

**IN THE COURT OF APPEAL  
AT MOMBASA**

**(CORAM: GATEMBU, LAIBUTA & NGENYE,**

**JJ.A.) CIVIL APPEAL NO. E037 OF 2022**

**BETWEEN**

**SAMAKI INDUSTRIES (K) LIMITED.....APPELLANT**

**AND**

**KENYA PORTS AUTHORITY.....RESPONDENT**

*(Being an appeal from the Ruling and Order of the Environment and Land Court of Kenya at Mombasa (L. L. Naikuni, J.) dated 6<sup>th</sup> December 2021*

*in*

***ELC Appeal No. 33 of  
2020)***

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. This appeal arises from a ruling of the Environment and Land Court (ELC) at Mombasa (**L. L. Naikuni, J.**) delivered on 6<sup>th</sup> December 2021. In that ruling, the ELC dismissed an application dated 27<sup>th</sup> September 2021 by which the appellant had sought orders, principally under Order 42 Rule

6 of the Civil Procedure Rules, to stay execution of the judgment of the ELC (**Yano, J.**) dated 13<sup>th</sup> September 2021 and delivered on 27<sup>th</sup> September 2021. In the same application, the appellant sought an order to stay further proceedings and judgment of the Magistrate's Court in CMCC No. 307 of 2003.

2. A brief background will provide context. The parties had a tenant/landlord relationship based on a lease agreement in respect of premises known as Title Number Mombasa/Block XXX1/3 (the premises). In January 2003, the appellant instituted suit against the respondent before the Magistrate's Court at Mombasa, being Civil Suit No. 307 of 2003 in which it applied for orders to restrain the respondent from evicting it from the premises. It also prayed for an order to compel the respondent to release to it a renewed and extended lease for the premises.
3. The respondent defended that suit and counterclaimed against the appellant and prayed for judgment for outstanding rent, vacant possession and mesne profits. In a judgment delivered on 28<sup>th</sup> November 2019, the Magistrate's Court dismissed the appellant's suit and allowed the respondent's counterclaim. The appellant was ordered to vacate the premises within 90 days.
4. Dissatisfied with the judgment of the Magistrate's Court, the appellant appealed to the High Court at Mombasa. That appeal was later transferred to the ELC. It was heard before Yano, J. who, in the judgment delivered on 27<sup>th</sup> September 2021, found no merit in the appeal and dismissed it with costs.
5. Still dissatisfied, and intending to challenge the ELC judgment before this Court, the appellant presented to the ELC the application to which we have already referred dated

27<sup>th</sup> September 2021 seeking to stay the ELC judgment as well as the Magistrate's Court's decision. That is the application that was dismissed by the ELC (L.L. Naikuni, J.), and hence the present appeal.

6. In the intervening period, the appellant did file its appeal, being Mombasa Civil Appeal No. E104 of 2021, against the judgment of the ELC delivered on 27<sup>th</sup> September 2021. That appeal has since been heard by this Court and dismissed in a judgment delivered on 12<sup>th</sup> July 2024. Where then, does that leave the present appeal?
7. During the hearing of this appeal before us on 7<sup>th</sup> October 2025, **Mr. Salim Verjee** appeared in person on behalf of the appellant while learned counsel **Miss. Essajee** appeared for the respondent. Mr. Verjee relied on his written submissions dated 5<sup>th</sup> June 2025 and supplementary submissions dated 1<sup>st</sup> September 2025 as well as oral submissions. Miss. Essajee relied on the respondent's written submissions dated 5<sup>th</sup> August 2025 and made oral highlights.
8. Based on the appellant's amended and further amended memorandum of appeal and the submissions, it was urged that the learned Judge erred in holding that the application for stay did not meet the threshold of Order 42 Rule 6 of the Civil Procedure Rules; failing to consider that the requirement for furnishing of security under Order 42 Rule 6 is discretionary; failing to evaluate the material presented by the appellant; failing to appreciate that the appellant

still had

a lease over the premises and remained a tenant in the premises; and in relying on the respondent's replying affidavit.

