



REPUBLIC OF KENYA



**Cavenagh v Horsey & 2 others (Civil Application E028 of 2024)  
[2025] KECA 702 (KLR) (25 April 2025) (Ruling)**

Neutral citation: [2025] KECA 702 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPLICATION E028 OF 2024  
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA  
APRIL 25, 2025**

**BETWEEN**

**ALASTAIR MARK CAVENAGH ..... APPLICANT**

**AND**

**CHRISTOPHER GORDON HORSEY ..... 1<sup>ST</sup> RESPONDENT**

**DAVID HORSEY ..... 2<sup>ND</sup> RESPONDENT**

**FIRST EUROPEAN FINANCE INVESTMENT LIMITED ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for an injunction pending appeal against the Ruling and Orders of the High Court of Kenya at Malindi (S. M. Githinji, J.) dated 22nd August 2024 in HCCC No. E013 of 2024)*

**RULING**

1. By a plaint dated 1<sup>st</sup> July 2024, the applicant, Alastair Mark Cavenagh, sued the respondents in Malindi HCCC No. E013 of 2024 seeking, inter alia: orders of injunction to restrain the respondents from transferring or dealing with any shares held by the 3<sup>rd</sup> respondent, First European Finance Investment Limited in Sunsail Trading Company Limited, Vipingo Ridge Limited and Vipingo Beach Limited (the three companies); an account to determine sums due to the 1<sup>st</sup> and 2<sup>nd</sup> respondents on account of purchase of shares held by one David Mitchell in the three companies; orders that 2/9 of the shares held by the 3<sup>rd</sup> respondent in the three companies be transferred to the applicant or to his nominee; or, in the alternative, all shares held by the 3<sup>rd</sup> respondent in the three companies be advertised for sale to the highest bidder; a declaration that the applicant is the owner of 2/9 of the shares held by the 3<sup>rd</sup> respondent in the three companies; an injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> respondents from exercising any rights or casting any votes in the 3<sup>rd</sup> respondent's board and general meetings in respect of shares held by the 3<sup>rd</sup> respondent in the three companies; and, pending sale and transfer of the 3<sup>rd</sup>



respondent's shares, an order that those shares be held in trust for the benefit of the applicant or the company's shareholders. He also prayed for costs and interest.

2. Contemporaneous with the plaint, the applicant filed a Notice of Motion of even date praying for, inter alia: "in the first instance, ex parte and thereafter pending the determination of this application, an injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents from dealing in any manner whatsoever with the shares held by the 3<sup>rd</sup> respondent in Sunsail Trading Company Limited, Vipingo Ridge Limited and Vipingo Beach Limited (the companies)". The remaining 7 prayers mirror the substantive reliefs sought in his plaint, which we need not replicate here, save to observe that they relate to the request for an account; orders for transfer or sale of the shares in the three companies; and leave to serve the 3<sup>rd</sup> respondent out of jurisdiction or, in the alternative, by email vide its known email address.
3. The applicant's Motion was supported by his affidavit sworn on 1<sup>st</sup> July 2024 essentially deposing to 14 grounds on which the Motion was anchored, namely:
  - a) That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have threatened and are taking steps to transfer shares held by the 3<sup>rd</sup> Respondent.
  - b. That the 3<sup>rd</sup> Respondent is a Limited Liability Company incorporated in Mauritius. It is a Special Purpose Vehicle (SPV) and owns shares in Vipingo Ridge Limited, Vipingo Ridge Beach Limited and Sunsail Trading Company Limited (the "Companies") which shares were previously owned by David Mitchell.
  - c. That in 2004 the Applicant and Mr. David Mitchell came up with the idea of developing a golf course at the Coast and incorporated a Company to acquire the property with the two of them as equal shareholders.
  - d. That after acquiring the property, the Applicant and David Mitchell invited the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as investors.
  - e. That the parties through the Companies have developed a world class golf club, club house and have sold plots to about 310 homeowners.
  - f. That a disagreement over management arose between David Mitchell and 1<sup>st</sup> and 2<sup>nd</sup> Respondents and to stay the possibility of David Mitchell selling his shares to a 3<sup>rd</sup> party, the Applicant requested to structure a transaction whereby David Mitchell would sell his shares to the 3<sup>rd</sup> Respondent without David Mitchell being aware that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were involved.
  - g. That in consideration of the Applicant convincing David Mitchell to sell his shares to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, they were to finance and enable the Applicant to acquire 2/9 of the shares in the 3<sup>rd</sup> Respondent.
  - h. That the Applicant not only convinced David Mitchell to sell his shares to the 3<sup>rd</sup> Respondent at USD\$ 6 Million but also subsequently, successfully reduced the purchase price of his shares to USD\$ 5 Million.
  - i. That however, when the Applicant requested the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to transfer his shares, they refused to do so claiming that the Applicant only had a financial interest in the sale of the shares.



