



REPUBLIC OF KENYA



**Kassam & 11 others v Mwangi & 12 others (Civil Appeal (Application)
E668 of 2024) [2025] KECA 511 (KLR) (21 March 2025) (Ruling)**

Neutral citation: [2025] KECA 511 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E668 OF 2024
J MOHAMMED, F TUIYOTT & FA OCHIENG, JJA
MARCH 21, 2025**

BETWEEN

KARIM SHERALI KASSAM 1ST APPLICANT
J & J FAMILY VENTURES LIMITED 2ND APPLICANT
KUNAL BID 3RD APPLICANT
SANJAY ADVANI 4TH APPLICANT
SHAFIQ DAWOODANI 5TH APPLICANT
MARGARET KAPTUIYA KOMEN 6TH APPLICANT
FAIZAL JERAJ 7TH APPLICANT
SAIRA GILANI 8TH APPLICANT
KETAN GOSWAMI 9TH APPLICANT
ASMI SHAH 10TH APPLICANT
SHELINA MANJI 11TH APPLICANT
HEENAL TANK 12TH APPLICANT

AND

STEPHEN GATHUITA MWANGI 1ST RESPONDENT
EXOTIC REAL ESTATES LIMITED 2ND RESPONDENT
JOHN P MALAWI 3RD RESPONDENT
EXOTIC REAL VENTURES LIMITED 4TH RESPONDENT
M LUMADETE 5TH RESPONDENT
ALI ABDI 6TH RESPONDENT



ABDI ALI	7 TH RESPONDENT
V NDIDI	8 TH RESPONDENT
NAIROBI CITY COUNTY GOVERNMENT	9 TH RESPONDENT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY	10 TH RESPONDENT
CATHERINE THAITHI	11 TH RESPONDENT
PATRICK ANALO AKIVAGA	12 TH RESPONDENT
NATIONAL CONSTRUCTION AUTHORITY	13 TH RESPONDENT

(Being an Appeal against the ruling and order of the Environment and Land at Nairobi, (A. Omollo, J.) dated 15th August 2024 in ELRC Petition No. E002 of 2024))

RULING

1. The applicants herein filed the appeal herein seeking to overturn the ruling and order made in ELC Petition No. E002 of 2024. Alongside the appeal, they filed the application dated 6th September 2024, seeking the following orders:
 - a) Spent.
 - b) Spent.
 - c. That there be a stay of execution of the Ruling and order made on 15th August 2024 in ELC Petition No. E002 of 2024 pending the hearing and determination of this appeal.
 - d. That the status quo on L.R. No. 209/20729 (original No. 209/870/3/5)-City Park Drive, Parklands, be maintained as of 1st January 2024 pending the hearing and determination of this appeal.
 - e. That there be a stay of proceedings of the petition dated 2nd February 2024 pending the hearing and determination of the appeal.
 - f. That costs be in the appeal.
2. A brief background of the case is that the applicants filed a petition before the trial court on 2nd February 2024, seeking declaratory, conservatory, and mandatory orders against the respondents to stop construction and development activities on L.R. No. 209/20729 (original No. 209/870/3/5)-City Park Drive, Parklands, hereinafter, "the suit property," and restore the degraded suit property to its original condition, as it was on 20th December 2023.
3. The Petition was grounded on allegations of contravention of various articles of the Constitution as read together with the provisions of the Physical Land Use and Planning Act (PLUPA), the Environmental Management and Co-ordination Act (EMCA), the National Construction Authority Act (NCA), the Leadership and Integrity Act, and the Public Officers Ethics Act.
4. The applicants also filed a notice of motion in the petition seeking conservatory orders to stop and halt the construction and development activities on the suit property pending the hearing and determination of the petition.



