



Ramji Meghji Gudka Limited v Openda & 2 others (Civil Application E163 of 2023) [2025] KECA 189 (KLR) (7 February 2025) (Ruling)

Neutral citation: [2025] KECA 189 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E163 OF 2023
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
FEBRUARY 7, 2025**

BETWEEN

RAMJI MEGHJI GUDKA LIMITED APPLICANT

AND

SHADRACK OPENDA 1ST RESPONDENT

THE COUNTY ENGINEER, KISII COUNTY 2ND RESPONDENT

KISII COUNTY GOVERNMENT 3RD RESPONDENT

(Being an application for stay of execution pending hearing and determination of the intended appeal from the judgment of the Environment & Land Court at Kisii (Munyao, J.) dated 28th November 2023 in Case No. 138 of 2014)

RULING

1. The application before this Court for consideration is the Notice of Motion Application dated 15th December 2023 brought pursuant to Rules 5(2)(b), 43, 44, 45, 47 & 49 of [Court of Appeal Rules 2010](#), seeking orders to grant stay of execution of the judgment of the Environment & Land Court at Kisii (Munyao, J.) dated 28th November 2023, together with all consequential orders thereto, and in particular the order nullifying the title to LR No. Kisii Municipality/BlockIII/35 in the applicants name, and have the same maintained as public land pending the hearing and determination of the intended appeal. The application is supported by an affidavit of even date as the application sworn by the applicant, Ashwin Ramji Gudka.
2. The grounds in support of the application are as follows:
 - i. The applicant lodged civil proceedings against the respondents seeking a declaration that the applicant was bonafide and registered owner of the suit property.



- ii. The respondents denied the allegations and lodged a counter claim seeking nullification of the title of the suit property in the name of the applicant.
 - iii. Vide judgment dated 28th November 2023, the court dismissed the applicant's case and allowed the counter claim filed by the 3rd respondent.
 - iv. The court further ordered the Land Registrar Kisii County to nullify the title to the suit property in the name of the applicant and have the same maintained as public land.
 - v. The respondents are now at liberty to utilize the suit property on the grounds that it is public land; and with no order barring the Land Registrar Kisii County from implementing the orders of 28th November 2023, the appeal will be defeated.
 - vi. That prior to the orders the applicant had commenced construction of a foundation slab on the property for developing the same when there was interference by the respondents leading to the suit filed by the applicant in the superior court.
3. The 3rd respondent has filed a replying affidavit sworn by Dr. Kennedy Ombamba Mwengei, the Chief Officer in the Department of Lands, Physical Planning and Urban Development Kisii County, opposing the application on the following grounds:
- i. That the application is unmeritorious for failure to meet the twin principles in a rule 5(2)(b) application.
 - ii. That the applicant does not know the boundaries of his alleged plot and has never been in occupation, the applicant did not have except for the lease and search certificate any other legal document to prove issuance of title.
 - iii. That the alleged plot falls squarely on a public road, the Kisii-Kisumu Highway.
 - iv. That stay of execution would not serve any purpose as the applicant is not in possession of the land and there is no development as alleged, and that the applicant has no good title to the suit land as found by the court.

As to whether the applicant has satisfied the requirements necessary for granting an order for stay of execution, we recognize that Rule 5(2)(b) applications arise at an interlocutory stage and the orders issued thereunder are for the purpose of protecting the subject matter of an appeal, the Court of Appeal having yet to finally determine the appeal.

4. It is the applicant's contention that the draft Memorandum of Appeal demonstrates that the intended appeal is not frivolous and that same has a high chance of success. For instance, the question relating to the suit property having been registered in her name; and the respondents on the 27th March 2014 having trespassed on the suit property and destroyed the concrete foundation that had been constructed therein by the applicant, are all arguable grounds, as is the question as to whether the property was on riparian land.
5. The applicant is also apprehensive that given the respondents' conduct of converting the suit property from an intended recreational unit, to a carwash business, suggests that the respondents can easily convert the same property to their own personal selfish gains or even cause wastage of the same; thus, the nullification of the title in the name of the applicant will give the respondents an advantage of dealing with the property in whatever manner they choose, and render the appeal nugatory.
6. The respondent submits that the applicant has not demonstrated that it has an arguable appeal in the all the 6 grounds set out in the draft Memorandum of Appeal; nor demonstrated that the intended



appeal if successful, will be rendered nugatory if the 3rd respondent proceeds to execute the judgement; that the applicant has not demonstrated how the intended appeal will offset the trial court's findings.