- j. That initially the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had agreed that upon payment of monies expended, the Applicant could transfer the shares to himself or any entity of his choice.
  - k. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have since requested the 3<sup>rd</sup> Respondent's Trustees in Mauritius to produce documents relating to the transaction.
  - l. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have also requested the Applicant to sign some historic share certificates.
  - m. That further, to the detriment of the Company and its shareholders, the Respondents have, using the board seats acquired by virtue of FEFI shares, terminated the services of experts who had been responsible for the success of the Companies mid replaced them with family members.
  - n. That the Applicant is rightfully apprehensive that unless restrained from dealing with the 3<sup>rd</sup> Respondent's shares, the Respondents may put them out of reach of the Applicant and use them to the detriment of the Companies.”
4. In response to the applicant's Motion, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a replying affidavit sworn by David Horsey (the 2<sup>nd</sup> respondent) on 16<sup>th</sup> July 2024 generally narrating, among other things: the historical events leading to the dispute over and concerning the parties' shareholding in the three companies; the consultations leading to the incorporation of the 3<sup>rd</sup> respondent and the shareholding structure; and the ultimate agreement with the applicant dated 10<sup>th</sup> May 2018 setting out the terms on which they would use the 3<sup>rd</sup> respondent as a special purpose vehicle to acquire the shares held by David Mitchell.
  5. According to the 2<sup>nd</sup> respondent, the agreement of 10<sup>th</sup> May 2018 did not contain any term or obligation for any portion of the shares held by the 3<sup>rd</sup> respondent in the three companies to be transferred to the applicant, who only agreed to receive a share of the profits arising from future sale of 2/3 of the shares, which sale was yet to take place.
  6. The deponent further averred that the applicant had no legal basis to seek orders of injunction to restrain the respondents from dealing with the shares held by the 3<sup>rd</sup> respondent, and which were beneficially owned by the 1<sup>st</sup> and 2<sup>nd</sup> respondents; that the applicant's Motion was an attempt to resile from the terms of a contract which he personally drafted; that the nature of the orders sought in his application were final in nature, and may only be issued after trial; and that the application was without merit and ought to be dismissed with costs.
  7. Subsequently, the applicant filed a fresh Motion dated 21<sup>st</sup> August 2024 supported by the affidavit of its learned counsel, Mr. James Gitau Singh, sworn on 21<sup>st</sup> August 2024 deposing to the grounds on which the fresh Motion was founded, and in which the applicant sought the following orders, namely:
    - “1. That the Application be certified as urgent, admitted for hearing during the Current Court Vacation and in any event be heard prior to the Application dated 1<sup>st</sup> July 2024 being heard and determined.
    2. That this Honourable Court be pleased to stay the Ruling scheduled for 22<sup>nd</sup> August 2024 pending the hearing and determination of this Application.