5. On 15th August 2024, the trial court partially allowed the applicants' application. The applicants were dissatisfied with the ruling of the trial court on the orders and directions compelling the 5th, 11th, and 13th respondents and their officers to take immediate measures to prevent or discontinue any act or omission deleterious to the environment on the suit property, and in particular to ensure the construction works is not undertaken outside the hours of 6 am to 6 pm until the Petition is heard and determined; and that the conservatory order of temporary injunction is granted stopping, discontinuing, and preventing the 1st, 2nd, 3rd, and 4th respondents and their agents from excavating or undertaking any development on the suit property until they put up dust covers under the supervision of NEMA; a report be filed in court as soon as the 2nd and 4th respondents comply, and upon compliance, the temporary orders shall be lifted.
6. In support of their application, the applicants relied on the grounds on the face of the application and the supporting affidavit of Karim Sherali Kassam, sworn on 6th September 2024. The applicants referred to their memorandum of appeal dated 30th August 2024. They set out five grounds from the said memorandum of appeal which they believe are extremely weighty and arguable. They state that their appeal has a very high chance of success.
7. The applicants stated that the 2nd, 3rd, and 4th respondents commenced the execution of the orders on 21st August 2024 by putting dust nets without the supervision of NEMA, and the involvement and participation of the applicants and the other parties, before a report was compiled and filed in court for mention on 17th September 2024.
8. The key concerns and allegations raised by the applicants are that the 5th and 7th respondents did not have the authority to grant development permission to the 2nd to 4th respondents and that therefore, the permission they granted to enable the development activities to commence, was unlawful.
9. The applicants claim the trial court failed to recognize that certain annexures (AA4-AA8) were not development permissions or approvals under PLUPA and EMCA. They stated that construction activities were proceeding without proper signage, and without clarity regarding a Change of User, making the activities illegal. They further stated that the construction of the proposed 85 apartments on 19 levels will block natural light and air from the applicants' residences.
10. In response to the application, the 2nd, 3rd, and 4th respondents through the affidavit of Abdi Ali sworn on 25th October 2024, stated that the 2nd respondent had obtained the necessary licenses, permits, and consents for the development activities on the suit property. They further stated that there was a valid and approved development plan (PLUPA-BPM-001880-N), and a Letter of Authority to Excavate.
11. They further stated that an Environmental Impact Assessment (EIA) report was submitted to NEMA, and the proposed residential building was in compliance with the EMCA and NEMA Regulations 2006. They stated that the Nairobi City County Government (NCCG) approved the application to develop 85 apartments on the suit property.
12. They stated that the 5th respondent had a mandate to inspect project sites and confirm compliance with development permissions. They stated that the dust covers were implemented as a precaution until the NEMA report was received.
13. The respondents were of the view that the applicants' claims were without basis, as the project includes mitigation measures to address potential negative impacts like dust and increased traffic, as well as the incorporation of measures for solid waste and effluent disposal.



14. The 5th respondent in a replying affidavit sworn on 11th September 2024, by Patrick Analo Akivaga, their chief officer of urban development and planning, stated that it approved a residential development with 85 apartments on the suit property on 20th July 2023 with conditions, including the installation of a project signboard with registration details and an approved EIA report by NEMA before work commenced.
15. The 5th respondent said that it issued a Change of User Approval on 26th January 2024, subject to certain conditions, including an EIA study and a NEMA EIA License.
16. It noted that the 2nd respondent began construction without the required signboard or NEMA EIA License; as a consequence, the 5th respondent issued an enforcement notice on 1st January 2024 due to the site's non-compliance, demanding the cessation of excavation and a geotechnical survey report.
17. The 5th respondent clarified that a Letter of Authority to Excavate was issued to the 2nd respondent on 11th January 2024, and was valid for three months from the date of issuance, with conditions including safety measures and adherence to EMCA regulations.
18. It noted that although the 2nd respondent had not provided a Geotechnical Survey Report, they conducted an EIA Study and submitted a report to NEMA on 14th January 2024. It stated that NEMA was required to publish a notice of the EIA Study Report in the Kenya Kenya Gazette and newspapers.
19. It stated that it was aware that the 2nd respondent was allegedly proceeding illegally without an approved EIA Study Report or EIA License and that allowing the project to continue would result in further illegal and unauthorized activities.
20. The 5th respondent asserted that it was necessary that the Honourable Court should stay the execution of the impugned development activities pending the determination of this appeal, as failure to do so would result in further illegal and unauthorized activities being conducted by the 2nd respondent on the project site.
21. The 13th respondent, through the affidavit of Arch. Stephen Mwilu, its manager for compliance, sworn on 12th November 2024, stated that its mandate was to oversee the construction industry and coordinate development while ensuring quality assurance.
22. It stated that the development permission and EIA license granted to the 1st-4th respondents constitute matters of zoning, planning, and the environment covered under PLUP and EMCA to which the 13th respondent was not a regulator.
23. The 13th respondent stated that the application was unmerited as it did not satisfy the requirements of Rule 5(2) (b) of the Court of Appeal Rules. It was the contention of the 13th respondent that the application did not raise weighty issues of fact and law, and the memorandum of appeal was frivolous.
24. The 13th respondent stated that the applicants had not proved any substantial loss they were likely to suffer if the application was not allowed.
25. When the application came up for hearing on 13th November 2024, Mr. Ndambiri, learned counsel, appeared for the applicants. Mr. Mohammed, learned counsel appeared for the 2nd, 3rd, and 4th respondents, Ms. Irene Odhiambo, learned counsel, holding brief for Mr. Mbake appeared for the 5th respondent, and Ms. Cindy Ogola, learned counsel, appeared for the 13th respondent. The 1st, 6th, 7th, 8th, 9th, 10th, 11th, and 12th respondents did not appear despite having been served with the hearing notice.



26. Counsel relied on their respective written submissions, which they briefly highlighted. Mr. Ndambiri informed the Court that the applicants were challenging the legality and constitutionality of the development activities undertaken by the 1st to 4th respondents, and the failure of the 5th to 10th respondents to stop the ongoing development activities.
27. Counsel submitted that the trial court's ruling effectively granted the respondents a license to continue construction despite lacking the necessary permits. He claimed that the appeal would be rendered pointless if construction continued without licenses or permits issued by the 5th to 11th respondents. He requested the maintenance of the status quo as of 1st January 2024.
28. Counsel withdrew the prayer for a stay of proceedings at the trial court stating that the issue was being addressed by the said trial court.
29. In their written submissions, the applicants pointed out that this Court had discretionary power and jurisdiction to order for a stay of execution, an injunction, or a stay of any further proceedings, which was applicable in civil proceedings where a Notice of Appeal had been lodged; and that the Court's discretion was guided by the interests of justice.
30. The applicants claim that if the ruling or order is not stayed and the proceedings in ELC No. E002 of 2024 also stayed, the environment, the applicants, and the general public would be greatly prejudiced and will be subject to immeasurable, irreparable, and irrecoverable loss and damage.
31. The applicants asserted that the trial court erred in law and in fact in making and granting a "conservatory order" compelling the 5th, 11th, and 13th respondents and their officers to take immediate measures to prevent or discontinue any act or omission deleterious to the environment. They are also concerned with ensuring that construction work is not undertaken outside the hours of 6 am to 6 pm until the Petition is heard and determined.
32. The applicants are of the view that no development permission was granted to the 1st to 4th respondent to commence any development on the suit property.
33. To buttress their submissions, the applicants relied on the following authorities; *Trust Bank Limited & Another v Investech Bank Limited and 3 Others* [2000] eKLR, *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR, *Kenafriic Matches Ltd v Match Masters Limited & Another*, Civil Application No. E092 of 2021.
34. Ms. Odhiambo stated that the 5th respondent partially supports the application for a stay of execution. Counsel submitted that although development permission was granted on 20th July 2023 with conditions, the 2nd respondent had not obtained a NEMA license to date, and also that the authority to excavate, which the 2nd respondent relied upon, was conditional and had since expired.
35. The 5th respondent reiterated their position as expounded in the replying affidavit. They relied on the cases of *Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 Others* [2013] eKLR, and *Regnoil Kenya Limited v Winfred Nyeri Karanja* [2019] eKLR in support of their legal arguments.
36. Opposing the application, Mr. Mohammed reiterated that the 2nd to 4th respondents had an excavation license at the time of filing the petition. He submitted that the orders sought to be stayed were negative orders and, as such, were incapable of execution. He submitted that the applicants had not clearly explained how the appeal would be rendered nugatory, as they had failed to demonstrate the substantial losses they would suffer.



37. Counsel submitted that the 2nd-4th respondents were in the process of regularizing their licenses and approvals and had ceased further development on the suit property until they met the statutory requirements for construction.
38. In their written submissions, the 2nd, 3rd, and 4th respondents submitted that the applicants had not met the threshold for issuance of the orders prayed, as there were no arguable grounds for appeal. They submitted that the orders issued by the trial court were conditional and also prompted the statutory bodies that were sued to perform their statutory duties.
39. They argued that the orders sought were negative which did not compel the applicants to do anything or restrain them from doing anything and as such, the orders were incapable of execution.
40. They refuted the applicants' claims that their appeal would be rendered nugatory and that they would suffer substantial loss, pointing out that no evidence was adduced in that regard.
41. They further submitted that status quo could not be maintained as at 1st January 2024 because the applicants did not provide proof of what it was at the time.
42. In support of the legal arguments advanced, the 2nd, 3rd, and 4th respondents relied on the following authorities: *Trust Bank Limited & Another v Investech Bank Limited & 3 Others*, (supra); *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR; *Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Others* [2016] eKLR; *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR; *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR; and *Kenya Wildlife Service v James Mutembei* [2019] eKLR.
43. Ms. Ogola opposed the application. She maintained that the applicants had not established grounds to warrant a reversal of the orders by the trial court. Counsel submitted that the evidence presented by the 5th respondent indicated that development permission was issued.
44. In its written submissions, the 13th respondent reiterated its points in the replying affidavit while relying on the following authorities: *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others*, (supra), and *David Morton Silverstein v Atsango Chesoni*, Civil Application No. 189 of 2001.
45. We have carefully considered the application, the rival affidavits by the parties, the submissions by counsel, the authorities cited, and the law. The issue for determination is whether the application has met the threshold for grant of the orders sought under Rule 5(2) (b) of the *Court of Appeal Rules*.
46. The dispute herein originates from the proposed development by the 2nd respondent, with the applicants contesting the legality and constitutionality of the project. The applicants allege that the developments are proceeding without proper approvals and in violation of environmental regulations.
47. This Court has discretionary power to order a stay of execution, an injunction, or a stay of any further proceedings when a Notice of Appeal has been lodged. However, this discretion must be exercised judiciously and in the interests of justice. The Court must also avoid making definitive findings that could prejudice the main appeal when considering the application.
48. Rule 5(2)(b) of the *Court of Appeal Rules* provides that:
- “ (2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—
- a.



- b. in any civil proceedings where a notice of appeal has been lodged in accordance with rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

49. 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.
- ii. 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.
- ii. 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.
- ii. An applicant must satisfy the court on both of the twin principles.
- iii. 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.
- iv. 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.
- v. 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*).
- vi. 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.
- vii. 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.
- viii. 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.”



50. For the applicants to be successful, they must first, demonstrate that their appeal is arguable and not frivolous. The threshold for arguability is met if even one arguable point is demonstrated.
51. The applicants raised several points of law, including; Whether the Learned Trial Judge misdirected herself on the fact that the 5th and 7th respondents are the only bodies and Public Officers mandated under the PLUPA to grant and/or approve any development within the 5th Respondent's jurisdiction; and Whether the Learned Trial Judge erred in fact and law in failing to note, appreciate, find and hold that specific annexures are not Development Permissions, Approvals or Licenses within the meaning of Sections 57, 58 and 59 of PLUPA and the Rules/Regulations made thereunder, and also under Section 58 of EMCA.
52. The question of whether the alleged activities commenced without the requisite NEMA license and other approvals is an arguable point. Therefore, we find that these points merit further consideration by this Court.
53. Secondly, the applicants must demonstrate that unless a stay is granted, the intended appeal, if successful, would be rendered nugatory. We are called upon to consider whether the actions that the applicants seek to stay are irreversible or compensable. The case of David Morton Silverstein v Atsango Chesoni, (*supra*), underscores that each case must depend on its own facts and peculiar circumstances when determining the nugatory aspect.
54. The applicants raised concerns about the construction of 85 apartments on 19 levels, arguing it will be deleterious to the environment. The applicants submitted that the environment and general public would suffer irreparable loss and damage if the construction continued. They supported this concern by allegations of contravention of the PLUPA, and EMCA.
55. It is evident that if the construction and development activities continue without proper environmental safeguards and approvals, the potential harm to the environment and public interest could be irreversible.
56. Lastly, the Court must consider the balance of potential prejudice to all parties if the stay is granted or not granted. While the respondents argue that they have the necessary permits and have taken measures to mitigate potential negative impacts, the 5th respondent painted a different picture. In balancing the interests of all parties involved, we find it is just and equitable to preserve the status quo and prevent potential environmental degradation.
57. The 2nd to 4th respondents submitted that the orders sought to be stayed were negative orders and as such, there was nothing to be stayed. The trial court issued orders, compelling the 5th, 11th, and 13th respondents to take immediate measures to prevent or discontinue any act deleterious to the environment. The court also issued orders stopping the 1st - 4th respondents from excavating or undertaking any development until dust covers are put up under NEMA supervision. We find these to be positive orders, as they required specific compliance measures by the parties mentioned.
58. In the result, this Court finds that the applicants have demonstrated that their appeal is arguable and that it would be rendered nugatory, as they may suffer irreparable harm if the stay is not granted. The status quo on the suit property shall be maintained as of the date of this ruling, until the hearing and determination of the appeal.
59. Consequently, the application herein is allowed. As the applicants prayed for costs to be in the appeal, it is so ordered.



60. These orders are necessary to preserve the subject matter of the appeal by protecting the environment, in the interests of the general public.

Orders accordingly.

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

JAMILA MOHAMMED

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

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

Signed

Deputy Registrar

