



**Kabundu Holdings Limited v Wakf Commissioner of Kenya (Civil Appeal
(Application) E039 of 2025) [2026] KECA 752 (KLR) (24 April 2026) (Ruling)**

Neutral citation: [2026] KECA 752 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E039 OF 2025
F TUIYOTT, KI LAIBUTA & GW NGENYE-MACHARIA, JJA
APRIL 24, 2026**

BETWEEN

KABUNDU HOLDINGS LIMITED APPLICANT

AND

WAKF COMMISSIONER OF KENYA RESPONDENT

*(Being an application for stay of order under Rule 5(2) (b) of the Court of Appeal
Rules against the Judgement and Decree of the Environment and Land Court at
Mombasa (Matheka, J.) delivered on 19th December 2024 in ELC Case No. E034 of 2023)*

RULING

1. The subject matter of our ruling is the application filed by the applicant, Kabundu Holdings Limited dated 24th March 2025. When the application first came up for hearing on 16th June 2025, it is only Mr. Kabundu in person for the applicant who was present. After hearing the application, we reserved the delivery of the ruling for 30th January 2026. However, the respondent, Wakf Commissioner of Kenya, filed an application dated 6th August 2025 seeking: to set aside, stay and/or discharge the interim orders issued on 16th June 2025, to arrest the ruling slated for 30th January 2026, and to allow it to file a response to the applicant’s application dated 24th March 2025 together with relevant submissions.
2. Learned counsel Mr. Lakicha for the respondent and Mr. Kabundu for the applicant were both present in Court on 13th October 2025 when the respondent’s application came up for hearing. By consent, the application was compromised on the following terms:
 - “ 1. The proceedings of this Court of 16th June 2025 are hereby set aside.
 2. The Kabundu’s Notice of Motion dated 24th March 2025 shall be heard afresh by way of the following:



- i. For the Kabundu, the written submissions and list of authorities of 13th June 2025, the replying affidavit of 9th October 2025, the preliminary objection of 15th September 2025, the further affidavit of 9th October 2025 and further affidavit of 10th October 2025.
 - ii. A replying affidavit and written submission of Wakf to be filed within 14 days hereof.
 - iii. Submissions in response by Kabundu to be filed and served within 14 days of service of the replying affidavit and written submissions.
 - iv. Thereafter, the matter be mentioned before the Deputy Registrar of this Court to confirm compliance and forward the file to the judges for preparation of a ruling.
 - v. Ruling shall be delivered on 10th April 2026.”
3. The respondent was supposed to have filed its replying affidavit and written submissions within 14 days from 13th October 2025, that is on or before 27th October 2025. The file was to be mentioned before the Hon. Deputy Registrar to confirm compliance before transmission to us for preparation of the ruling.
4. On noting that time had considerably lapsed with no communication from the Deputy Registrar, we sought to know the status of the file in the month of March 2026, approximately one month before the ruling date. However, the respondent did not file a response whereas it was at its behest that this Court revisits this matter. This was certainly a waste of precious judicial time, which would have otherwise been utilised to hear other litigants. We frown upon such practice. This ruling is therefore written bearing in mind that there was non-compliance by the respondent with the consent of 13th October 2025.
5. As a brief background, the respondent filed suit in Mombasa ELC Cause No. E034 of 2023 alleging ownership of Mombasa/Block XX/47 (the suit property), which the applicant was alleged to have been unlawfully in occupation of after lapse of the lease, which terminated on 30th November 2012. The respondent prayed for: eviction orders from the suit property against the applicant; permanent injunction against the applicant from trespassing on the suit property; The Officer Commanding Station (Mombasa) do provide security during eviction; costs of, and incidental to, the suit; and other suitable orders.
6. In a judgement dated 19th December 2024, the learned Judge (Matheka, J.) allowed the respondent’s suit to the effect that: the applicant hands over vacant possession of the suit property within 90 days, failure to which the respondent was at liberty to apply for warrants of forceful eviction; a permanent injunction do issue against the applicant from trespassing on the suit property; and that costs of the suit and counterclaim be awarded to the respondent.
7. Aggrieved, the applicant invoked this Court’s jurisdiction by filing a Notice of Appeal dated 29th December 2024. It has also filed a substantive appeal, being Civil Appeal No. E039 of 2025 as attested



by a Record of Appeal dated 28th February 2025. But, before the appeal was set down for hearing, the applicant filed a Notice of Motion dated 24th March 2025 seeking the following orders:

- a) Spent.
 - b. That pending the hearing and determination of Mombasa Court of Appeal Civil Appeal No. E039 of 2025, there be and is hereby issued an order of injunction restraining the respondent, either by themselves, their officers, agents, employees, assigns or any person acting for them from selling, transferring, leasing, charging, demolition, disposing of or in any manner dealing with the suit property.
 - c. Spent.
 - d. That pending hearing and determination of this appeal there be and is hereby issued an order of stay of execution of the Judgement and Decree delivered on 19th December 2024 and all consequential decree and order ensuing therefrom.
 - eb. That without prejudice to the above, this Court direct that the Record of Appeal be heard and determined on priority basis.
 - f. Costs of this application abide the outcome of the appeal.”
8. The application is supported by the affidavit of Patrick Kabundu, the applicant’s Director and Company Attorney sworn on even date. He deposed that, even if it is not disputed that the respondent is the owner of the suit property, the applicant has invested, built thereon and owns a one-storey building worth millions of shillings, and which has tenants in occupation; and that, if it is evicted, it stands to lose investment worth millions of shillings.
 9. As to arguability of the appeal, it is deposed that the respondent failed to comply with the mandatory terms of effectuating Eviction Notice as stipulated by Section 152E (1) of the *Land Act*; that the respondent failed to adhere to the terms provided under Section 8(3) of the then applicable *Wakf Commissioners Act*, Cap 109 (Revised edition 2012 [1981], which required that, for the conduct of any meeting for the purpose of making a resolution, the quorum of the Wakf Commissioners shall be three persons, one of whom shall be an ex-officio member; and that, under Section 6(1) (a) and (b) of the Act, the ex-officio member should be either the Provincial Commissioner of the then Coast Province or the Chief Kadhi.
 10. The applicant contended that, on 6th April 2023, the respondent’s Secretary, one Ibrahim Mohammed Haji Bulushi, convened a meeting and passed a resolution appointing the firm of Abdulrahman Saad & Associates Advocates to represent it in the proceedings before the ELC; that, by virtue of the fact that the meeting appointing the said firm of advocates did not comply with Sections 8(3) and 6(1) (a) and (b) of the repealed *Wakf Commissioners Act*, the respondent’s Secretary lacked the locus standi to issue the Notice of Eviction dated 28th September 2022; and that, therefore, the entire proceedings before the ELC were a nullity.
 11. It was deposed that the respondent will not suffer prejudice if the orders sought are granted since, in response to the respondent’s Advocates letter of offer dated 9th May 2022, the respondent accepted renewal of the lease by a letter of acceptance dated 30th April 2023; that annexed to the acceptance letter were a Banker’s Cheque of Kshs.100,000 to facilitate the renewal process, a Banker’s Cheque of Kshs.6,600 for the ground rent for the years 2012 to 2023, and a Banker’s Cheque of Kshs.50,000 to facilitate final documentation and a valuation report, all of which were in compliance with the terms



of the letter of offer dated 9th May 2022. The applicant is therefore aggrieved that it was unjust for the learned Judge to issue the eviction orders in disregard of the terms of the acceptance letter.

12. The applicant urges that it has been in occupation of the suit property for 51 years; that there is a Church which has been conducting its services on the suit premises for 15 year; and that, if it is evicted, the Church would lose its members, which loss cannot be quantified by way of damages. Additionally, the applicant urges that it has built a tenants' clientele over a period of many years which, if it is evicted, would be lost, and which loss cannot be quantified by damages; and that, effectively, if an order of stay is not granted, the appeal will be rendered nugatory.
13. Pursuant to the Consent Order of 13th October 2025, the applicant's Preliminary Objection dated 15th September 2025 was to be considered alongside the instant application. Our perusal of the points of objection therein attest that they raise similar issues to the grounds of appeal. In other words, they are grounds of appeal but in the style and name of a preliminary objection. We emphasise that in an application of this nature, and inasmuch as one of the considerations as to the merit of the application is the arguability of the appeal, the Court is divested of power of making definitive findings of merit of the grounds raised. The applicant will therefore have to hold his horses until during the hearing of the appeal when he shall fully ventilate the grounds raised in the Preliminary Objection.
14. As earlier highlighted, the application is unopposed.
15. At the hearing of the application on 16th June 2025, Mr. Kabundu for the applicant highlighted their written submissions dated 13th June 2025. He basically restated the background to the dispute as highlighted hereinabove for which reason we need not repeat ourselves. Suffice it to state that Mr. Kabundu's main emphasis was that, as at the time when the suit was filed in 2019, the quorum of the meeting that made the resolution appointing its counsel was not properly constituted; that the respondent's Secretary acted singularly and contrary to the governing Statute which requires that there be a quorum of three persons; and that, as such, the suit as filed had no foundation in law.
16. On the applicable law under rule 5(2) (b) of this Court's Rules, while citing this Court's decision in *Ann Wanjiku Kibeh vs. Clement Kungu Waibara and IEBC* (2020) eKLR, the applicant submitted that, premised on the grounds of appeal proffered, the appeal deserved an inquiry of the full bench of the Court, hence it was arguable; and that even a single ground of appeal is adequate to satisfy the first limb of the twin principle under rule 5(2)(b) as was held in *University of Nairobi vs Ricatti Business Of East Africa* (2020) KECA 463 (KLR).
17. As to whether the appeal will be rendered nugatory if stay or injunctive order was not granted, the applicant contended that it stands to suffer great prejudice since it risked imminent eviction from the suit property; and that, in any case, the foundation of the eviction notice was issued by a person who lacked authority by dint of Sections 7(3) and 8(3) of the repealed *Wakf Commissioners Act*.
18. We have considered the application, the grounds in its support, the applicant's oral and written submissions and the law. It is settled law that rule 5(2) (b) of this Court's Rules may be invoked by an applicant who is seeking either an injunctive relief or order(s) of stay of execution. And, in such an application, an applicant must satisfy this Court on the twin principles under the rule, namely that he has an arguable appeal and, secondly, absent stay or injunctive order, the appeal or intended appeal will be rendered nugatory. In the instant application, all we have to determine is whether the applicant is deserving of this Court's discretionary relief of a stay of execution or injunctive order or both reliefs pending hearing and determination of the main appeal.



