



REPUBLIC OF KENYA



**Mokua v Mokua (Civil Application E078 of 2023)
[2025] KECA 238 (KLR) (13 February 2025) (Ruling)**

Neutral citation: [2025] KECA 238 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E078 OF 2023
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
FEBRUARY 13, 2025**

BETWEEN

PAUL NYANGARESI MOKUA APPLICANT

AND

JONES MOKUA RESPONDENT

(Being an application for an injunction and stay of execution on costs of the judgment of (J.M. Mutungi, J.) dated 8th October 2019 in Case No. 181 of 2013)

RULING

1. The application before this Court is the Notice of Motion dated 28th April 2023 brought under Certificate of Urgency and pursuant to rule 5(2)(b) of the Court of Appeal Rules 2010, seeking:
 - i. to stay the orders on costs issued on 8th October 2023 in ELC No. 181 of 2013 (Mutungi, J.) pending the determination of the application and appeal;
 - ii. a temporary injunction restraining the respondent his servants and/or agents jointly and severally from disposing off, selling, transferring dealing and/or interfering whatsoever with the suit property Central Kitutu/Daraja Mbili/1791 pending the determination of the application and appeal.
 - iii. Costs.
2. The application is supported by the affidavit of even date sworn by Paul Nyangaresi Mokua, the applicant herein.
3. The applicant in his capacity as the legal representative of his late father's estate, had filed ELC No. 1818 of 2013, against the respondent seeking an order of reversion and cancellation of title No. Central Kitui/Daraja Mbili/1791 from the names of the respondent and rectification of the register to the name of Mokuol Olisanda, an order of injunction restraining the respondent; by himself, his servants and/



- or agents from trespassing on the said parcel and an alternative prayer seeking damages for the value of the land. Eventually, judgment was entered in essence dismissing the applicant's suit and condemning the applicant to pay costs.
4. The applicant then lodged an appeal through Ochoki & Co Adv, whom the applicant had instructed to take the matter over from Omariba & Co. Advocates.
 5. In the meantime, the respondent commenced the execution for his taxed costs of Kshs.519,995/=.
 6. It is the applicant's contention that the notice of appeal filed by Omariba & Co. Advocates, was filed without instructions and that the applicant still has a pending application to have the notice of appeal filed by Bruce Odeny as the one properly on record.
 7. The respondent in opposing the application through the replying affidavit dated 2nd May 2024, sworn by Jones Mokaya, points out that, the applicant aggrieved by the judgment of the superior court instructed Ochoki & Company to lodge a Notice of Appeal which was lodged on 22nd October 2019, but the said notice was never served on the respondent, nor his advocates on record. To demonstrate that there is no arguable appeal, the respondent argues that the advocate on record for the applicant in the superior court was the firm of M/s Omariba & Company Advocates as such the Notice filed by M/s Ochoki & Company Advocates was lodged by a stranger, and the other Notice purported to have been lodged by M/s Bruce Odeny & Company dated 26th May 2022 which is still yet to be served on the respondent.
 8. It is further submitted that the trial court dismissed the applicant's application for stay on the grounds that the judgment was a negative order in that it dismissed the suit and there was no order that was made to be complied with, that although the applicant was indulged and directed to ensure the Notice, Record and Memorandum of appeal were filed and served within 10 days of the ruling dated 10th November 2023, he did not comply and as such there is no Notice of Appeal that would even deign to invoke the jurisdiction of this Court.
 9. The respondent also contends that the applicant has not objected to the notice of taxation nor set aside the reference, and nothing would render the appeal nugatory as he is also a farmer, is capable of refunding any taxed costs, and in any event, he has no intention of disposing of the suit property; that the respondent is in full occupation of the suit property, and the injunction sought is meant to interfere with his ownership/enjoyment of the suit property and as such the applicant has failed to show how his appeal would be rendered nugatory and thus, has not satisfied the twin requirements for an application under Rule 5(2)(b) of this court's rules.
 10. Lastly the respondent submits that in any event no orders of stay can be granted as the suit was dismissed and that same was a negative order incapable of being stayed.
 11. With regard to whether the applicant has satisfied the requirements necessary for granting an order for stay/injunction under Rule 5(2)(b), the principles have been set out in several decisions by this court, for instance, in Housing Finance Company of Kenya Limited vs. Sharock Kher Mohamed Ali Hirji & Anor [2015] eKLR, this Court stated:

“The principles governing the exercise of the court's jurisdiction under rule 5(2)(b) of our Rules are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. We need only restate these principles from Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd – Civil Appl. No. Nai. 93/02 (UR), thus: -



“Hitherto, this Court has consistently maintained that for an application under rule 5(2)(b) to succeed, the applicant must satisfy the court on two matters, namely: -

- i. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,
- ii. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”

Both limbs must be demonstrated to exist before one can obtain relief under rule 5(2)(b). (See Republic vs. Kenya Anti- Corruption Commission & 2 Others [2009] KLR 31).

