



REPUBLIC OF KENYA



**KENYA LAW**  
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**Sauti Savings & Credit Co-operative Society Limited v Omuse & 8 others (Civil Appeal (Application) E760 of 2025) [2026] KECA 818 (KLR) (30 April 2026) (Ruling)**

Neutral citation: [2026] KECA 818 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E760 OF 2025  
P LILAN, DK MUSINGA & JO OKELLO, JJA  
APRIL 30, 2026**

**BETWEEN**

**SAUTI SAVINGS & CREDIT CO-OPERATIVE SOCIETY  
LIMITED ..... APPLICANT**

**AND**

**VINCENT EKEYA OMUSE ..... 1<sup>ST</sup> RESPONDENT  
ALFRED ONYANGO ATIENO ..... 2<sup>ND</sup> RESPONDENT  
ODEDE REZIN OCHIENG ..... 3<sup>RD</sup> RESPONDENT  
DENNIS OLUOCH OCHIENG ..... 4<sup>TH</sup> RESPONDENT  
JAMES OCHIENG AGENGO ..... 5<sup>TH</sup> RESPONDENT  
ONESMUS KIMUYU KIMEU ..... 6<sup>TH</sup> RESPONDENT  
MICHAEL OMWANDA AJWANG ..... 7<sup>TH</sup> RESPONDENT  
PETER WESONGA OUNA ..... 8<sup>TH</sup> RESPONDENT  
KHADIJA ALI ..... 9<sup>TH</sup> RESPONDENT**

*(An application for stay of execution and enforcement proceedings pending hearing and determination of intended appeals from the judgment and decree of the Environment and Land Court of Kenya at Nairobi (Oguttu Mboya, J.) delivered on 31st January, 2025 and from the ruling and order of the Environment and Land Court at Nairobi (C.G. Mbogo, J.) dated 12th August, 2025 in ELC No. E106 of 2021)*



## RULING

1. By a Notice of Motion dated 17<sup>th</sup> December, 2025, Sauti Savings & Credit Co-operative Society (the applicant), under Rule 5(2)(b) of the Court of Appeal Rules, 2022, and all other enabling provisions of the law, the applicant seeks the following orders:
  - “ 1. Spent;
  2. Pending the hearing and determination of this application, execution of and all proceedings to enforce the judgment and decree delivered in Nairobi Environment & Land Court CC No. E106 of 2021 by the Honourable Justice Oguttu Mboya on 31<sup>st</sup> January, 2025 as well as the Ruling and order given on 12<sup>th</sup> August, 2025 by the Honourable Justice C.G Mbogo in the same case be stayed;
  3. Execution of and all proceedings to enforce the judgment and decree delivered in Nairobi Environment & Land Court CC No. E106 of 2021 by the Honourable Justice Oguttu Mboya on 31<sup>st</sup> January, 2025 be stayed pending the hearing and determination of the intended appeal to be filed by the Applicant against the said judgment and decree;
  4. The costs of and occasioned by this application be made to abide the result of the applicant’s intended appeal.”
2. The matter was heard on 9<sup>th</sup> March, 2026 by way of written submissions and oral highlights by the parties. Learned Counsel Mr. Sundeep Sarvia together with Ms. Satar appeared for the applicant, Mr. Wesonga learned counsel appeared for the 1<sup>st</sup> to 8<sup>th</sup> respondents, while Mr. Abdurahaman Mohamed, learned counsel, is on record for the 9<sup>th</sup> respondent.
3. To put the application in context, we shall give a brief background. The main issue in dispute is the judgement entered in favour of the respondents, and a ruling of the superior court which dismissed a preliminary objection raised by the applicant, Sauti Savings & Credit Co-operative Society who was the 1<sup>st</sup> respondent in the suit.
4. By a plaint dated 11<sup>th</sup> March, 2022, the respondents alleged to have purchased various plots from the applicant and despite paying the full purchase price, the applicant did not process the title deeds. The respondents averred that the applicant instead had started excavating and selling parts of the suit property without the respondents’ authority with a view to dispossessing the respondents of their possession and ownership of the plots. The respondents accused the applicant of fraud and outright theft and prayed inter alia that the court compel the applicant to issue the respondents with original title deeds in respect of the allocated plots or in the alternative, the applicant be compelled to compensate the respondents for the loss of their plots at current market value and interest thereon. The applicant filed their defence on 5<sup>th</sup> July, 2022 denying all the allegations. The applicant further averred that the court had no jurisdiction to entertain the matter.
5. When the matter was set for hearing, the parties filed an executed a partial consent dated 14<sup>th</sup> June, 2023, which consent was adopted by the superior court. The terms of the consent were that prayers i to v in the plaint be dispensed with and that the only issue for determination by the court was the amount of compensation that was due to the respondents. Thus, from the consent, the single issue that the