3. That this Honourable Court be pleased, on its own motion, to amend the Application dated 1<sup>st</sup> July 2024 to allow the injunction to be in place pending the determination of the suit.
  4. That in the alternative, this Honourable Court be pleased to grant leave to the Applicant to amend the Application dated 1<sup>st</sup> July 2024.
  5. That pursuant to grant of leave as prayed in (4) above, the draft Amended Application annexed herewith be deemed as having been properly filed and served upon payment of the requisite court fees.
  6. That the costs of this Application be provided for.”
8. In essence, the applicant’s second Motion was intended to arrest the ruling on his application dated 1<sup>st</sup> July 2024, which was scheduled for delivery the following day on 22<sup>nd</sup> August 2024. In addition, the applicant sought orders, inter alia, that the second Motion be considered for orders that the interim injunctive relief previously sought be granted pending determination of the suit.
  9. Among the 14 grounds on which the subsequent Motion was anchored are that “(e) In the Notice of Motion application dated 1<sup>st</sup> July 2024, the applicant sought interim injunctive orders but inadvertently forgot to include the words that the injunction should be in place ‘pending the hearing and determination of this suit’”. According to counsel, the omission of the order was through no fault of the applicant and its exclusion would have the effect of disposing of the application with finality on merit; that the purpose of interim injunctions is to maintain the status quo until the main issues in a case are heard and determined; that the amendment would not occasion any prejudice to the respondents; that, conversely, the applicant stood to be highly prejudiced if not allowed to amend his application, as the shares in dispute might be dealt with in the manner apprehended by the applicant; and that the overriding objective of section 100 of the *Civil Procedure Act* (general power to amend) and Article 159(2) (d) of *the Constitution* dictate that amendments should be freely allowed at any stage of the proceedings if they are brought in good faith with the intention of bringing forward all issues in controversy so that the same can be determined with finality.
  10. The applicant’s second Motion having been filed only a day before the ruling on the original application, the respondents did not have the opportunity to file any reply thereto.
  11. Be that as it may, the learned Judge heard and dismissed the applicant’s Motion dated 21<sup>st</sup> August 2024. In his ruling dated 22<sup>nd</sup> August 2024, the learned Judge observed:

“The said application was filed yesterday while the application it intends to amend is of 1/7/2024. The application was deliberated on by way of written submissions as was directed by the court and the ruling is for today. The said ruling is ready and it goes without saying that precious judicial time has been spent on it. The applicant had ample time to apply for amendment of the application but did so on the last minute. The reason for delay is not explained. My view is that such an application given the timing, cannot be in interest of justice and is prejudicial to the respondent. As such the prayers for orders are declined. The court will go ahead and deliver the ruling as scheduled.”



12. Accordingly, the learned Judge proceeded to deliver his ruling as scheduled and, likewise, dismissed the applicant's Motion dated 1<sup>st</sup> July 2024. According to the learned Judge:

“A cursory glance at the face of the application, the prayer sought is of an injunction and is interim in nature pending inter-partes hearing and determination of the application and thus can be said to be spent. There is no substantive prayer for injunction at this point for determination. I will therefore leave it at that. Remaining for determination is therefore Prayer Nos. 3, 4 and 5. Prayer 3 for an order for accounts to be taken to ascertain the amounts expended by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in acquiring shares held by the 3<sup>rd</sup> Respondent.

In my view, the prayer has no basis and is void of substance bearing in mind that this was clearly not an issue disputed by the Respondents. The 2<sup>nd</sup> Respondent indeed admitted under paragraph 28 of his replying affidavit that the purchase price was re-negotiated to USD 1,000,000/- less. I see no need to ascertain this, when the same was admitted.

In his plaint, the Applicant has sought reliefs akin to Prayer 4 and 5. These prayers are final in nature and can only be granted upon hearing the main suit. Granting them at this stage will, in my view, be determining the suit primarily or at an interlocutory stage before hearing the evidence.

For the stated reasons, I dismiss the application dated 1/7/2024. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent will have the costs.”

13. Aggrieved by the learned Judge's decision, the applicant moved to this Court on appeal on 8 grounds set out in his undated Draft Memorandum of Appeal, namely:

- “1. That the learned Judge erred in law and fact by failing to allow the Appellant to amend his Notice of Motion Application dated 1<sup>st</sup> July 2024;
2. That the learned Judge erred in law and in fact by summarily dismissing and failing to determine on merit, the Appellant's Application dated 21<sup>st</sup> August 2024 seeking amendment of his Notice of Motion Application dated 1<sup>st</sup> July 2024;
2. That the learned Judge erred in law and in fact when he proceeded to determine the Application dated 1<sup>st</sup> July 2024 without applying the established principles of when an injunction should issue;
3. That the learned Judge erred in law and in fact by failing to consider the harm that would befall the Applicant in the event that the injunctive Orders were not issued;
4. That the learned Judge erred in law and in fact by failing to properly exercise his discretion and Order an injunction based on the facts of the Plaintiff's case;
5. That by failing to apply the law on amendment and to allow the Applicant amend the Notice of Motion dated 1<sup>st</sup> July 2024, the Judge did not determine the Application on merit; and
6. That the learned Judge erred in law and evidence by failing to apply principles established under the Law of Contract, Evidence and the Companies Act, when he declined to grant the injunction.