12. In the case of Equity Bank Ltd vs. West Link Mbo Ltd Civil Application 78 of 2011 Githinji, J.A stated:

“From the foregoing, it is clear that Rule 5(2)(b) is a procedural innovation designed to empower the court to entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals.”

13. In the case of Teachers Service Commission vs. Kenya National Union of Teachers & 3 Others, Sup. Court App 16/2015 [205] e KLR;

23. It is clear to us that Rule 5(2)(b) is essentially a tool for preservation. It safeguards the substratum of the Appeal in consonance with principles developed over the years.

.....

[“27] Rule 5(2)(b) of the Court of Appeal Rules is derived from Article 164(3) of *the Constitution*. It illuminated the Court of Appeal’s inherent discretionary jurisdiction to preserve the substratum of the Appeal/intended Appeal.”

14. Before we proceed to consider the application, it is necessary to consider the issue of jurisdiction that has been raised by the respondent regarding the notice of appeal. It is trite law that, for a party to invoke the jurisdiction of this court under rule 5(2)(b), it must first file a notice of appeal in accordance with rule 77 of the Court of Appeal Rules.

15. In Phoenix of EA Assurance Company Limited vs. S. M. Thiga t/a Newspaper Service [2019] eKLR, this Court had the following to say on the matter:

“A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the court cannot confer jurisdiction on itself.”

16. In Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR, the Supreme Court was categorical that:

“A notice of appeal is a primary document to be filed outright whether or not the subject matter under appeal is one that requires leave or not. It is a jurisdictional prerequisite.”

17. The respondent submits that there is no proper notice of appeal on record as the notice lodged on 22nd October 2019 and the notice dated 26th May 2022 were filed before the applicant obtained leave. Upon perusal of the record, we note that the applicant was, on 10th November 2023, upon filing an



application for extension of time to file the Notice of Appeal, allowed to do the same within 14 days from delivery of the ruling on 10th November 2023, which the applicant has failed to do to date.

18. It is this Court's view that it has been clearly established that there is no valid Notice of Appeal and as such this Court has no jurisdiction to deal with the application.
19. Has the applicant demonstrated an arguable appeal? In the case of *Wasike vs. Swala* [1984] 591 KLR this Court held that an arguable appeal is not one that would necessarily succeed but one that merits consideration by the court. An arguable appeal also must not be idle and/or frivolous. The applicant's central issue is that the court erred in dismissing his suit. This Court notes that there is also no valid notice of appeal and as such the jurisdiction of this Court had not been engaged.
20. Whether or not an appeal will be rendered nugatory depends on whether 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 aggrieved party.
21. The applicant has stated that he will suffer irreparable loss and harm owing to the fact that the suit properties will be sold. This court has in the case of *Esso Kenya Limited vs. Mark Makwata Okiya Civil Appeal No. 69 of 1991*:

“...as it is settled law that where the remedy sought can be compensated by an award if damages then the equitable relief of injunction is not available.”
22. We also note that the order being appealed against is an order of dismissal, it is a negative order that cannot be stayed. It is settled law that the issue as to whether a negative order is capable of being stayed is paramount in determining the success or otherwise of an application under 5(2)(b). For instance, this Court in the case of *George Ole Sangui vs. Kedong Ranch Limited Civil Application No. Nai. 55 of 2015* citing *Western College of Art and Applied Sciences vs. Oranga & Others* [1976] KLR 63 stated as follows:

“...the dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or refrain from doing anything. It does not confer any relief.... the act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted.”
23. It is our considered view that the applicant wants to circumnavigate the law on negative orders by praying for stay of costs whereas the memorandum of appeal challenges the dismissal of the suit.
24. The upshot of this is that the applicant has not shown that he has an arguable appeal and has also failed to show how his appeal would be rendered nugatory. Having failed to satisfy both limbs of the test in a 5(2)(b) application, the notice of motion dated 28th April 2024 is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF FEBRUARY, 2025.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....



JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