- court was left to decide was the compensable amount payable to the respondents for having bought the plots in 1994 and at the time of filing the suit in 2021, they had not been issued with titles to their plots.
6. The superior court considered the matter and entered judgment in favour of the respondents. The superior court, in its judgment, awarded kshs 4.3 million per plot to the respondents. Already Kshs 900,000 per plot had been paid to the plaintiffs, so the amount released to the plaintiffs totaled kshs 17.1 million released directly to the plaintiffs. A balance of about kshs 39.9 million is secured in the joint accounts between the applicant and the respondents' advocates.
  7. The applicant's case is premised on the grounds stated on the face of the application, and a supporting affidavit sworn on 17<sup>th</sup> December, 2025 by one David Elley Ndwigah, the chairman of Sauti Savings & Credit Cooperative, the applicant herein, and a further affidavit sworn on 2<sup>nd</sup> March, 2026. The applicant filed their written submissions dated 5<sup>th</sup> March, 2026.
  8. From the grounds of the application and the supporting affidavit, the applicant's counsel avers that in the supporting affidavit, they have annexed two memorandums of appeal and further that the actual appeals have also been filed, the appeals being Civil Appeals No. E020 of 2026 and E024 of 2026. At paragraph 7 of their submissions, the applicant has summarised the grounds of appeal into seven separate grounds for the first appeal (E020 of 2026) and five separate issues on the second appeal, E024 of 2026. The applicant aver that from the grounds, the appeals are not frivolous, that they are arguable and that they go to the very root of the decision that the appellant is challenging. The appeals, the applicant aver, challenge the basis upon which the quantum of damages awarded was based, that it ought to have been based on frustration rather than breach of contract. Based on these grounds, the appeal is not frivolous but arguable.
  9. On the issue of nugatory, the applicant avers that in view of the amounts that have been awarded and in view of the status of the respondents, it is very unlikely that the applicant would recover from the respondent any amounts that would have been paid to the respondents under either the impugned judgment or the ruling. The applicant relies on several authorities contained on their list of authorities. The authorities provide that where an applicant in an application for stay pending appeal raises an issue that the respondents will not be able to refund any sums that have been paid in the event of success of the appeals, the burden of proof to show that such refund can be made shifts upon the respondents. In this case, the applicant avers that the respondents have not adduced any evidence demonstrating their means as evidence that they would be able to refund whatever is paid to them.
  10. The application is opposed by the all the respondents. The 1<sup>st</sup> to 8<sup>th</sup> respondents have opposed the application vide a replying affidavit by Vincent Keya Omuse, the 1<sup>st</sup> respondent, deponed on 19<sup>th</sup> January, 2026. They have also filed their written submissions dated 2<sup>nd</sup> March 2026. The 9<sup>th</sup> respondent also opposes the application and has filed a replying affidavit dated 24<sup>th</sup> February, 2026 and written submissions dated 25<sup>th</sup> February, 2026. The respondents aver that the application is devoid of merit and fails to satisfy the well-settled principles under Rule 5(2)(b). They aver that the intended appeal fails to meet the limb of arguability because the applicant merely made sweeping statements that its intended appeals are "arguable and bound to succeed" without identifying any specific error of law, misdirection, or improper exercise of discretion by the learned Judge.
  11. As to nugatory, the 1<sup>st</sup> to 8<sup>th</sup> respondents aver that it is settled law that a money decree does not ordinarily render an appeal nugatory, unless the applicant demonstrates that the respondents is impecunious and incapable of refunding the decretal amount. They submit that bare allegations of inability to refund do not discharge the legal burden placed upon an applicant under Rule 5(2)(b). They conclude by averring that the application is devoid of merit, brought in bad faith, and intended



solely to delay execution and therefore the Notice of Motion dated 17<sup>th</sup> December, 2025 ought to be dismissed with costs.

