



REPUBLIC OF KENYA



KENYA LAW
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**Ahmed v Varsani & 4 others (Civil Application 357 of 2024)
[2025] KECA 102 (KLR) (24 January 2025) (Ruling)**

Neutral citation: [2025] KECA 102 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 357 OF 2024
P NYAMWEYA, WK KORIR & GV ODUNGA, JJA
JANUARY 24, 2025**

BETWEEN

SALAT SOMO AHMED APPLICANT

AND

JADAVJI GOVIND VARSANI 1ST RESPONDENT

PREMBAI JADAVJI VARSANI 2ND RESPONDENT

THE CHIEF LAND REGISTRAR 3RD RESPONDENT

THE REGISTRAR OF LANDS MAVOKO 4TH RESPONDENT

VIPUL JADVAJI GOVID VARSANI 5TH RESPONDENT

(Being an application for stay of execution pending the hearing and determination of an appeal against the Ruling and Orders of the Machakos Environment and Land Court (Christine Ochieng, J) dated and delivered on 19th June, 2024 in ELC Case No. E013 of 2023)

RULING

1. The applicant's notice of motion dated 10th July 2024 and brought primarily under rule 5(2)(b) of the [Court of Appeal Rules](#), seeks a stay of execution of the ruling/order made in ELC Case No. E013 of 2023 delivered on 19th June 2024.
2. Although the applicant's supporting affidavit does not bring out with clarity the substance of the decision with which the applicant is aggrieved, from the attached copy of the ruling dated 19th June 2024, it is apparent that the ruling arose from two applications dated 6th December 2023 and 15th February 2024 taken out by the 2nd and 5th respondents seeking, inter alia: stay of the orders issued on 20th November 2023; setting the same aside; granting leave to the 2nd respondent to respond to the applicant's application dated 25th April 2023; seeking to have Vipul Jadavji Govind Varsani, the 5th



- respondent, joined to the suit as a defendant with the necessary amendments; and restoring the parties to the status quo as at 13th March 2023 by putting back the 2nd and 5th respondents in possession of the suit property.
3. Upon hearing the two applications, the learned Judge (C. Ochieng, J) found them merited and directed that: the 5th respondent be joined as the 5th defendant in the suit; that the applicant amends his plaint within 14 days; that the respondents amend their defences within 14 days of service thereof; that the status quo ante the issuance of the orders of 13th March 2023 be restored; and that the orders issued on 20th November, 2023 be set aside.
 4. In support of the application, the applicant states in his affidavit sworn on 10th July 2024: that he is aggrieved by and intends to appeal against the said decision; that on 13th March 2023, the trial court granted orders maintaining the status quo in respect of parcel No. LR 12715/14287 (Original Number 12715/110/3) pending the hearing and determination of the application dated 21st February 2023 to the effect that the parties were restrained from further developing or transferring the suit property pending the determination of the said application; that the applicant was and has always been in possession of the suit property at the time the order was issued; that the 1st and 2nd respondents ignored the said order and instructed their agents to destroy the applicant's property and evict him therefrom; that on 20th November 2023, the trial court cited the said respondents for contempt of the order issued on 13th November 2023, were denied audience till they purged their contempt and were directed to appear before the court and show cause why they should not be committed to civil jail for 6 months; and that the said respondents never purged their contempt but instead appeared before the court with an elderly ailing woman claiming to be the 2nd respondent and sought for the court's mercy.
 5. According to the applicant, he has strong grounds of appeal with high chances of success premised on the errors by the learned Judge: in setting aside the orders of 20th November 2023 citing the respondents for contempt; in joining the 5th respondent as the 5th defendant; in failing to examine the authenticity of the 1st Defendant's death certificate; in finding that the status quo ante was that the respondents were in possession of the suit property; in failing to find that the 1st and 2nd defendants had always had actual knowledge of the status quo orders and were not in possession of the suit property when the orders were issued which orders they flouted; and in failing to find that the 1st and 2nd respondents were found to be in contempt of the court order.
 6. The applicant deposed that the 1st and 2nd respondents had threatened to evict him from the suit property and had set into motion the process of executing the orders.
 7. In response, Vipul Jadavji Govind Varsani, the 5th respondent swore an affidavit on 27th September 2024 in which he deposed that he applied for the setting aside of the orders issued on 20th November 2023 and for joinder to the suit on the ground that he had been unlawfully evicted from the suit property and his application was allowed; that he peacefully returned to the suit property on 24th June 2024 and regained possession thereof pursuant to the order of the court which the applicant willingly obeyed; that in those circumstances, there was nothing capable of being stayed; and that the 1st, 2nd and 5th respondent acquired the suit property in 1997 and had carried out developments thereon and continued to be in possession thereof.
 8. We heard the application on the Court's virtual platform on 30th September 2024 when the applicant was represented by learned counsel, Ms Mwanga who held brief for Mr Kabata for the applicant. Although there was no appearance for the respondents, the 1st, 2nd and 5th respondents had filed their written submissions.



9. Ms Mwanga relied on her written submissions in which it was contended that: the substratum of his application is the ownership and possession of the suit property possession and enjoyment of which the applicant asserts; that based on the case of *Public Service Commission & 72 Others v Okiya Omtatah & 4 Others* [2021] KECA 392 (KLR), an arguable appeal is not one which must necessarily succeed; that in granting possession to the respondents, the trial court disregarded the applicant's evidence and condoned the violation of its orders; that no prejudice would be suffered if the orders sought in the present application were granted since the subject matter is land; and that based on the decision in *Reliance Bank Ltd v Norlake Investment Ltd* [2002] 1 EA 227, the loss, if any, can be compensated by way of damages.
10. On behalf of the 1st, 2nd and 5th respondents, it was reiterated that, as the order sought to be stayed has already been executed, there is nothing to stay; that the order sought to be appealed against arose from a preliminary application and did not determine the rights of the parties; that there is no demonstration of how the intended appeal will be rendered nugatory if the stay is not granted or by the joinder of the 5th respondent to the proceedings or setting aside of the orders of 20th November 2023; and that since the order of status quo restrained the parties from developing or transferring the suit property, the applicant will not suffer any prejudice if the orders are executed.
11. We have considered the application and the affidavits in support thereof and in opposition thereto. This Court, in its numerous decisions, has crystallised the basis for the exercise of this Court's jurisdiction under rule 5(2)(b) aforesaid. The exercise of this jurisdiction is original, independent and discretionary (see *Githunguri v Jimba Credit Corporation Ltd No (2)* (1988) KLR 838). It is a procedural innovation designed to empower the Court to entertain interlocutory application for the preservation of the subject matter of the appeal where one has been filed or is intended (see *Equity Bank Ltd v West Link Mbo Limited* [2013] eKLR. It only arises where the applicant has lodged a notice of appeal or the appeal itself (see *Safaricom Ltd v Ocean View Beach Hotel & 2 Others* Civil Application No.327 of 2009 UR).
12. The conditions to be met before a party can obtain relief under rule 5(2)(b), as enunciated in case law, are that the applicant has to demonstrate that the appeal is arguable on the one hand and, on the other hand, that if the stay sought is not granted, the appeal or the intended appeal, as the case may be, will be rendered nugatory (see *Githunguri v Jimba Credit Corporation Ltd No (2)* (*supra*). By the term arguable", it is not meant an appeal or an intended appeal that will succeed, but one which raises a bona fide issue worth of consideration by the Court (see *Kenya Tea Growers Association & Another v Kenya Planters Agricultural Workers Union*, Civil Application No. Nai. 72 of 2011 UR). An appeal need not raise a multiplicity or any number of such points, and a single arguable point is sufficient to earn an applicant such a relief, subject to the satisfaction of the second condition (see *Damji Praji Mandavia v Sara Lee Household Body care (K) Ltd* Civil Application No. Nai 345 of 2005 (UR). It is therefore trite that demonstration of one arguable point will suffice (see *Kenya Railways Corporation v Ederman Properties Ltd* Civil Appeal No. Nai. 176 of 2012; and *Alimohamed Musa Ismael v Kimba Ole Ntamorua & 4 others* Civil Appeal No. Nai. 256 of 2013.)
13. As for the second requirement, an appeal or intended appeal is said to be rendered nugatory where the resulting effect is likely to be irreversible or, if it is not reversible, whether damages will reasonably compensate the party aggrieved (see *Stanley Kangeche Kinyanjui v Tony Keter & 5 others* Civil Appeal No. 31 of 2012). Loss to the parties on both sides of the appeal plays a central role in the determination since it is what the Court must strive to prevent by preserving the status quo (see *Total Kenya Limited versus Kenya Revenue Authority* Civil Application No. 135 of 2012).



14. Both limbs must be demonstrated before a party can obtain a relief under rule 5(2) (b) (see *Republic v Kenya Anti-Corruption Commission & 2 others* (2009) KLR 31; *Reliance Bank Ltd v Norlake investments Ltd* (2012) IEA 22); and *Githunguri v Jimba Credit Corporation* (*supra*)..
15. We agree that the issue of whether or not the 5th respondent was properly joined to the proceedings, being an exercise of discretion which must be invoked judiciously, though may not necessarily succeed, is not a frivolous one, hence the intended appeal is arguable. We need not say more at this juncture so as not to embarrass the bench that will hear the appeal.
16. On the nugatory aspect, stay orders as opposed injunction generally maintain the status quo pending the hearing and determination of the appeal, if filed, or the intended appeal. It is, generally not a relief that reverses the decision being appealed against by reversal of the actions already taken in the execution of the orders sought to be stayed. In this case, the respondents' position is that the order was executed when the applicant voluntarily granted the 1st, 2nd and 5th respondents access to the suit property. The applicant did not file any further affidavit to refute this position. The order having been executed, we are of the view and hold that the applicant has failed to satisfy that unless we grant the orders sought the intended appeal will be rendered nugatory.
17. The orders of 20th November 2023 arose from an application that sought to cite the respondents for contempt. The effect of the orders sought to be stayed is that the parties will be heard and a final determination made in the matter. The applicant has not explained how the intended appeal will be rendered nugatory absence stay of execution hence we are not satisfied that the second limb in applications of this nature has been met.
18. In the premises, we decline to grant the orders sought and dismiss the Motion dated 10th July 2024 with costs.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY, 2025.

P. NYAMWEYA

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