9. On the other hand, counsel for the respondent submitted that, in the ruling the subject of this appeal, the ELC merely declined to grant orders of stay of execution pending hearing and determination of the 'intended' appeal; that the intended appeal was in fact filed, heard and determined and judgment rendered by this Court on 12<sup>th</sup> July 2024. It was submitted that, on account of those developments, the question of granting an order of stay of execution or of proceedings cannot arise, and that the present appeal is therefore overtaken by events, is moot, and a waste of the Court's time. In that regard reference was made to the Supreme Court's decision in the case of **Institute for Social Accountability & Another vs. National Assembly & 5 Others (Petition 1 of 2018) [2022] KESC 39 (KLR)** for the proposition that where, as here, events occur changing the facts or law which deprive the parties of the pursued outcome or relief, then the matter becomes moot.
10. In response, Mr. Virjee submitted that the matter is not moot and that the Court retains the discretion to hear the case in the interest of justice; that all that appellant requires is for this Court to determine whether the learned Judge of the ELC was right or wrong in dismissing the appellant's application for stay; that, if the learned Judge of

the ELC was

wrong, the impugned ruling should be set aside with costs to the appellant.

11. We have considered the appeal and the submissions. The glaring issue that arises at the outset is whether this appeal is moot. As already indicated, in its application before the ELC dated 27<sup>th</sup> September 2021, the appellant sought in the main, an order of stay of execution of the judgment of the ELC (Yano, J.) dated 13<sup>th</sup> September 2021 and delivered on 27<sup>th</sup> September 2021 pending hearing and determination of its intended appeal. It was an interim measure of protection that the appellant sought to prevent execution being carried out as the appellant's appeal was pending.
12. There is no dispute that that appeal was subsequently filed, heard and determined, and dismissed in a judgment delivered on 12<sup>th</sup> July 2024. In our view, the effect of that is that further consideration of whether a stay of execution was rightly or wrongly refused is otiose. As this Court stated in the case of **Ole Pere & Another vs. District Land Adjudication and Settlement Officer, Narok South & 24 Others; Pere & Another (Interested Parties) (Civil Appeal 79 of 2019) [2025] KECA 113 (KLR)** :

***“The law of mootness inquires whether events subsequent to the filing of a suit have eliminated the controversy between the parties. A case or issue is considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use or when the cause of action has been lost or overtaken by intervening events. In such instance,***

***there is no actual substantial relief which a litigant would be entitled to, and which would be negated by the dismissal of the case. Courts generally decline jurisdiction over such cases or dismiss them on grounds of mootness, save when, among others, a compelling constitutional issue raised requires the formulation of controlling principles to guide the bench, the bar and the public; or when the case is capable of repetition yet evading judicial review.***

13. The Supreme Court of Kenya had earlier in the case of ***Institute for Social Accountability & Another vs. National Assembly & 5 Others*** (above) pronounced itself thus:

***“...a matter is moot when it has no practical significance or when the decision will not have the effect of resolving the controversy affecting the rights of the parties before it. If a decision of a court will have no such practical effect on the rights of the parties, a court will decline to decide on the case. Accordingly, there has to be a live controversy between the parties at all stages of the case when a court is rendering its decision. If after the commencement of the proceedings, events occur changing the facts or the law which deprive the parties of the pursued outcome or***

14. We hold that the fact that the appellant’s appeal, Mombasa Civil Appeal No. E104 of 2021, challenging the judgment of Yano, J. was heard and determined, the question of staying that judgment ‘to await the outcome’ of an appeal already determined is moot.
15. However, even if we were to consider this appeal on merits, the impugned decision of the ELC involved exercise of judicial discretion. The circumstances when this Court will interfere with such decision are limited. The appellant

has not

demonstrated that the Judge of the ELC misdirected himself in law; or that that he misapprehended the facts; or that he took account of considerations of which he should not have taken account; or that he failed to take account of considerations of which he should have taken account, or that his decision, albeit a discretionary one, is plainly wrong. See **United India Insurance Company Limited Kenindia Insurance Company Limited & Oriental Fire & General Insurance Company Limited vs. East African Underwriters (Kenya) Limited [1985] eKLR.**

16. Based on the foregoing, the appeal is moot, is without merit and is hereby dismissed with costs to the respondent.

**Dated and delivered at Mombasa this 25<sup>th</sup> day of March 2026.**

**S. GATEMBU KAIRU, FCI Arb, C. Arb.**

.....  
**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA, C Arb, FCI Arb.**

.....  
**JUDGE OF APPEAL**

**G.W. NGENYE-MACHARIA**

.....  
**JUDGE OF APPEAL**

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

*Signed*  
**DEPUTY**  
**REGISTRAR**