12. The 9<sup>th</sup> respondent also opposes the application and avers that the applicant has failed to satisfy the two limbs of arguability of the intended appeal and that the appeal, if successful, would be rendered nugatory if the orders prayed for were not granted. She avers that the application constitutes a continuation of a pattern of delay designed to deny the respondents the fruits of a lawful judgment delivered on 31<sup>st</sup> January, 2025. She further avers that mere dissatisfaction with a judgment or repetition of arguments rejected by the trial court does not constitute arguability. The 9<sup>th</sup> respondent concludes her submissions by stating that no arguable appeal has been demonstrated, the intended appeal will not be rendered nugatory, and that the applicant is approaching the Court with unclean hands. Thus, they pray that the Notice of Motion dated 17<sup>th</sup> December, 2025 is devoid of merit, constitutes an abuse of the Court process, and is calculated to delay satisfaction of a lawful decree and should therefore be dismissed with costs.
13. We have carefully considered the motion and the supporting affidavit, the rival submissions by the parties, the grounds of opposition, the authorities cited and the law.
14. The applicant's motion is brought under Rule 5(2)(b) of this Court's Rules which provides:

“Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may:

  - (a) .....
  - (b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”
15. The principles for our consideration in the exercise of our unfettered discretion under Rule 5(2)(b) to grant an order of stay are now well settled. First, an applicant has to satisfy the Court that there is an arguable appeal, and secondly, the applicant must demonstrate that unless an order of stay is granted the appeal, if successful, would be rendered nugatory. These principles are well set out in Stanley Kangethe Kinyanjui vs Tony Ketter & Others [2013] eKLR 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;
  - ii. The discretion of this Court under Rule 5(2) (b) to grant a stay of 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;
  - iv. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances;
  - v. An applicant must satisfy the Court on both the twin principles.
  - vi. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised;



- 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;
- 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;
- ix. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling;
- 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 will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

16. In accordance with numerous authorities relating to applications for stay of execution pending appeal, it is necessary for us, in exercising our discretion under rule 5(2)(b) of the Rules, to consider, firstly, whether the applicant’s appeal is an arguable appeal, and, secondly, whether the appeal, if successful, will be rendered nugatory if no stay is granted.
17. On the first limb of arguability, we have come to the conclusion that, given the total judgment amount awarded and the fact that the respondents have not adduced any evidence on their means to repay the sums to be paid if the appeal succeeded, the appeal is not frivolous or unarguable. Further, a cursory perusal of the pleadings herein certainly reveals that indeed the applicant has an arguable appeal since the applicant has met the fundamental issues relating to the jurisdiction of the Court by filing the notices of appeal and the respective appeals. In our view, the intended appeal is not frivolous.
18. As to the second issue, whether a successful appeal would be rendered nugatory if there is no stay, the applicant suggests that if the decretal amount is paid to the respondents and then reduced substantially on appeal, the respondents will not be able to repay the difference between the decretal amount and that awarded by this Court. The applicant avers further that the amount decreed is so large that the payment of that amount will destabilise the applicant’s financial position resulting in immediate irreparable injury to it and its members, the applicant being a savings & credit co-operative society. Apart from frequently repeating the assertion of likely destabilisation and the inability of the respondents to repay back the amount in case judgment was in favour of the applicant, the applicant gave no evidence or submissions as to how and to what extent the applicant would be destabilised. No accounts were produced by the applicant to support the destabilisation theory. We are therefore not satisfied that the applicant has shown that a successful appeal on judgment and decree will be rendered nugatory if no stay is granted.
19. Consequently, and for the foregoing reasons, the applicant has not persuaded this Court that the application is deserving of the orders sought. This Court, therefore, finds no merit in the Notice of Motion dated 17<sup>th</sup> December, 2025. Accordingly, the Notice of Motion dated 17<sup>th</sup> December, 2025 is hereby dismissed with costs to the respondents.

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF APRIL, 2026.**

**D. K. MUSINGA, (PRESIDENT)**

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**JUDGE OF APPEAL**

**PAUL LILAN**



.....  
**JUDGE OF APPEAL (DR.) J. O. OKELLO**

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

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

**Signed**

**DEPUTY REGISTRAR.**

