

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA (P), MURGOR & NGENYE, JJ.A.)

CIVIL APPEALS DIVISION

CIVIL APPLICATION NO. E439 OF 2025

BETWEEN

**MWIKI COMPANY LIMITED.....1ST APPLICANT/1ST
APPELLANT**

ROBERT WAIRIRI.....2ND APPLICANT/2ND APPELLANT

AND

AGNES MUTHONI WANJOHI 1ST

RESPONDENT FRANCIS WANJOHI MUNYERI. 2ND

RESPONDENT

PHILLIP AWANGI KABIRI 3RD

RESPONDENT

***(Being an Application for Stay of Execution pending
the filing, hearing and determination of an
Intended Appeal against the Sentence against
Contempt issued by the Environment
& Land Court at Thika (J. A. Mogeni, J.)
delivered on 28th May, 2025***

in

ELC No. 368 of 2017)

RULING OF THE COURT

This dispute originates from proceedings before the Environment and Land Court of Kenya at Thika in ELC No. 368 of 2017, where the Respondents sued the **1st Applicant, Mwiki Company Limited** and **the 2nd Applicant Robert Wairiri** over L.R. No. 1091/29 (*the suit property*). On 7th November 2018, the parties recorded a Consent Judgment in the suit requiring the Applicants to cause the transfer and registration of the relevant portions of the suit property into the names of the Respondents within six (6) months.

The Applicants did not effect the transfers within the stipulated period, prompting the Respondents to seek to have the Applicants cited for contempt of court for failure to comply with the consent decree. By a ruling delivered on 19th December 2022, the 2nd Applicant, Robert Wairiri, was found to be in contempt of the court orders issued on 7th November 2018.

Thereafter, a Notice to Show Cause was issued requiring the 2nd Applicant to show cause why he should not be committed to civil jail. Upon hearing his mitigation, the trial court (Mogeni, J.) on

28th May 2025 sentenced the 2nd Applicant to pay a fine of Kshs. 1,000,000 within three months, in default to serve six (6) months' civil jail.

Aggrieved by the sentence, the Applicants lodged a Notice of Appeal in this Court, and by a Notice of Motion dated 18th July 2025 brought pursuant to **Sections 3, 3A & 3B** of the **Appellate Jurisdiction Act, rules 5 (2) (b), 31, 47** of the **Court of Appeal Rules**, the Applicants seek, *inter alia*, that: pending the hearing and determination of the Application and the Appeal, this Court do issue an order of stay of execution against the orders of the Environment and Land Court of 28th May 2025. Also sought was leave to adduce the following additional evidence in the Appeal, namely;

- a) *“Copies of the correspondence between M/s Kamere & Company Advocates and Sharpley Barret & Company Advocates.*
- b) *Copies of the correspondence between M/s Kamere & Company Advocates and M/s J. M. Waiganjo & Company Advocates.*
- c) *Copies of correspondence between M/s Lokitano & Company Advocates and M/s J. M. Waiganjo & Company Advocates.*
- d) *Copies of the proceedings in Thika ELCOS No. E006 of 2023 Robert Wairiri -vs-Mama Ngina Kenyatta & Kristina Wambui Pratt”*

The Applicant’s Motion is brought on several grounds that: this Court has wide and unfettered discretion to grant the stay orders sought; that the grounds of appeal in the draft

Memorandum of Appeal raise *bona fide* issues worthy of consideration; that the 2nd Applicant's liberty is threatened and there exists a real, apparent and imminent risk of arrest and committal to civil jail for six months, notwithstanding his willingness to comply with the Consent order issued on 7th November 2018; that if the 2nd Applicant is committed to civil jail

he shall suffer irreparable harm incapable of compensation by damages, thereby rendering the intended appeal nugatory. It was further contended that during mitigation, the 2nd Applicant elaborated on supervening circumstances beyond his control that made compliance with the Consent Judgment of 7th November 2018 impossible. The Applicants contend that they have instituted and are prosecuting *Thika ELCOS No. E006 of 2023* to seek vacant possession and transfer of the suit property directly from the initial vendors to the Respondents; that, only upon determination of *Thika ELCOS No. E006 of 2023* and issuance of vesting orders will the 2nd Applicant be able to fully comply with the transfer orders in favour of the Respondents; that the 2nd Applicant is a man of menial means and his ability to pay the fine imposed is doubtful; that he is elderly and of ill health, and exposure to prison conditions will exacerbate his health condition.

The 2nd Applicant also contended that there exist exceptional circumstances necessitating the adducing of additional evidence; that the failure to file the additional documentary evidence as part of the record was purely a mistake of Counsel, and that had the trial Judge considered the new and additional evidence, the

Court would probably have reached a different conclusion as the additional evidence exonerates the Applicants from any

intentional disobedience of the orders issued on 7th November 2018. It was contended that the 1st Applicant purchased the suit property from Mama Ngina Kenyatta and Kristina Wambui Pratt (as Trustees of Wawinyi Mweke Ranch) in 1989, and despite payment of the agreed consideration and taking possession, transfer of title was never effected in favour of the 1st Applicant; that due to failure by the initial vendors to execute transfer documents, the 1st Applicant was unable to transfer portions of the subdivided property to the Respondents.