7. The respondent argues that stay of execution of the judgement would serve no purpose and nothing will be rendered nugatory since the applicant is not in occupation of the parcel of land and has no development on it as alleged, a stay of execution will merely provide the applicant entry into the plot which will incite serious conflict on the ground.
8. In the case of *Teachers Service Commission v Kenya National Union of Teachers & 3 Others*, Sup. Court App 16/2015 [2015] eKLR:

“(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 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.”

This Court has set out the parameters to be met for an order of stay to be granted in an application under Rule 5(2)(b). In the case of *Alferd Mincha Ndubi v Standard Limited* [2020] eKLR. This Court quoted with approval the case of *Isbmael Kangunyi Thande v Housing Finance Company of Kenya Limited* Civ. Appl No. Nai. 157/2006 “to succeed in an application in 5(2)(b) the applicant has to establish that:

- i. The appeal is arguable.
- ii. The appeal is likely to be rendered nugatory if the injunction is not granted and appeal succeeds.

These principles were restated by this Court *Multi Media University & Another v Prof. Gitile N. Naituli* (2014) eKLR:

“...from the long line of decided cases on Rule 5(2)(b) the jurisprudence is underlined in the case of *Stanley Kangethe Kinyanjui v Tony Ketter & Others* (2013) eKLR as follows:

- i. In dealing with Rule 5 (2) (b) the court exercises original and discretionary jurisdiction,
- ii. The discretion is wide and unfettered if it is just to do so,
- iii. Court becomes seized of the matter only after Notice of Appeal is 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 twin principles,
- vi. Whether Appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised,
- vii. Arguable appeal is not one that will necessarily succeed but one which ought to be argued fully before court and is not frivolous,



- viii. The court must not make a definitive/final finding as to facts of law in an application under Rule 5(2)(b),
 - ix. 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.
9. As to whether the appeal is arguable, we recognize that in the case of *Wasike v 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. In the case of *Attorney General v Okiya Omtatah & Anor* [2019] eKLR this court held that:
- “the principles for our consideration in exercise of our unfettered discretion under Rule 5 (2) (b) to grant an order of stay is well settled. Firstly, the Applicant must satisfy that it has an arguable Appeal. However, this is not to say that the Appeal will necessarily succeed but suffice it that the Appeal is not idle or frivolous.”
10. This Court has held in *Co-operative Bank of Kenya Ltd v Banking Insurance and Finance Union Kenya* [2014] eKLR ‘it is sufficient that the issues raised are arguable.’ In Kisumu Civil Appeal 74/2016, *George O. Gache & Anor’ v Judith Akinyi Bonyo & Others* this Court stated: ‘at this stage the court is not expected to inquire into the merits of the case and whether or not the appeal will succeed. It is sufficient that the applicant has met the threshold as existence of a single bona fide issue is sufficient.’
11. We have carefully considered the grounds set out in the motion and the memorandum of appeal. In our view the appeal is arguable inter alia whether the Court erred in finding that the suit property was public land. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.
12. On the Appeal being rendered nugatory, this Court has held in the case of *Reliance Bank Limited v Norlake Investment Limited* [2002]1 EA 227 that the factors which render an appeal nugatory are to be considered within the circumstances of each case and in so doing the court is bound to consider the conflicting claims of both sides. (See also *Oraro & Rachier Advocates v Co-operative Bank of Kenya* [1999] LLR 1118.
13. 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.”
- In this the court is to decide which party’s hardship is greater.
14. On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds. The Environment & Land Court dismissed the applicant’s suit and allowed the 3rd respondent’s counter claim, the upshot of which was that the applicant’s title was nullified, and the suit property declared public land. We note that it is not disputed that the applicant had made some development on the suit property prior to the



nullification of the applicant's title to the suit property. The speed at which the character of the suit property is being altered lends credit to the applicant's fears.

15. It is this Court's opinion that the appeal would be rendered nugatory, and the appellant would suffer loss which would cause great difficulty in light of the fact that it is yet to be determined with finality whether or not the suit land was public land. We are persuaded that this is land that should be protected; and we are inclined to issue an injunction to preserve the status quo so that the competing rights (or lack of them) are determined after the parties have been heard.
16. We hold that the applicant has satisfied the requirements under Rule 5(2)(b) of this Court's Rules. Accordingly, the notice of motion dated 15th December 2023 is hereby allowed. Costs shall be in the cause.

DATED AND DELIVERED AT KISUMU THIS 7TH 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