7. That the learned Judge erred in law and in fact by failing to issue Orders against the 3<sup>rd</sup> Respondent (First European Finance Investments Limited), who had not bothered to enter appearance despite service with all pleadings.”
14. By a Notice of Motion dated 18<sup>th</sup> September 2024 filed pursuant to rule 5(2)(b) of the Court of Appeal Rules, the applicant seeks the following orders, namely:
  - “1. That this Honourable Court be pleased to issue an injunction to restrain the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from dealing in any manner whatsoever with the shares held by the 3<sup>rd</sup> Respondent in Sunsail Trading Company Limited, Vipingo Ridge Limited and Vipingo Beach Limited pending the hearing and determination of an intended Appeal against the Rulings delivered by Hon. Stephen Githinji on 22<sup>nd</sup> August 2024 in HCCC No. E013 of 2024 Alastair Mark Cavenagh v Christopher Gordon Horsey & 2 Others.
  2. That this Honourable Court be pleased to grant any other Orders it deems suitable and equitable in the circumstances.
  3. That the costs of this Application be provided for.”
15. The applicant’s Motion is supported by his annexed affidavit sworn on 18<sup>th</sup> September 2024 deposing to 18 grounds on which it is made. Excluding the grounds that touch on the merits of the intended appeal from which we must steer away, those relevant to an application under rule 5(2) (b) of this Court’s Rules as is the case here are:
  - “m) That immediately after the Rulings, the Respondents have issued notices seeking to dilute the Applicant’s shareholding in the Companies by issuing notices to increase in the share capital of the Companies.
  - n. That being aggrieved by the Court’s Rulings of 22<sup>nd</sup> August 2024, the Applicant has filed a Notice of Appeal against it.
  - o. That the effect of the Rulings being appealed against is to create a situation where the Respondents by using their majority are adversely mismanaging the Companies.
  - p. That in light of the foregoing, there is an imminent risk that unless this Honourable Court grants an injunctive Order to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from dealing with the shares held by the 3<sup>rd</sup> Respondent in the Companies pending the hearing and determination of the intended Appeal, the Respondents may put them out of the Applicant’s reach and use them to the detriment of the Companies.
  - q. That the Applicant has an arguable Appeal which warrants ventilation before this Court.
  - r. That it is therefore in the interest of justice that this Application be allowed as prayed.”
16. In response to the applicant’s Motion, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a replying affidavit sworn by the 2<sup>nd</sup> respondent on 13<sup>th</sup> February 2025 stating that the grounds on which the applicant’s appeal is founded are not arguable; that, if the orders sought are granted, the 3<sup>rd</sup> respondents shareholder



rights will be significantly curtailed without reasonable basis; that the applicant is misusing the judicial process as a means of interfering with the companies' internal corporate governance matters that are ably governed by the *Companies Act*, and which are not relevant to determine whether the applicant's intended appeal is likely to be rendered nugatory; that the applicant has had ample time to file evidence before this Court showing the damage caused by the 1<sup>st</sup> and 2<sup>nd</sup> respondents by any continued corporate action, which he has not; that the intended appeal is not likely to be rendered nugatory should the orders sought be declined; that the appellant has not satisfied the twin tests for grant of an injunction at the appellate level; and that the applicant's appeal is not likely to be rendered futile should the companies be allowed to continue with their ordinary course of business. They urged the Court to dismiss the application with costs.

17. In his further affidavit sworn on 11<sup>th</sup> February 2025, the applicant stated that, subsequent to his application dated 18<sup>th</sup> September 2024, the respondents have undertaken various activities to take over the possession and control of the companies; that, in breach of their fiduciary duty, the respondents have continued to call for meetings of shareholders well aware that several minority shareholders will be unable to follow and participate in the requisitioned meetings; that the respondents convened a general meeting scheduled for 24<sup>th</sup> February 2025 for the purpose of a resolution to remove the applicant from his position as Director; that, due to their mismanagement, the respondents have allowed the security status of the companies to deteriorate resulting in numerous burglaries in the Vipingo Ridge complex; and that, if left unchecked, the respondents' conduct will be to the detriment of the company and further erode the value of its shares, thereby rendering the intended appeal nugatory.
18. In support of the Motion, learned counsel for the applicant, M/s. LJA Associates LLP filed written submissions dated 11<sup>th</sup> February 2025 citing 7 judicial authorities, which counsel highlighted orally when the application came for hearing on the Court's virtual platform on 19<sup>th</sup> February 2025.
19. On their part, learned counsel for the respondents, M/s. Coulson Harney LLP, also filed written submissions dated 14<sup>th</sup> February 2025 citing 10 judicial authorities, which were likewise highlighted orally at the hearing of the Motion.
20. To succeed in an application under rule 5(2) (b) of the Court of Appeal Rules, an applicant has to satisfy the twin principles enunciated in various decisions of this Court, namely that he or she must demonstrate:
  - i. that they have an arguable appeal; and
  - ii. That the intended appeal (or appeal if already filed) will be rendered nugatory if stay of execution or preservatory orders of injunction pending appeal are not granted to secure the substratum of the appeal.
21. On the first limb of this twin principle, this Court held in *David Morton Silverstein v Atsango Chesoni* [2002] eKLR that, for an order of stay to issue, the applicant must first demonstrate that the appeal or intended appeal is arguable, that is, it is not frivolous, and that the appeal or intended appeal would, in the absence of stay (or interim injunction as is the case here), be rendered nugatory.
22. With regard to the sufficiency of the pleaded grounds of appeal to warrant grant of the orders sought, this Court in *Yellow Horse Inns Ltd v A. A. Kawir Transporters and 4 others* [2014] eKLR observed that an applicant need not show a multiplicity of arguable points, as one arguable point would suffice.
23. On the issue as to whether the applicant's intended appeal is arguable, it is noteworthy that he has raised a number of grounds challenging the learned Judge's decision to summarily dismiss his second Motion intended to correct what he termed as an inadvertent error in his prayers in the first application. His



draft memorandum of appeal speaks for itself and, from a cursory look, we are persuaded that they are arguable. As this Court held in *Kenya Commercial Bank vs Nicholas Ombija* [2009] eKLR, an “arguable” appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court. As to whether the intended appeal will succeed, is a matter for another bench of this Court to determine not for us to judge at this stage. Accordingly, the applicant has satisfied the first limb of the twin principles.

24. On the second limb as to whether the appeal will be rendered nugatory if the orders of injunction sought are not granted, the applicant must demonstrate that, the intended appeal would be rendered nugatory in the event that it succeeds (See: *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* (2013) eKLR).
25. The applicant avers that the intended appeal will be rendered nugatory or futile unless the prayer for injunction is granted. According to him, “... there is an imminent risk that unless this Honourable Court grants an injunctive Order to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from dealing with the shares held by the 3<sup>rd</sup> Respondent in the Companies pending the hearing and determination of the intended Appeal, the Respondents may put them out of the Applicant's reach and use them to the detriment of the Companies.”
26. In our considered view, any drastic changes in the governance, administrative and shareholding frameworks of the 3<sup>rd</sup> respondent before the intended appeal is heard and determined either way to pave way for the substantive suit in the superior court would be difficult to undo. Put differently, such changes would render the intended appeal, if successful, nugatory.
27. The applicant having satisfied both limbs of the twin principles for grant of orders under rule 5(2) (b) of this Court’s Rules, we find that the Notice of Motion dated 18<sup>th</sup> September 2024 succeeds and is hereby allowed with orders that:
  - a. an injunction be and is hereby granted to restrain the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from dealing in any manner with the shares held by the 3<sup>rd</sup> Respondent in *Sunsail Trading Company Limited, Vipingo Ridge Limited and Vipingo Beach Limited* pending hearing and determination of the intended Appeal; and
  - b. the cost of the application be costs in the appeal.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF APRIL 2025.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA CARb, FCIArb.**

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**JUDGE OF APPEAL**

**G. W. NGENYE-MACHARIA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original



Signed

**DEPUTY REGISTRAR**

