Safqa Limited v Ragen (Suing in the Public Interest) & 6 others (Civil Appeal (Application) E119 of 2025) [2026] KECA 748 (KLR) (24 April 2026) (Ruling)

Neutral citation: [2026] KECA 748 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL (APPLICATION) E119 OF 2025

SG KAIRU, KI LAIBUTA & GW NGENYE-MACHARIA, JJA

APRIL 24, 2026

BETWEEN

SAFQA LIMITED ..... APPLICANT

AND

AINEA RAGEN (SUING IN THE PUBLIC INTEREST) ..... 1ST RESPONDENT

CHIEF LAND REGISTRAR, MOMBASA ..... 2ND RESPONDENT

COUNTY LAND ADJUDICATION AND SETTLEMENT OFFICER .... 3RD RESPONDENT

NATIONAL LAND COMMISSION ..... 4TH RESPONDENT

COUNTY GOVERNMENT OF MOMBASA ..... 5TH RESPONDENT

CEC FOR LANDS, HOUSING AND URBAN PLANNING MOMBASA COUNTY ..... 6TH RESPONDENT

ATTORNEY GENERAAL ..... 7TH RESPONDENT

(Being an application for stay of execution pending appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Mombasa (S. M. Kibunja, J.) delivered on 12{{^th}} March 2025 in Petition No. E008 of 2023)

RULING

1. The 1st respondent, Ainea Ragen, commenced a public interest litigation by way of a petition against the applicant, Safqa Limited, and the 2nd to 7th respondents (the Chief Land Registrar, Mombasa; the National Land Commission; the Mombasa County Land Adjudication and Settlement Officer, the County Government of Mombasa; the CEC for Lands, Housing and Urban Planning, Mombasa County; and the Attorney General) in the Environment and Land Court at Mombasa in ELC

Petition No. E008 of 2023 seeking, inter alia, a declaration that plot No. 1580 Mwembelegeza Scheme in Mombasa County (the suit property) was public utility land reserved for a bus park; an order compelling the 5th respondent (the County Government of Mombasa) to demolish all and every structure and developments erected by the applicant on the suit property; an order directing cancellation of the title held by the applicant; and costs of the suit.

2. The 1st respondent's case was that the applicant unlawfully acquired the suit property from one Antony Karisa Charo in 2015 and developed a shopping mall thereon while the land had been reserved for public use since the planning of the Mwembelegeza Scheme in 1998; that the 4th respondent had placed a caveat on the suit property in 2007 to prevent any dealings therewith; that, despite registration of the caveat, the 2nd respondent (the Chief Land Registrar) issued a title document to Antony Karisa Charo in 2014; and that, soon thereafter, the said Antony Karisa Charo sold the suit property to the applicant.

3. In opposition to the petition, the applicant averred that it conducted due diligence on the title register, relied on the Green Card and title documents; and that it had no knowledge of the designation of the suit property as a public utility. Accordingly, it prayed that the petition be dismissed.

4. In its judgment dated 12th March 2025, the ELC (S. M. Kibunja, J.) found that the applicant had failed to prove that it was a bona fide purchaser for value without notice; that it had acquired the title to the suit property unprocedurally; and that the land remained a public utility not available for alienation. Consequently, the court declared the applicant's title invalid, ordered its cancellation, restrained the applicant from any or any further dealings in the suit property, and directed removal of all developments from the suit property within 90 days from the date of judgment, failing which the 5th respondent (the County Government of Mombasa) do demolish the developments at the applicant's cost. In addition, the court ordered that the 1st respondent's costs of the petition be borne by the applicant.

5. Aggrieved by the learned Judge's decision, the applicant moved to this Court on appeal faulting the learned Judge for, inter alia: holding that the certificate of official search was not part of the due diligence conducted by the applicant; holding that the said Antony Karisa Charo did not have a good title to the suit property which he could pass to the applicant; making adverse findings against the said Karisa Charo, who was not a party in the petition; holding that the applicant failed to prove that it was a bona fide purchaser; and in failing to consider the Part Development Plans for the Scheme produced by the applicant in evidence. The 14 grounds on which its appeal is anchored are set out in its memorandum of appeal dated 2nd July 2022.

6. By a Notice of Motion dated 17th July 2025 made under rule 5(2)

   (b) of the Court of Appeal Rules, 2022 the applicant seeks stay of execution of the impugned judgment pending hearing and determination of its appeal.

7. The applicant's Motion is supported by the annexed affidavit of Abdulaziz Suleiman, a director of the applicant, sworn on 17th July

   2025 essentially deposing to the process under which the applicant obtained title to the suit property and expounding on the grounds of appeal contained in its memorandum.

8. In addition, the Motion is made on 9 grounds, most of which appear to advance arguments on the merits of its appeal on which we hereby refrain from commenting. However, relevant to the Motion before us, the applicant contends: that the applicant has an arguable appeal; and that the intended appeal (if successful) would be rendered nugatory if the orders sought are not granted.

9. In support of the Motion, learned counsel for the applicant, M/s.Mugambi & Company, filed written submissions dated 6th August 2025 citing the cases of Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR, which sets out the twin principles to be satisfied for grant of stay orders pursuant to rule 5(2) (b) of the Rules of this Court; Ahmed Musa Ismael v Kumba Ole Ntamorua & 4 Others [2014] eKLR; and Caroline Awinja Ochieng & Another v Jane Anna Mbithe Gitau & 2 Others [2015] KECA 450 (KLR where this Court held that eviction and subsequent demolition of structures and re-development of the suit property would damage and alter the nature, character and substratum of an intended appeal. They urged the Court to grant the applicant's Motion.

10. The 1st respondent oppose the applicant's Motion vide his replying affidavit sworn on 28th July 2025 contending, among other things, that the applicant is "on a wild goose chase", fighting a losing battel with no probability of success; that the Motion is unmerited, a waste of judicial time, and an abuse of the Court process; and that it should be dismissed with "punitive costs".

11. In his written submissions dated 1st August 2025, the 1st respondent cited 3 judicial authorities essentially focusing on the demerits of the applicant's appeal on which we need not pronounce ourselves at this point in time.

12. The 2nd to 7th respondents did not reply to the applicant's Motion or file any written submissions.

13. As this Court pronounced itself time and again, for an applicant to merit stay orders pursuant to rule 5(2) (b) of the Court of Appeal Rules pending appeal, he or she must demonstrate to the satisfaction of the Court that he or she has an arguable appeal; and that the appeal (or intended appeal as the case may be), if successful, would be rendered nugatory absent stay. The two requirements constitute what is commonly referred to as the twin principles that must be satisfied before such orders can avail (see Anne Wanjiku Kibeh v Clement Kungu Waibara and IEBC [2020] eKLR; and Yellow Horse Inns Limited v A. A. Kawir Transporters & 4 Others [2014] eKLR).

14. A cursory look at the applicant's draft memorandum of appeal in the backdrop of the record as put to us reveals numerous substantive issues of law and fact deserving of the Court's inquiry on appeal. Moreover, and as this Court has often stated, even one bona fide ground of appeal is adequate to satisfy the first limb of the twin principle. University of Nairobi v Ricatti Business of East Africa [2020] eKLR is a case in point.

15. Regarding the second limb of the twin principle, the term "nugatory" was defined in Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA p.227 at p.232 as "worthless, futile or invalid". It also means "trifling". Having concluded that the applicant's intended appeal is arguable, the remaining question is whether the intended appeal, if successful, would be rendered nugatory if the stay orders sought were not granted.

16. Having carefully examined the impugned ruling, the applicant's Motion, the grounds on which it is anchored, the affidavits in support and in reply, the rival submissions of learned counsel for the applicant and those of the 1st respondent as well as the cited authorities, we form the view that the intended appeal would be rendered worthless or futile if we declined to grant the orders sought. To our mind, enforcement of the orders sought to be stayed prior to the hearing and determination of the appeal would result in demolition of the developments on the property.

17. In the case of African Safari Club Limited v Safe Rentals Limited [2010] eKLR, this Court held:

> " ...with the above scenario of almost equal hardship by the parties, it is incumbent upon the Court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... We think that the balancing act is in keeping

with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable."

18. On the authority of African Safari Club Limited (ibid), the Court is invited to determine which party's hardship is greater. Put differently, would it serve the course of justice to decline, at this stage, the orders sought with the effect of having the developments on the suit property demolished before its appeal is determined? We think not.

19. What that means is that, if the applicant's prayer for stay of execution of the impugned judgment is declined and its appeal eventually succeeds, the consequent loss would be so highly disproportionate balanced as against that of the respondents as to render its intended appeal nugatory. On the other hand, the 1st respondent and the public which he represents only need to wait a little longer before they can recover the bus park should the applicant's appeal fail.

20. Having carefully examined the impugned judgment, the applicant's Motion, the grounds on which it is anchored, the affidavits in support and in reply thereto, the written and oral submissions of learned counsel, we form the view that the applicant has satisfied the conjunctive limbs of the twin principles for grant of stay orders under rule 5(2) (b) of the Rules of this Court. Accordingly, its Motion dated 17th July 2025 succeeds and is hereby allowed. We make no order as to costs.

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

S. GATEMBU KAIRU, FCIArb, CArb.

JUDGE OF APPEAL

.....

DR. K. I. LAIBUTA CArb, FCIArb.

JUDGE OF APPEAL

.....

G. W. NGENYE-MACHARIA

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR