

**IN THE COURT OF  
APPEAL AT NAKURU**

**(CORAM: MATIVO, MURUNGI & HASSAN, JJ.A.)**

**CIVIL APPEAL (APPLICATION) NO. NAK E059 OF  
2023**

**BETWEEN**

**ALEXANDER KIPNGETICH SITIENEI.....APPLICANT**

**AND**

**ETHICS & ANTI-CORRUPTION  
COMMISSION.....1<sup>ST</sup>  
RESPONDENT**

**WILSON GACHANGA.....2<sup>ND</sup>  
RESPONDENT**

*(Being an application for stay of execution from the  
ruling of the Environment and Land Court of Kenya at  
Nakuru (A. O.*

*Ombwayo, J.) dated 9<sup>th</sup> March 2023*

*in*

***ELC No. 53B of 2021).***

**\*\*\*\*\***

**RULING OF THE COURT**

1. By an application dated 11<sup>th</sup> February 2026 the applicant prays for stay of execution of the judgment rendered by *Ombwayo, J.* on 9<sup>th</sup> March 2023 in Nakuru Environment and Land Court (ELC) Case No. 53B of 2021 and all consequential orders pending the hearing and determination of his appeal. The applicant also

prays that the respondents be condemned to pay the costs of the application. The application is brought under Rule 5 (2) (b) of the

Court of Appeal Rules, 2022, Sections 3A and 3B of the Appellate Jurisdiction Act, Article 159 of the Constitution and all other enabling provisions of the law.

2. In summation, the grounds in support of the application are:
  - (a) aggrieved by the said judgment, the applicant has appealed to this Court;
  - (b) there has been unlawful interference and destruction of the property;
  - (c) the applicant's bananas have been harvested and structures have been erected on the land and debris deposited on the land;
  - (d) as a consequence, absent of stay, the applicant will suffer irreparable harm which cannot be compensated by way of damages;
  - (e) absent of stay, his appeal if successful will be rendered nugatory. It is the applicant's case that his appeal is arguable and it has high chances of success.
3. The 1<sup>st</sup> respondent filed a replying affidavit dated 17<sup>th</sup> April 2026 sworn by Brigid Maina advocate in opposition to the application. The salient averments are:
  - (a) the trial court established that the applicant's certificate of lease for Nakuru Municipality Block 8/30 was irregularly acquired and nullified it;
  - (b) the applicant has not identified any specific error of law or

fact in the trial court's

judgment; (c) a bare assertion that an appeal is arguable and has high chances of success does not discharge the burden of demonstrating arguability of the appeal; (d) the appeal will not be rendered nugatory if the stay is refused; (e) the loss complained of can be compensated by way of damages; (f) the judgement was delivered on 9<sup>th</sup> March 2023, the notice of appeal was filed on 3<sup>rd</sup> May 2023, yet this application was filed on 11<sup>th</sup> February 2026;

(g) public interest militates against granting stay which would allow the applicant to continue asserting his rights over a property whose title has been found to be irregular.

4. The applicant filed a supplementary affidavit dated 18<sup>th</sup> February 2026 asserting that on 14<sup>th</sup> February 2026 he visited the land and found more activities being carried on the land including trucks carrying wood from the land.
5. During the virtual hearing of this application on 20<sup>th</sup> April 2026, learned Counsel Mr. Mukundi appeared for the applicant holding brief for Mr. Kipkoech. Learned counsel Ms Brigid Maina appeared for the 1<sup>st</sup> respondent. There was no appearance for the 2<sup>nd</sup> respondent.

6. In his written submissions dated 25<sup>th</sup> February 2026 in support of the application. Mr. Mukundi cited **Trust Bank Limited & Ano. vs. Investech Bank Ltd & 3 Others [2000] KECA 38 (KLR)** in support of the proposition that to succeed in an application under Rule 5 (2) (b), an applicant must satisfy two prerequisites, namely, that the appeal or intended appeal is arguable, and that absent of stay, the appeal if successful will be rendered nugatory. Counsel also cited **Stanley Kangethe vs. Tony Keter & 5 Others [2013] eKLR** to urge that an arguable appeal is not one that will succeed, but one which is not frivolous and underscored that the applicant's appeal has high chances of success. Citing **Chris Munga N. Bichange vs. Richard Nyagaka Tongi & 2 Others [2013] KECA 141 (KLR)**, counsel urged that the applicant has satisfied the two prerequisites. Lastly, counsel implored this Court to order that the respondents pays the costs of this application.
7. Ms Maina, learned counsel for the 1<sup>st</sup> respondent adopted her written submissions dated 17<sup>th</sup> April 2026. The nub of her submissions is that the applicant's appeal is neither arguable nor does it have a probability of success and that it will not be

rendered nugatory. Citing **RWW vs. EKW [2019] eKLR**, she urged this Court to balance both parties' interests.

8. We have considered the application, the grounds in support thereof, the rival affidavits and submissions, the authorities cited and the law. Applications under Rule 5 (2)(b) of the Court of Appeal Rules, 2022 are governed by two well-settled "*twin principles*" that an applicant must satisfy concurrently to obtain a stay of execution, an injunction, or a stay of proceedings pending an appeal. The Court must be satisfied that the appeal or intended appeal is arguable and not frivolous and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory.

9. As was stated by this Court in **Trust Bank Limited and Ano. vs. Investech Bank Limited and 3 Others** [supra], the jurisdiction of this Court under Rule 5(2) (b) is original and discretionary. In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this Court, both requirements must be demonstrated to the Court's satisfaction.

10. On the first imperative, we have to consider whether there is at least a single *bona fide* arguable ground that has been raised by the applicant in order to warrant ventilation before this Court. An arguable ground is not one that must necessarily succeed; it is merely one that is "*deserving of consideration by the Court*" or "*ought to be argued fully*". A single *bona fide* arguable ground is sufficient to satisfy this test. (See **Stanley Kangethe vs. Tony Keter & 5 Others** [supra]. We are cognizant of the fact that when this Court hears a Rule 5 (2) (b) application, it is exercising a discretionary power at an interlocutory stage. Because the main appeal has not yet been heard on its merits, the Court must tread carefully and avoid making definitive findings of facts and law because doing so would embarrass the bench that will eventually hear the substantive appeal. If the judges in the Rule 5 (2) (b) stage were to declare a fact "*proven*" or a law "*settled*," they would effectively be deciding the appeal before it even starts, potentially pre-judging the case. (See **Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd [2005] eKLR**).

11. The question whether the trial court was right in finding that the applicant's title is irregular, and therefore null and void is an arguable ground. Because one ground suffices, we find that that the applicant has satisfied the first pre-requisite.
12. We now turn to the second requirement, which is whether the appeal or intended appeal if successful will be rendered nugatory. This Court in ***Kirunge vs. Nyaga [2023] KECA 1343*** emphasized that whether an appeal will be rendered nugatory depends on whether the consequences of failing to grant a stay are irreversible or prejudicial to the point of "*preserving the substratum of the appeal*". In ***Reliance Bank Ltd vs. Norlake Investments Ltd [2002] 1 EA 227***, this Court clarified that the term nugatory must be given its full meaning. The most common understanding is that the success of the appeal would be of no value that is it will be worthless, futile or invalid. It must be shown that the appeal will be trifling, that is the appeal is of very little importance or legal consequence because of past events that cannot be undone.

13. The question narrows down to whether the applicant has demonstrated that the appeal will be rendered nugatory. In determining this question, we bear in mind that each case is determined on its own peculiar facts and circumstances. There is an uncontroverted averment that the property has since been leased to a third party who has since commenced operations on the land. From the grounds cited by the applicant, his major concern appears to be destruction of his bananas on the land. There was no argument to suggest that the bananas cannot be compensated by way of damages nor do we have reasons to suggest otherwise. In fact, the applicant confirmed by photographs annexed to his supplementary affidavit and also in his application that the respondent took over the property and leased to a third party who is cutting and transporting logs from the land. The primary goal of Rule 5 (2) (b) is to preserve the subject matter of the dispute. This ensures that if the applicant eventually wins the appeal, the victory is not "*hollow*" or "*nugatory*" (worthless) because the property is gone or destroyed. But in this case, the ground appears to have shifted. As stated above, a third

party has been put into possession and is undertaking activities on the land.

14. Courts are extremely hesitant to grant a stay of execution or an injunction once a change in possession or title has already occurred. This is based on the principle that a stay is a preventative remedy, not a restorative one. To undo what has already happened, an applicant would usually need a mandatory injunction or an order for restitution which carries a much higher burden of proof than a simple stay of execution. By now, it is evident that we have said enough to demonstrate that the applicant has not satisfied the nugatory aspect. It is a requirement that an applicant must satisfy the twin principles.

15. Before we conclude, it would be remiss for us not to mention that the impugned judgment is dated 9<sup>th</sup> March 2023. The application before us is dated 11<sup>th</sup> February 2026, after almost 3 years. One wonders where the applicant was all this time. It is an established legal principle that equity aids the vigilant and not the indolent. While Rule 5 (2) (b) of the Court of Appeal Rules is often described as granting the Court "*unfettered*" discretion, that discretion is

judicial and must be exercised on sound legal principles, including the requirement that an applicant moves the Court timeously. Courts view a long, unexplained delay as a sign that the applicant is not serious about the appeal.

16. We have said enough to demonstrate that the applicant has not satisfied the second twin principle nor does he deserve this Court's discretion to merit the stay sought. Accordingly, we dismiss the application dated 11<sup>th</sup> February 2026 with costs to the respondents.

**Dated and delivered at Nakuru this 30<sup>th</sup> 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.**