

**IN THE COURT OF
APPEAL AT NAKURU**

(CORAM: MATIVO, MURUNGI & HASSAN,

JJ.A.) CIVIL APPLICATION NO. NAK E031 OF

2026 BETWEEN

**MARTIN GATHOGO NDUMBI.....1ST
APPLICANT**

GABRIEL MWENDIA KAMAU.....2ND

APPLICANT AND

LUCY WANJIRU MUTURI.....RESPONDENT

(Being an application for stay pending appeals from the rulings and orders of the Environment and Land Court of Kenya at Naivasha (O.

M. Clausina, J.) dated 23rd October 2025 & 25th February 2026

in

***ELCLA No. E001 of
2025).***

RULING OF THE COURT

1. **Martin Gathongo Ndumbi** and **Gabriel Mwendia Kamau** (the applicants) in their application dated 27th February 2026 beseech this Court to stay the conviction imposed on them on 23rd October 2025 by the Environment and Land Court (the ELC) in ELC Appeal No. E001 of 2025 and also stay the sentence and/or suspend the sentence of 6 months' imprisonment imposed upon them on 25th February 2026 in the said case pending the hearing and

determination of their appeals against both the conviction and sentence. They also

pray for an order that this Court grants such other or further orders as it may deem just and expedient. Lastly, they pray that the costs of this application be provided for. The application is premised on Rule 5 (2) (b) of the Court of Appeal Rules, 2022.

2. The salient grounds in support of the application as we discern them from the application and the annexed supporting affidavit also dated 27th February 2026 sworn by Paul Amuga advocate are that: (a) on 27th March 2025, the applicants executed a judgement rendered by the Chief Magistrate's Court on 15th August 2024 unaware that the decision had been stayed by the ELC; (b) by an application dated 28th March 2025, the respondent applied to have them cited for contempt of court orders; (c) on 23rd October 2025 they were found guilty of contempt of court; (d) they have appealed to this Court against the said ruling in Civil Appeal No. E006 of 2026 and they also intend to appeal against the sentence of 6 months' imprisonment without the option of a fine; (e) their appeal against conviction and their intended appeal against the sentence have high chances of success; (f) unless the 6 months' imprisonment is stayed, their appeals will be rendered

nugatory because they will complete their jail term before their appeals are heard and determined; (g) it is in the interest of justice that this application be allowed. Also, in support of the application, they attached medical reports to the affidavit to demonstrate that they are sickly.

3. The application is strenuously opposed by the respondent vide her replying affidavit dated 4th March 2026. The germane points are that: (a) the applicants were properly convicted for contempt and sentenced to serve 6 months imprisonment; (b) the applicants filed Civil Application No. E110 of 2025 seeking stay orders but it was dismissed and appealed to this Court in Civil Appeal No. E006 of 2026; (c) the affidavit in support of the application was sworn by their advocate as opposed to the applicants, yet it contains factual issues which are within the applicants' knowledge; (d) the alleged sickness is false, and it was not raised before the ELC and it's a gimmick to evade justice; (e) the demolition was undertaken by persons under the appellants instructions; (f) the respondent suffered considerable loss and substantial legal costs; (g) the applicants should not be allowed to abuse court process.

4. During the virtual hearing of the application on 22nd April 2026, learned counsel Mr. Ahomo and Mr Amuga appeared for the applicants while the respondent was represented by learned counsel Mr. G. Kimani.
5. In support of the application, the applicants counsel maintained that the applicants appeal is arguable stressing that during the hearing of the appeal they will demonstrate that the conviction was in error, that the applicants were not served with the orders they were accused of disobeying, that the sentence of 6 months is predicated on an erroneous finding, and that the 6 months imprisonment without the option of a fine is harsh.
6. Regarding the nugatory aspect, the applicants' counsel cited the risk of completing the prison sentence before the appeal is heard and determined and urged that in the event their appeals fail, they will complete the jail term. Counsel relied on **Rev. Jackson Kipkemboi Koskey & 7 others vs. Rev. Samuel Muriithi Njogu & 4 Others [2007] eKL & Stanislus Nyagaka Ondimu vs. Kalyaso Farmers' Co-operative Society and others Civil Appeal No. Nai 337 of 2005** in

support of the proposition that in absence of stay, their appeals will be rendered nugatory.