The Application is supported by an affidavit and a Further Affidavit sworn on 10th August 2025 the 2nd Applicant, a director of the 1st Applicant, in which he reiterates the grounds set out on the face of the Motion.

Annexed to the application is a Notice of Appeal dated 10th June 2025 and a memorandum of appeal raising the grounds that; the learned Judge wrongly ordered the 2nd Applicant to either pay a fine of Kshs. 1,000,000 or in the alternative face civil jail for a term of 6 months without substantively and objectively analyzing the steps and measures put in place by the Applicants and the

practicality of complying with the orders of the court to purge the contempt; and further, in imposing a very punitive sentence notwithstanding that the Applicants demonstrated the difficulty experienced in complying with the orders.

In a Replying Affidavit sworn by Phillip Mwangi Kabiru, the 3rd Respondent, on his own behalf and with the authority of the 1st and 2nd Respondents, the motion was opposed. It was deposed that the Application is misconceived, vexatious, and fatally defective as the Applicants have deliberately and willfully refused to honour the Consent Judgment and Decree dated 7th November 2018, which required them to transfer and register the suit property into the Respondents' names within six months; that the Consent Judgment did not contain any conditional terms such as those now being advanced by the Applicants; that it was the Applicants' failure to comply with the decree that prompted the Respondents to file the contempt proceedings, and that by a ruling delivered on 19th December 2022, the 2nd Applicant was found to be in contempt of court. No appeal has been lodged against that ruling; that they have not offered security for compliance with the sentence, which he states is a prerequisite for the grant of stay orders.

In their written submissions, counsel for the Applicants submitted that the Application dated 18th July 2025 satisfies the threshold for grant of stay of execution under **Rule 5(2)(b)** of the

Court of Appeal Rules, 2022, and for leave to adduce additional evidence at the appellate stage.

On arguability, counsel submitted that the nine grounds in the draft Memorandum of Appeal raise serious issues concerning the exercise of discretion in sentencing. On the nugatory aspect, counsel submitted that the 2nd Applicant faces imminent imprisonment and that loss of liberty is irreparable and incapable of compensation by damages. Reliance was further placed on **National Land Commission vs Theresia Runi & 4 others [2020] eKLR** for the proposition that the nugatory test depends on whether what is sought to be stayed would be reversible or compensable in damages.

On leave to adduce additional evidence, counsel invoked **Rule 31** of the **Court of Appeal Rules, 2022** and relied on the case of **Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamed & 3 others [2018] eKLR**, and submitted that the additional correspondence demonstrates the Applicants' efforts to comply with the court orders and absolves the 2nd Applicant from willful disobedience.

In their written submissions, counsel for the Respondents opposed the Application and urged the Court to dismiss it with

costs. Counsel reiterated that the Applicants were found in contempt of a Consent Judgment dated 7th November 2018, and that no appeal or stay has ever been lodged against that Judgment. It was argued that the subsequent filing of *Thika ELCOS No. E006 of 2023* was immaterial as the Respondents are not parties to that suit.

On the issue of interference with discretion, counsel cited ***Ndige vs Arasa (Civil Appeal E043 of 2022) [2024] KEHC 5158 (KLR)***, for the proposition that an appellate court will only interfere with the exercise of discretion where it is shown that the decision was based on error of law, irrelevant considerations, failure to consider relevant matters, or is plainly wrong. It was contended that the Applicants have not demonstrated any such error by the court and that the sentence imposed, including the option of fine, was reasonable.

We have considered the motion, the replies and the parties' submissions from which two issues can be discerned. Firstly, whether stay of execution of the orders of contempt of court is warranted, and secondly, whether the Applicant can adduce additional evidence in the intended appeal.

First, the extent of the jurisdiction of this Court under ***Rule 5(2) (b)*** of the ***Court of Appeal Rules*** to grant stay of execution or injunctions pending appeal was explained by this Court in ***Mukesh Kumar Kantilal Patel vs Charles Langat [2021] eKLR*** as follows:

“It is trite that an application for stay by dint of Rule 5(2)(b) of the Court of Appeal Rules gives this Court discretionary powers to order stay of execution in order to preserve the subject matter of an appeal in order to ensure its just and effective determination.”

It is well settled that under **Rule 5(2) (b)** of this Court's rules, an applicant must satisfy two principles: first, that the intended appeal is arguable; and second, that unless the orders sought are granted, the appeal would be rendered nugatory. Both limbs must be satisfied conjunctively.

In the case of **Trust Bank Limited and Another vs Investech Bank Limited**

and 3 Others [2000] eKLR, this Court 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...”

On the first limb, as to whether the appeal is arguable, the Court should consider whether there is a single *bona fide* arguable ground that has been raised by the applicant. Without making definitive findings at this stage, we are of the view that the issue of whether the learned Judge properly exercised her

discretion in sentencing, particularly in light of the mitigation advanced, raises a *bona fide* point deserving interrogation on appeal.

Turning to the second prerequisite, which is the nugatory aspect, the sentence imposed by the learned Judge was not purely custodial. It carried an option of a fine of Kshs. 1,000,000 and in default a six months' civil jail. The Applicants have not placed before this Court any cogent material demonstrating inability to pay the fine, insolvency, or any other circumstance that would render compliance impossible. Mere assertions of financial hardship, without evidential support, will not suffice. Of significance, the trial court having provided an option for the Applicants to pay a fine, it goes without saying that were the Applicant to pay the fine, the term of imprisonment specified can be averted.

Further, the Applicants have not demonstrated that, if the custodial sentence were to be served, the intended appeal would thereby be rendered nugatory. While we appreciate that loss of liberty through imprisonment cannot be reversed if an appeal is successful, in the circumstances of this matter we are not persuaded that we ought to stay the order for payment of fines. The nugatory test turns on whether the subject matter sought to be preserved would be destroyed, rendered irretrievable, or

incapable of compensation or reversal; the Applicant must demonstrate that the appeal, if successful, would be rendered hollow or academic.

In the circumstances, the Applicants have not satisfied the nugatory limb of the principles governing applications under **Rule 5(2)(b)**.

Secondly, the Applicants seek leave under **Rule 31** of the **Court of Appeal Rules, 2022** to adduce additional evidence by way of correspondence between their former advocates and the advocates for the initial vendors, which they contend demonstrates the efforts undertaken to comply with the Consent Judgment of 7th November 2018.

Rule 31 (1) of the **Court of Appeal Rules**, provides that:

“On appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have powers-

(a).....

b. in its discretion and for sufficient reason, to take additional evidence or direct that additional evidence be taken by the trial court;

c. When additional evidence is taken by the trial court, it shall certify such evidence to the Court, with a statement of its opinion on the credibility of the witness or witnesses giving the additional evidence.”

The discretion under **Rule 31** of the Court Rules is to be exercised judicially and sparingly. As stated in the case of

Joginder Auto Service Ltd vs

Mohammed Shaffique & Another [2001] eKLR, the Court exercises that discretion on three broad principles:

“(1) The applicant must show that the evidence sought to be adduced could not have been obtained with reasonable diligence for use at the trial.

(2) The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and

(3) The evidence must be apparently credible, although it need not be incontrovertible.”

In the same vein, the Supreme Court of Kenya in the case of **Mohamed**

Abdi Mahamud v Ahmed Abdullahi Mohamed & 3 Others
[2018] eKLR set out

guidelines an appellate court should consider before granting orders for admission of new evidence in the following terms:

“a. the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;

b. it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;

c. it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;

d. where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;

e. the evidence must be credible in the sense that it is

capable of belief;

f. the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;

g. whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;

h. where the additional evidence discloses a strong prima facie case of willful deception of the Court;

i. the Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful;

j. a party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case;

k. the court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.”

Pursuant to the guidelines, the question for determination is whether the instant application to adduce evidence satisfies the laid-out requirements. Of significance is whether the additional evidence sought to be introduced by the Applicants is directly relevant to the appeal before this Court and if allowed, it would influence or impact the result of the appeal; whether it could not have been obtained with reasonable diligence for use at the trial, and whether it was not within the knowledge of, or could not have been produced at the time of trial by the Applicants.

A consideration of the material sought to be introduced

discloses that it comprises of correspondence and documents relating to efforts allegedly undertaken to comply with the Consent Judgment. The Applicants have not

demonstrated that the documents were unavailable at the time of the contempt proceedings or that they could not, with reasonable diligence, have been produced before the trial court. On the contrary, the material clearly relates to events that predate or were contemporaneous with the proceedings culminating in the sentence.

Further, even if they were to be admitted, it has not been demonstrated how they will influence the outcome of the intended appeal, given that they were not available to the trial Judge who made the order. In the circumstances, and guided by the afore stated principles, “sufficient reason” has not been demonstrated to warrant the admission of additional evidence. The prayer for leave to adduce additional evidence is without merit and therefore fails.

In the result, although the intended appeal raises arguable issues, the Applicants have failed to satisfy the second limb, being the nugatory aspect as required under **Rule 5(2)(b)** of this Court’s Rules, as a consequence of which the application for stay of execution of the orders of contempt of court fails.

That said, the trial court having ordered the Applicants to pay Kshs. 1,000,000 or face six months imprisonment, it is observed that were they to pay such amount, any imprisonment will be averted.

Accordingly, the Notice of Motion dated 18th July 2025 be and is hereby dismissed with costs to the Respondents.

It is so ordered.

Dated and delivered at Nairobi this 25th day of March, 2026.

D. K. MUSINGA, (PRESIDENT)

.....
JUDGE OF APPEAL

A. K. MURGOR

.....
JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR