



**Schofield t/a Schofield & Associates v Ehsani & another (Civil Appeal
(Application) E706 of 2022) [2026] KECA 852 (KLR) (30 April 2026) (Ruling)**

Neutral citation: [2026] KECA 852 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E706 OF 2022
J MOHAMMED, M NGUGI & F TUIYOTT, JJA
APRIL 30, 2026**

BETWEEN

ANNE WANGECI SCHOFIELD T/A SCHOFIELD & ASSOCIATES APPLICANT

AND

HOOMAN EHSANI 1ST RESPONDENT

PALM VALLEY DEVELOPMENT LIMITED 2ND RESPONDENT

(Being an application to strike out the defence of the 2nd respondent and for injunction pending the hearing and determination of an appeal from the ruling and orders of the High Court of Kenya at Nairobi-Milimani (W. A. Okwany, J.) dated 16th December 2021 in Civil Case No. 352 of 2016)

RULING

1. The notice of motion dated 15th September 2022 is prolix and has not been easy to follow. Even the prayers alone are confusing. They seek:
 - “ a. That this application be certified as urgent, service thereof dispensed with and the same be heard ex-parte in the same instance.
 - b. That this honorable court be pleased to strike out the Defence of the 2nd respondent and determine quantum of damages payable to the applicant.
 - c. That in the alternative this Honourable Court be pleased to strike out the Defence of the 2nd respondent and order the High Court to determine the Quantum of damages payable to the applicant.
 - d. That this Honourable Court be pleased to make an order restraining the Directors and shareholders from the winding up of the 2nd respondent and



transferring the reversionary interest to a third-party pending determination of this application appeal, and Suit No. 352 of 2016.

- e. That this Honourable Court be pleased to issue orders restraining the 1st respondent and the 2nd respondent from interfering with the registration of the Caveat registered by the chief Land Registrar on LR 12825/35 and/or any dealings with LR 12825/35 pending determination of this application appeal herein and determination (sic) High Court and determine Quantum of damages prayer to the respondent.
- f. That the Honourable Court marks prayers (c) and (d) as withdrawn having been overtaken (sic) by events.
- g. That this Honourable Court awards the costs of the case against the 2nd respondent in Civil Suit 352 of 2016 and the appeal to the applicant.”

2. It is most unusual that a party seeks certain prayers in an application and then a prayer later in the same application seeks to withdraw the very same prayers. Anyhow, our first task is to mark prayer (c) and (d) of the motion of 15th September 2022 as withdrawn as requested in prayer (f).
3. That leaves prayers (a), (b), (e) and (g). Prayer (a) was for certification and is spent. Prayers (b) and (g) are curious. They ask this Court to make orders in the suit pending before the trial court. Specifically, that we order that the defence of the 2nd respondent be struck out and we determine quantum of damages payable to the applicant. Second, we award costs against the 2nd respondent in the same matter.
4. While those two prayers could be made in a determination of the substantive appeal, they are not grantable in an interlocutory application. None of the statutory provisions that grant us jurisdiction in interlocutory matters donates to us such wide powers. Prayers (b) and (g) are therefore struck out.
5. The only prayer left for our determination is prayer (e) and for good measure we set it out again:
 - “e. That his (sic) Honourable Court be pleased to issue orders restraining the 1st respondent and the 2nd respondent from interfering with the registration of the Caveat registered by the chief Land Registrar on LR 12825/35 and/or any dealings with LR 12825/35 pending determination of this application appeal herein and determination (sic) High Court and determine Quantum of damages prayer to the respondent.”
6. This is a prayer for an injunctive relief and would find anchor in rule 5(2)(b) of the Court of Appeal Rules which, in addition to giving this Court power to grant stay of execution, also gives it power to grant an injunction.
7. To be gleaned from the body of the application and the supporting affidavit sworn by Anne Wangeci Schofield on 1st September 2025 is the following abridged background to the motion. In the suit before the High Court, the claim by the applicant against the 1st respondent and 2nd respondent is in respect of fees for legal work rendered by the applicant to the 2nd respondent as project advocates for the development of a residential project known as Palm Valley Development as a joint venture over land reference No. 12825/39-42 Kiambu (the property).
8. The appeal before this Court is against the Ruling of Okwany, J. delivered on 16th December 2021 in which, inter alia, the learned Judge declined an application by the applicant seeking to restrain the respondent from selling, charging, transferring title or parting with possession of any unsold villas,



town houses and apartments in the development and from distributing to shareholders or to the investors of the 2nd respondent or any person whatsoever the income from the villas, town houses and apartments already sold in the development. Other prayers declined were that the respondents be restrained from selling, transferring title to six townhouses reserved under and allotted to Stephen Kamotho Kabogo, the 1st respondent and Century City Limited under the terms of the Joint Venture Agreement between those parties and to restrain the directors and shareholders of the 2nd respondent from transferring the reversionary interest in LR No. 12825/39-42 to the management company and/or transfer of the title to any person or company or entity and from winding up the company.

9. At the same time of filing the appeal, the applicant moved this Court in Civil application No. E032 of 2022 seeking injunctive orders similar to those that the High Court had refused in the impugned decision. This Court declined the application for reasons we shall allude to shortly.
10. Both the main suit and the appeal are yet to heard. In her affidavit in support of the current motion, the applicant depones that she has received information that the development is complete and the facilities are all ready; all units have received occupation certificates and all units have been sold save for two apartments. Further, in accordance with the Joint Venture Agreement, the 2nd respondent is likely to be wound up and she will be left without a defendant. She is also aware that the 1st respondent has advised an American investor to use South African lawyers with the intention of the respondents sneaking funds out of Kenya. It is for this reason that she pleads that the restriction placed by the Registrar of Lands on any dealings with regard to LR No. 12825/35 be protected against it being lifted at the instance of the respondents.
11. The respondents resisted the application by way of a preliminary objection dated 22nd September 2025 in which they contend that: the application was bad in law and fatally defective for being filed in this Court instead of the High Court; the High Court maintained the discretion under Order 8 of the Civil Procedure Rules to allow amendments to a defence as long as no injustice or prejudice was caused to the other party; an order from a lower court exercising original jurisdiction to allow amendment of a defence could only be appealed from with leave and was not a matter of right; the application breached section 76 of the *Civil Procedure Act* because no proper appeal could lie unless and until a valid notice of appeal was filed and served within the mandatory prescribed time, noting that no such valid notice existed before the High Court; section 76 of the *Civil Procedure Act* specifies that no appeal lies from orders made in a court's original or appellate jurisdiction except as provided by law, though errors may be raised later in a memorandum of appeal when the decree is appealed; under Order 42 Rule 1 of the Civil Procedure Rules, an appeal lies from every decree passed by a court exercising original jurisdiction to the High Court unless otherwise expressly provided; an application for leave to appeal must be made in the manner laid down in rules 42 and 43 of the rules of this Court, within fourteen days of the decision or fourteen days from the refusal of such leave by the superior court, and the applicant had not exhausted the jurisdiction of the High Court and had therefore prematurely invoked the jurisdiction of this Court.
12. When this matter came up for hearing, learned counsel Mr. Scott Mutua represented the respondents. Neither the applicant nor counsel acting for her was present in Court although duly served. We have considered the motion, the submissions filed on behalf of the parties, and the highlighting made by counsel Mutua.



13. The matter before us is a 5(2)(b) application for injunction whose grant is made on well settled principles restated by this Court in decisions such as Stanley Kangethe Kinyanjui V Tony Ketter & 5 others [2013] KECA 378 (KLR) as follows;

- i. In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See *Ruben & 9 Others v Nderitu & Another* (1989) KLR 459.
- ii. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
- iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. *Halai & Another v Thornton & Turpin* (1963) Ltd. (1990) KLR 365.
- iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni*, Civil Application No. Nai 189 of 2001.
- v. An applicant must satisfy the court on both of the twin principles.
- vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.
- vii. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.
- viii. In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. *Damji Pragji* (supra).
- ix. The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.
- x. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.
- xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecuniosity, the onus shifts to the latter to rebut by evidence the claim. *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403."



14. Our task is somewhat easier because this is the second application of kindred nature made by the applicant for protective orders pending hearing of the same appeal. Of the arguability of the appeal, this Court had rendered itself as follows earlier:

“In our view the appeal is arguable. This Court will determine, inter alia, whether the trial court erred in failing to consider and determine the fact that the 2nd respondent was a limited liability company and the 1st respondent had to file the board resolution authorizing him to prosecute the suit in accordance with the law. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.”

15. We agree, and that too is our answer in this application.

16. On whether the appeal will be rendered nugatory if stay is not granted, the Court observed:

“The applicant states that unless this Court grants the orders, the respondents will proceed and complete the project and then sell the developed houses; that the 2nd respondent will transfer the reversionary interest into the management company and therefore wind-up, hence she will be forced to sue the management company comprising of about 88 occupants to recover the judgment sum if the appeal succeed. We do not actually see why the applicant will not recover the fees even when the development is complete and sold. The people who instructed the applicant are known to her and the company which is in the business of purchasing land, constructing and selling will indeed suffer great loss if they were to be stopped from conducting their business and finishing, compared to the legal fees which can be recovered at anytime from the respondents. There have not been any averments that the respondents will not be able to pay the fees in case the orders sought are not granted. In any case, the applicant still holds vital documents of the respondents including the title which in itself is worthy much more than her fees. We are not persuaded that the nugatory aspect has been demonstrated.”

17. Nothing that would seriously implicate the second limb has changed. Even if the recall of the caveat is effected, thereby watering down what the applicant considers to be her security, still there is no allegation that the respondents themselves will not be able to meet what will ultimately be a money decree should she succeed on appeal. Similarly, even if the 2nd respondent is wound up, it has not been proved or alleged, that the 1st respondent is unable to pay up the possible decree.

18. Our orders are:

- i. Prayers (c) and (d) of the notice of motion dated 15th September 2025 are hereby marked as withdrawn.
- ii. Prayers (a) and (f) of the said motion are marked as spent.
- iii. Prayers (b) and (g) of the said motion are hereby struck out.
- iv. Prayer (e) is hereby dismissed.
- v. Costs of the application shall be to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL 2026.

JAMILA MOHAMMED



.....
JUDGE OF APPEAL

MUMBI NGUGI

.....
JUDGE OF APPEAL

F. TUIYOTT

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