7. The respondent's counsel strongly opposed the application maintaining that the applicants have not demonstrated that they have an arguable appeal. In addition, counsel argued that the law is clear that a party found guilty of contempt must purge the contempt before seeking the Court's discretion. In support of the foregoing, counsel cited ***Hadkinson vs. Hadkinson [1952] 2 All ER 567*** where the Court held that a contemnor should not be heard unless he purges the contempt. Further, counsel contended that illness is not a ground to avoid sentence, that the applicant's application is *res judicata*, that the applicants will suffer no prejudice if they serve the sentence, and that the applicants should be ordered to provide security for costs.
8. A convenient starting point is to address the respondent's contestation that this application is *res judicata*, a legal principle stipulated in Section 7 of the Civil Procedure Act, whose object is to bar multiplicity of suits and guarantee finality to litigation. The above section contemplates 5 conditions which, when they co-existent will bar a

subsequent

suit. These are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit. (See **Lotta vs. Tanaki [2003] 2 EA 556** and **Kenya Commercial Bank Ltd & Ano. vs. Muiri Coffee Estate Ltd & 3 Others (Motion 42 & 43 of 2014 (Consolidated)) [2016] KESC 6 (KLR)**).

9. As decided cases suggest, if any judicial tribunal in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, the judgment or ruling is *res judicata*. It follows that if in any subsequent proceedings (unless they be of an appellate nature or review) in the same or any other judicial tribunal, any fact or right which was determined by the earlier judgment or ruling is called in question, the defence of *res judicata* can be raised. This means in effect that the judgment or ruling

can be

pleaded by way of estoppel in the subsequent case. The question before us narrows to whether the applicants' application the subject of this ruling is *res judicata*.

10. Much as the respondent invokes the doctrine of *res judicata*, she did not attach a ruling by this Court determining similar issues as those urged in the present application. She only attached to her affidavit the ruling by the ELC dated 5th February 2026 issued in ELC E001 OF 2025 declining the applicants' stay of the impugned decision. If that is the basis of the respondent's contestation that the present application is *res judicata*, then she got it wrong. This is because under Rule 5 (2) (b), this Court exercises original jurisdiction that is separate from its normal appellate function. This allows the Court to hear applications for interim relief directly, even before a full appeal is heard. This means that when hearing an application for a stay of execution, an injunction or a stay of proceedings, the Court does not sit as an appellate court reviewing the lower court's decision on that specific application. Instead, it acts as a court of first instance to determine if the subject matter of an intended appeal needs protection. An applicant whose application for stay

has been

declined by the trial court is under Rule 5 (2) (b) is permitted to seek stay from this Court.

11. However, it is important for us to mention that the applicants were before this Court by an application dated 9th February 2026 seeking the following orders:

1. Spent;
2. **That there be a stay of further contempt proceedings, including stay of mitigation and sentencing of the appellants/applicants for contempt of court, in Naivasha Environment and Land Court Appeal No. E001 of 2025 pending the hearing and determination of the appeal herein;**
3. **That such further or other order be granted as this Court may deem just and expedient in the circumstances of this application;**
4. **That costs of this application be provided for.**

12. Their application was heard and dismissed by this Court, **(Mativo, Gachoka & Okello, JJ.A)**. In paragraph 1 of this ruling, we highlighted the prayers sought in the instant application. We need not repeat them here, save to mention that they are not similar to the above prayers. It is important to point out that as at the point of filing the above application, the applicants had been convicted and the matter was pending mitigation and sentencing. As the above prayers show, in the earlier dismissed application, the applicants were seeking to stay the mitigation and

sentencing. The applicants have since

been sentenced and imprisoned for 6 months. They are currently serving jail term. They are now before us seeking to suspend the conviction and the sentence. We have carefully read the ruling of this Court which determined the applicant's application dated 9th February 2026 and the prayers sought in the application before us and the grounds cited. The earlier application sought to stay the contempt proceedings, including stay of mitigation and sentence. The sentence has since been passed. In any event, the application dated 9th February 2026 was dismissed for absence of a valid notice of appeal. In a nutshell, the issues urged in the present application were not raised or determined by this Court in the said application. Therefore, the application before us is not *res judicata*.

13. We now address the merits of the application before us. Rule 5 (2) (b) of the Court of Appeal Rules, 2022 grants this Court original jurisdiction to order a stay of execution, an injunction, or a stay of proceedings pending the determination of an appeal or an intended appeal. To succeed in a Rule 5 (2) (b) application, an applicant must satisfy the "*twin principles*" (often referred to as the twin tests). An applicant

must satisfy the Court that his appeal is arguable and that in absence of stay, the appeal, if successful, will be rendered nugatory. Both principles must be proven for the Court to grant the relief under the said rule.

14. Regarding the first prerequisite, the applicant must demonstrate that the appeal or intended appeal is arguable and not frivolous. The threshold here is that an applicant does not have to demonstrate that the appeal or intended appeal will succeed. All that an applicant is required to demonstrate is that his appeal or intended appeal deserves consideration by this Court. Notably, even one ground can suffice. (See **Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR**).

We are alive to the fact that at this point we are restrained from making conclusive findings of fact or law. That is the function of the bench that will hear the appeal. Fully conscious of our controlled mandate, we are persuaded that the question whether the applicants were aware of the order they were accused of violating is an arguable ground. The question whether the conviction was free from error is an arguable ground. We are persuaded that the applicants have satisfied the first pre-requisite.

15. In addition to satisfying the arguability test, an applicant must show that if the stay is not granted and the appeal eventually succeeds, the success of that appeal would be rendered nugatory (meaningless or worthless). In

Stanley

Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others

[supra] the court clarified that "nugatory" refers to situations where the result of the appeal cannot be given effect. The key consideration under this ground is whether absent of stay, the damage caused would be irreversible or if the subject matter would be destroyed or dissipated before the appeal is heard and determined. (See **Reliance Bank Ltd vs. Norlake Investments Ltd [2002] 1 EA 227**). It is important to bear in mind that each case depends on its peculiar facts and circumstances. Here we are dealing with a case where the applicants are already in prison.

16. There are numerous decisions by this Court consistently holding that where a person faces a jail term for contempt of court, their intended appeal would be rendered nugatory (meaningless) because the loss of liberty is irreversible and cannot be undone by a later

successful appeal. The Supreme Court in **Stephen Maina
Githiga & 5**

Others vs. Kiru Tea Factory Company Limited [2019]

KESC 80 (KLR) underscored that contempt proceedings involving potential imprisonment demand judicial intervention because the harm to the party's rights is "*irreversible.*"

17. In our view, unlike financial loss, which can be compensated by damages, the loss of physical liberty is unique because it cannot be quantified or reversed once it has occurred. Cases of this nature require a delicate balancing act. This is because in contempt cases, the Court must bear in mind that the hardship of a person staying in jail for an order that might later be set aside outweighs the delay caused to the party seeking to enforce the order. This is because in the event the appeal fails, the contemnor can go back and finish his jail term. By staying the committal to civil jail, the Court preserves the "*subject matter*" of the appeal, which is the individual's freedom.

18. We have said enough to demonstrate that the application before us satisfies the two pre-requisites. Therefore, it is for allowing. Accordingly, we allow the applicants' application dated 27th February 2026 and order as follows:

- a) The order convicting the applicants for contempt of court issued on 23rd October 2026 in ELC Appeal No. E001 of 2025 is hereby stayed pending the hearing and determination of the applicants' Civil Appeal No. E006 of 2026 against the conviction and their intended appeal against the sentence of 6 months imprisonment imposed on 25th February 2026.
- b) The sentence of 6 months imprisonment imposed upon the applicants in ELC Appeal No. E001 of 2025 is hereby suspended pending the hearing and determination of their appeal against the said conviction and sentence.
- c) Pursuant to the order suspending sentence of imprisonment the applicants be released from prison forthwith pending the hearing and determination of their appeal against conviction and sentence.
- d) The costs of this application shall abide by the outcome of the appeals.

Dated and delivered at Nakuru this 28th day of April, 2026.

J. MATIVO

.....
JUDGE OF APPEAL

MURUNGI B. KAIRARIA

.....
JUDGE OF APPEAL

AHMED ISSACK

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR.