



Muvake & another v Co-operavite Bank of Kenya Limited (Civil Application 396 of 2024) [2025] KECA 279 (KLR) (21 February 2025) (Ruling)

Neutral citation: [2025] KECA 279 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 396 OF 2024
DK MUSINGA, FA OCHIENG & WK KORIR, JJA
FEBRUARY 21, 2025**

BETWEEN

SARAH MUMO MUVAKE 1ST APPLICANT

VADAME GITONGA MUVAKE 2ND APPLICANT

AND

CO-OPERAVITE BANK OF KENYA LIMITED RESPONDENT

(An application for stay of execution of the judgment of the High Court of Kenya at Kajiado (Mutuku, J.) dated 25th July 2024 in Civil Suit No. 16 of 2020)

RULING

1. Before us is an application dated 1st August 2024, filed under a certificate of urgency. It is an application for orders;

“... staying the implementation of the judgment of the High Court of Kenya at Kajiado.”

2. The said judgment was delivered on 25th July 2024.

3. The application was premised upon grounds which were set out on the face thereof, and which can be summarized thus;

“6.The applicants face the risk of the sale of their residential house, and the eviction from their matrimonial home, in which they had lived for the last 48 years.”

4. This Court was told that the learned trial judge had, in the judgment, given the applicants 14 days to vacate the suit property.



5. Being dissatisfied with the judgment, the applicants lodged a notice of appeal. They also wrote to the trial court, requesting that they be supplied with the record of the proceedings at the trial court.
6. The applicants have requested this Court to order that the implementation of the judgment be stayed until the appeal is heard and determined.
7. It was the considered opinion of the applicants that if the court does not stay the implementation of the judgment, their appeal would be rendered nugatory.
8. When canvassing the application before us on 14th October 2024, Mr. Jaoko, learned advocate for the applicants, reiterated that the suit property L.R. No. Kajiado/kaputiei/north/19453 was their matrimonial home, where they are resident even today.
9. In the circumstances, they believe that if the suit property was sold or if they were evicted therefrom, before the determination of their appeal, their said appeal would be rendered nugatory.
10. The applicants also submitted that they had an arguable appeal, which ought therefore, to be heard and determined on merits, before it can be decided whether or not the judgment in issue could be implemented.
11. As an example of an issue deemed to give rise to an arguable appeal, is the applicants' assertion that the respondent did not serve the statutory notice contemplated under Section 96(2) (3), (8) of the [Land Act, 2012](#).
12. A second example of an issue deemed to be arguable on appeal, relates to the failure by the respondent to provide the applicants with information concerning the quantum of the outstanding loan.
13. The Court was told that the principal borrower died on 13th June 2020. Thereafter, the 1st applicant wrote to the respondent, informing it about the demise of the principal borrower, and requesting the respondent's information about the quantum of the outstanding loan.
14. The applicants said that the respondent failed to respond to their two letters dated 10th July 2020 and 13th July 2020.
15. When the Court inquired from Mr. Jaoko Advocate whether or not the loan had since been paid off, counsel said that he believed that the outstanding balance was about Kshs.7.5 million.
16. Nonetheless, the applicants' advocate still blamed the respondent for being "dumb quiet" when the applicants sought information concerning the outstanding balance.
17. When the Court prodded further, the applicants confirmed that since the demise of the principal borrower on 13th June 2020, the applicants had not made any payment to the bank.
18. The respondent opposed the application through a replying affidavit and also by way of written submissions.
19. In the first instance, the respondent emphasized that a statutory notice had been duly served. The said notice was served via the postal address which the principal borrower had given as his address for service.
20. The applicants did not challenge the fact that the principal borrower had given his address of service, and that, that is the address to which the respondent sent the statutory notice.
21. Instead, the applicants submitted that because some officers of the bank had visited the suit property which the principal borrower had offered to charge as security for the loan; the bank ought to have physically delivered the statutory notice to the suit property.



22. By effecting service in that manner, the bank also appears to have complied with the contractual obligation in relation to how the statutory notice ought to have been served.
23. We therefore find that the applicants failed to satisfy this Court that they have an arguable appeal.
24. It is well settled that a party seeking a stay of execution needs to satisfy the court that he has an arguable appeal, and also that if a stay is not granted, the appeal, if successful, would be rendered nugatory.
25. Rule 5(2)(b) is a procedural provision that allows the Court to protect the subject matter of an appeal when it has already been filed. In the case of *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others*, (supra), the Court held that:
 - 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 impecunity, the onus shifts to the latter to rebut by evidence the claim. *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403."
26. Having come to the conclusion that the applicants have failed to persuade us that they have an arguable appeal, that implies that the application is for rejection.



- 27. In the circumstances, we need not consider whether the appeal would be rendered nugatory if the order for stay is not granted. But even if we were to do so, the respondent is a reputable commercial bank and would be able to pay any damages that the applicants may be awarded if their appeal were to succeed. The appeal would therefore not be rendered nugatory.
- 28. We find that the application lacks merit. It is therefore dismissed. The applicants will pay the respondent, the costs of the application.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY, 2025.

D. K. MUSINGA, (PRESIDENT,)

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