19. This Court expounded on the twin principles in the case of Trust Bank Limited & another vs. Investech Bank Limited & 3 Others (2000) KECA 11 (KLR) 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...”

20. On whether an appeal is arguable, even a single bona fide ground is sufficient to warrant grant of the relief sought. An arguable appeal is not one which must necessarily succeed but one which is not frivolous. We are mindful that we should not make definitive findings as to arguability of the appeal or intended appeal lest we embarrass the bench that will ultimately hear the main appeal. See Stanley Kang’ethe Kinyanjui vs. Tony Ketter & 5 Others (2013) KECA 378 (KLR). Lastly, in determining whether an appeal will be rendered nugatory, this Court has to consider the conflicting interests of both parties, and each case has to be determined on its own merits.

21. We have perused the proposed grounds of appeal in the applicant’s Memorandum of Appeal dated 28th February 2025. The applicant intends to argue, among other grounds, the issue of the validity of the respondent’s suit, faulting the learned Judge for failing to address its (the applicant) Preliminary Objection to the effect that the suit was filed without the requisite authority from the Applicant’s Commission as, being a body corporate, its Secretary alone could not file the suit or swear the verifying affidavit in support of the suit, or purport to appoint the firm of Abdulraham Saad & Associates Advocates as an authorizing officer for purposes of filing the suit; and that the learned Judge erred in law in making a finding on account of a defective Notice of Eviction dated 28th September 2022 issued by the respondent’s Secretary contrary to the mandatory provisions of Section 152E (1) of the [Land Act](#). On these grounds, we are satisfied that the grounds of appeal are neither idle nor frivolous, and that they deserve to be considered at the hearing of the main appeal. Accordingly, the applicant has established the first limb on arguability of the appeal.

22. On the nugatory limb, we are prepared to accept the applicant’s contention that if indeed the eviction notice is found to have been issued contrary to the law and the applicant is evicted unprocedurally, in the absence of the respondent demonstrating that it can compensate the applicant with damages, the intended appeal will no doubt be rendered nugatory. Further, if the applicant is evicted, the investment on the suit property will most likely go to waste or a third-party may benefit from it. The applicant has therefore aptly demonstrated merit of the second limb under rule 5(2)(b).

23. For the foregoing reasons, we are satisfied that the applicant has satisfied both limbs of the principles under rule 5(2) (b) of this Court’s Rules. Accordingly, the Notice of Motion dated 24th March 2025 is hereby allowed as prayed in terms of prayers (b) and (d), namely:

- i. That pending the hearing and determination of Mombasa Court of Appeal Civil Appeal No. E039 of 2025, there be and is hereby issued an order of injunction restraining the respondent, either by themselves, their officers, agents, employees, assigns or any person acting for them from selling, transferring, leasing, charging, demolition, disposing of or in any manner dealing with the suit property.



- ii. That pending hearing and determination of Mombasa Civil Appeal No. E039 of 2025, there be and is hereby issued an order of stay of execution of the Judgement and Decree delivered on 19th December 2024 and all consequent decree and order ensuing therefrom.
- iii. Costs of the application shall abide the outcome of the appeal.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF APRIL, 2026.

F. TUIYOTT

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JUDGE OF APPEAL

DR. K. I. LAIBUTA, CArb, FCIArb

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JUDGE OF APPEAL

F. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR

