegal mining. This led to the issuance of a stop order on 19th September 2024, which the 3rd respondent has defied and continues the impugned activities jointly with the 2nd respondent.
8. The applicant deposes that the appeal will be rendered nugatory since the environmental harm complained of is

ongoing and potentially irreversible, and the stop order issued by the Regional Mines Officer against the 3rd respondent has been defied. In these circumstances, the applicant avers that only immediate injunctive relief can preserve the substratum of the appeal and protect both individual and public environmental rights pending this Court's final determination.

9. The applicant also deposes that the appeal is arguable and has high chances of success because the court below erred in treating illegal mining as a matter of public interest. That it failed to properly apply principles governing conservatory orders in environmental cases, and elevated criminal conduct above constitutional protections under **Articles 42, 69, and 70**. That the failure by several state agencies to effectively restrain the illegal activities, justifies the grant of the injunctive relief sought to give effect to the court's constitutional mandate to protect environmental rights.
10. In response, the 2nd and 3rd respondent, filed a replying affidavit sworn by the 3rd respondent on 28th October 2024. In it, the respondents oppose this application in its entirety and depose that it is incompetent, premature, and devoid of merit. That the applicant's intended appeal is itself defective, the Notice of Appeal having been lodged out of time and no application has been made to regularize that omission, thus there is no competent appeal upon which this Court can exercise jurisdiction.

11. The respondents deny engaging in illegal mining and assert that the Environment and Land Court did not make any definitive finding that their activities were unlawful. They maintain that their mining operations are licensed, lawful, and have been ongoing for several years, employing more than one hundred people whose livelihoods depend on the continued operation of the mine. They further deny the allegations that their activities have polluted the environment, or caused adverse effects to the surrounding properties or the general public, describing those claims as unsubstantiated and unsupported by evidence.
12. It is further deposed that the application is premature and *sub judice*, as the legality of the mining activities is a live issue pending determination before the superior court. The respondents depose that the applicant has not demonstrated any violation of the constitutional right to a clean and healthy environment, particularly given that the mining activities have been conducted for many years without proven environmental harm. Allegations that the 3rd respondent controls a militia are described as malicious, false, and unsupported.
13. Regarding the stop order relied upon by the applicant, the respondents aver that the order issued by the Regional Mining Officer on 19th September 2024 has since been stayed by a court order in separate judicial review proceedings, which they contend are unrelated to the current dispute. They assert that the applicant's reliance on

that stop order is therefore

misplaced and that any attempt by this Court to act on the same issues would amount to improper interference with matters pending before another court.

14. The respondents also aver that the applicant is guilty of material non-disclosure and has come to Court with unclean hands, as the applicant himself is engaged in illegal mining on an adjacent parcel of land without any licence. On this basis, they aver that the applicant does not merit the equitable relief of an injunction, as he has failed to meet the threshold for grant of interim relief under **rule 5(2)(b)**, having neither demonstrated an arguable appeal, nor shown that the intended appeal would be rendered nugatory if the orders sought are denied.
15. Finally, the respondents explain that their activities fall within the framework of artisanal and small-scale mining, and that delays or gaps in licensing are attributable to failures by government institutions to operationalize the statutory mechanisms for artisanal mining, rather than to any illegality on their part. They assert that public policy and the interests of justice favour allowing them to continue the operations pending determination of the substantive dispute. They pray that the application be dismissed with costs for lack of merit.
16. The applicant swore a supplementary affidavit on 7th February, 2025 in response to the replying affidavit. He refutes the claim that the notice of appeal was filed out of time, stating that it

was lodged on 27th June 2024, well within the prescribed period. He further states that no application has been made by the respondents to strike out either the notice or the appeal, and that both the notice and record of appeal were duly served on the respondents several months earlier.

17. The applicant maintains that the Environment and Land Court expressly found that the 2nd and 3rd respondents lacked mining licences and acknowledged the serious environmental and public health consequences of their activities, contrary to the respondents' assertions of legality. He relies on a report by the National Environmental Complaints Committee confirming that there was illegal mining and pollution by the 2nd and 3rd respondents, including air, water, and soil contamination, and avers that these violations persist. He denies allegations that he too is engaged in illegal mining, terming them malicious and stating that the disputed land is in fact, occupied by the 3rd respondent's agents.
18. He also maintains that allegations regarding militia activity linked to the 3rd respondent are supported by government investigations and his own police report, underscoring the gravity of the dispute. The applicant contends that the stop order issued on 19th September 2024 further evinces illegality and that the doctrine of *sub judice* is inapplicable to him.
19. In conclusion he deposes that the respondents have effectively admitted operating without licences and seek to

justify

continued mining based on governmental inaction. He accuses several State agencies of acquiescing in, or facilitating the illegal activities and concludes that the respondents' reply reinforces the need for injunctive relief to protect the constitutional right to a clean and healthy environment pending the determination of the appeal.

20. The 2nd and 3rd respondents filed their written submissions dated 7th February 2025, through the firm of M/S Bruce Odeny & Company Advocate.
21. The applicant filed written submissions dated 10th February 2025 in person. He urges that the application satisfies the requirements of **rule 5(2)(b)** as the intended appeal is arguable and will be rendered nugatory if interim relief is denied. He submits that the court expressly found that the 2nd and 3rd respondents were conducting unlicensed and illegal mining with adverse environmental consequences, but declined to grant conservatory orders based on alleged public interest founded on employment considerations.
22. The applicant argues that this raises arguable points of law, including: whether public interest can be grounded on illegality; whether Article 70 may be disregarded in environmental matters; and, whether courts may ignore official government reports confirming environmental violations.

23. The applicant submits that the appeal will be rendered nugatory if the impugned activities go on and cause continuing environmental harm, which is inherently irreparable. He relies on **Article 70** and **section 3(3)** of EMC Act to urge that courts have a constitutional duty to prevent or discontinue acts harmful to the environment. That statutory prohibitions against unlicensed mining cannot be overridden by regulatory inaction or claims of long-standing practice. He prays that the injunctive relief sought be granted pending the appeal.
24. In rebuttal, the 2nd and 3rd respondents urge that the application does not meet the requirements of **rule 5(2)(b)** as the applicant has failed to demonstrate both an arguable appeal and the nugatory limb. They urge that there is no competent appeal before the Court since the Notice of Appeal was filed out of time and has not been regularized, thereby depriving the Court of jurisdiction.
25. They further argue that the Court made no definitive finding that the mining activities were illegal and the issue of legality remains pending before the lower court. On that basis, they submit that the intended appeal is frivolous. That no irreparable harm has been shown and any alleged injury is reversible and compensable. That the Court cannot grant interim relief in advance of the substantive appeal. That the balance of convenience favors them, for reasons that their mining operations have been ongoing for years and support

numerous livelihoods. Further, that the applicant has approached the Court with unclean hands. They pray that the application be dismissed with costs.

26. The application came up for hearing in plenary on 12th February 2025 via the electronic platform. The applicant appeared in person. Ms. Akinyi learned counsel, appeared for the 2nd and 3rd respondents, while Mr. Muchiri learned counsel held brief for Mr. Deya learned counsel for the 5th respondent. The applicant and Ms. Akinyi briefly highlighted their submissions while Mr. Muchiri indicated that his client was not opposed to the application and would leave it to the Court's discretion.
27. The Applicant has invited this Court to deploy its special and discretionary jurisdiction under **rule 5(2)(b)** to restrain the 2nd and 3rd respondents from continuing with mining activities, pending the hearing of the intended appeal. That jurisdiction is neither boundless nor indulgent. It is governed by settled principles that admit no relaxation, however emotive or earnestly presented a case may be.
28. We begin by examining the threshold issue raised by the respondents concerning the jurisdiction of this Court to exercise its mandate under **rule 5(2)(b)**. That is, the competence of the intended appeal. The Notice of Appeal is said to have been lodged outside the prescribed timelines and has not been regularized by any application. On the other

hand, the applicant maintains that he filed his appeal within the prescribed timeline. There is a procedure under this Court's Rules to impugn a notice of appeal or indeed the appeal. That procedure has not been invoked yet by any of the parties. It will therefore be premature for us to make a determination on the issue. We shall therefore refrain ourselves from determining the issue so that we do not prejudice a party who may want to move the court as appropriate. All that is required to invoke this Court's jurisdiction is a notice of appeal duly filed.

29. That said, we turn to determine whether the applicant has satisfied the two limbs requisite for the grant of orders under **rule 5(2)(b)**: first, that the intended appeal is arguable; and second, that unless the orders sought are granted, the appeal—if successful—will be rendered nugatory. This is not a menu from which a litigant may choose one limb and ignore the other. The two limbs are conjunctive, not alternative. That position has been restated by this Court *ad infinitum* and warrants no further debate.
30. Notably, in **Trust Bank Limited and Anor v. Investech Bank Limited and 3 Others [2000] eKLR**, the Court held that:

“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...”

31. On the first limb, the threshold for arguability is deliberately low. An arguable appeal is not one that must succeed. It is enough that it raises a bona fide issue deserving of consideration by the Court. A single arguable point will suffice. In **Kenya Commercial Bank Limited v Nicholas Ombija [2009] eKLR** this Court held that:

“An ‘arguable’ appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court”.

32. The Applicant intends to challenge the exercise of discretion by the Environment and Land Court in declining to grant conservatory relief, notwithstanding finding that the mining activities in question were unlicensed and environmentally deleterious. The appeal raises questions as to whether public interest may properly be invoked to justify conduct found to be unlawful; whether the court below correctly applied **Article 70**; and, whether it was open to the court to discount official reports by public agencies confirming environmental harm.
33. Those questions are neither idle nor fanciful. They touch on the proper balancing of constitutional rights, statutory

compliance, and judicial discretion. Without expressing any concluded view, lest we embarrass the bench that may be seized of the appeal, we are satisfied that the issues raised in the intended appeal are worth interrogation on appeal.

34. Turning to the nugatory aspect, the test as articulated by this Court in **Reliance Bank Ltd v Norlake Investments Ltd (2002) 1 EA**, turns on whether what is sought to be restrained is reversible, or if not, whether damages or other remedies would reasonably compensate the successful party. The burden lies squarely on the applicant to demonstrate, by evidence and not by assertion, that the appeal would be rendered worthless if interim relief is denied.
35. In **Shah Munge & Partners Ltd v National Social Security Fund Board of Trustees & 3 others [2018] KECA 865 (KLR)** this court stated as follows:

"[21] On the nugatory aspect, as this Court stated in Reliance Bank Ltd vs Norlake Investments Ltd (supra), the factors which could render an appeal nugatory have to be considered within the circumstances of each particular case and in doing so, the Court is bound to consider the conflicting claims of both sides. In the circumstances of that particular case, the Court stated:

"To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might

undergo

while waiting for the applicant's appeal to be heard and determined".

36. In the present case, the applicant contends that the alleged environmental harm is ongoing and irreversible. While environmental protection is undoubtedly a matter of constitutional importance, it does not follow that every alleged environmental injury automatically satisfies the nugatory test. A **rule 5(2)(b)** relief is not granted on the strength of generalized apprehension or principled concern alone. It must be grounded in demonstrable prejudice that cannot be adequately addressed through the ordinary processes of the law.
37. We have considered the rival arguments and find that the applicant has not shown that any harm suffered cannot be remedied by appropriate relief should the appeal succeed. The subject land belongs to the respondents. It is not public land. Further, the suit has not been concluded and it has not been demonstrated that the Court would be rendered helpless at the conclusion of the appeal, in fashioning an effective remedy. On the other hand, the orders sought would have the immediate effect of halting ongoing mining operations, with significant economic and social consequences, including the disruption of livelihoods.
38. In the end, while we are satisfied that the intended appeal raises arguable issues worthy of this Court's consideration on appeal, the applicant has failed to demonstrate that the appeal

would be rendered nugatory absent stay. Accordingly, the Notice of Motion dated 11th October 2024 is dismissed in its entirety. Costs shall abide the outcome of the appeal.

Dated and delivered at Kisumu this 13th day of March 2026.

H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

.....

... JUDGE OF

APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

