



**Mulama & 3 others v Viragi (Civil Application E165 of 2024)
[2025] KECA 647 (KLR) (4 April 2025) (Ruling)**

Neutral citation: [2025] KECA 647 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E165 OF 2024
HA OMONDI, F TUIYOTT & LK KIMARU, JJA
APRIL 4, 2025**

BETWEEN

**AGNETA GAZEMBA MULAMA 1ST APPLICANT
REV. PHAREZ NYABERA ZAVANI 2ND APPLICANT
SIMON MUSYOKI MBINDYO 3RD APPLICANT
GOSPEL CENTRE-MBALE 4TH APPLICANT**

AND

STEPHEN SALAMBA VIRAGI RESPONDENT

*(Application for stay of execution pending hearing and determination
of the intended appeal from the Environment and Land Court at
Kakamega (Ohungo, J. dated 22nd October 2024 in Case No. 22 of 2020)*

RULING

1. The application before this Court is a Notice of Motion dated 7th November 2024 brought pursuant Rules 5(2)(b) of [Court of Appeal Rules](#) 2010. The applicant seeks orders that:
 - i. Stay of execution do issue in Kisumu ELC No. 22 of 2020 pending hearing and determination of the intended appeal.
 - ii. An interim order of injunction do issue restraining the respondents from in any way dealing with the suit property Kakamega/Bugonda/2163 pending the hearing and determination of the application and intended appeal.
 - iii. Costs in the cause.



2. The application is supported the affidavit of even date sworn by the applicant, Phares Zavani Nyabera who explains that on 22nd October 2024 the court delivered a judgment dismissing the applicants' case; applicants' church has been on the suit parcel for 34 years and has built thereon a permanent building; the respondent has title to the land and intends to sell the suit land and evict the applicants. The applicants now seek stay of execution of the impugned judgment as the respondent has made an application for extraction of the decree and intends to proceed with execution which will render the appeal nugatory yet the intended appeal has high chances of success.
3. The respondent has neither filed a response nor submission to this application.
4. The application before us is based on rule 5(2)(b) of this Court's Rules which provide 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 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.

Our difficulty is borne out of the fact that the applicant has made a rather omnibus application seeking both orders of stay as well as an order of injunction. Has the Applicant satisfied the requirements necessary for granting an order for stay of execution? In the case of Teachers Service Commission v. Kenya National Union of Teachers & 3 Others, Sup. Court App 16/2015 [205] eKLR it was stated that:

“(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.”

5. 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."

6. Is the Appeal arguable? 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 Omtata & 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.”

7. This Court has held in *Co-operative Bank of Kenya Ltd v. Banking Insurance and Finance Union Kenya* [2014] eKLR that

“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.”

8. With the foregoing in mind, we have carefully considered the grounds set out in the motion and the impugned decision which dismissed the applicant’s case, we hasten to point out that this court has on various occasions held that a negative order which dismisses a suit is incapable of being stayed. For instance, in the case of *George Ole Sangui v. Kedong Ranch Limited*, Civil Application No. Nai. 55 of



2015, this Court whilst citing the famous case of *Western College of Arts and Applied Sciences v. Oranga & Others* [1976] KLR 63, pronounced itself thus:

“In the instant case, the High Court dismissed the suit in which the applicants were seeking a declaration and an order to be registered as the proprietors of the suit land on the basis of the doctrine of adverse possession. The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent. That was not a positive order that required any party to do or refrain from doing anything. It was not capable of execution or enforcement. 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.”

9. Equally, in the case of *Daniel Lomagul Kandeji & 2 Others v Kamanga Holdings Limited & 40 Others* (2017) eKLR, this Court expressed itself in the following manner:

“In the motion before us the applicants sought a stay of the striking out of the O.S. This was a negative order which, by parity of a long line of decisions of this court as demonstrated above, is incapable of being stayed.”

10. At the plenary hearing of the motion, we ought to have directed the applicant to select which prayer it wished to pursue, but as we did not, and we are now under an obligation to consider the 2nd prayer which relates to an order of injunction. Fortunately, the same principles applicable in consideration of applications for stay of execution, equally apply in an application for an injunction under Rule 5(2)(b) of this *Court's rules*. In our view the appeal is arguable. The applicants have admitted that the respondent has title to the suit property, but argue that the respondents lost their entitlement to the land; and that the applicants have acquired prescriptive rights by way of adverse possession; and would defeat the argument relating to indefeasibility of title. We acknowledge that an arguable appeal need not be one that will succeed, but a demonstration that there is even one single issue that can be argued on appeal, is sufficient. We cannot fault the applicant on the contention that the issue concerning extinction of the respondent's rights, and their acquisition of prescriptive rights remains arguable.
11. The second principle for consideration is whether the appeal will be rendered nugatory should the injunction not be granted. In this regard, we refer to the case of *Reliance Bank Limited v Norlake Investment Limited* [2002]1 EA 227 which stated 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.
12. 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 instant matter, the court has to decide which party's hardship is greater.



13. On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought. That the applicant has been in occupation of the land was not contested, the issue was whether it had acquired prescriptive rights, or was a licensee. If no preservative orders are issued, then there would be nothing to stop the respondent dealing adversely with the land, to the prejudice of the applicants, and thus rendering the appeal nugatory. On account of this, then, we find that the applicants have satisfied the two limbs as to merit an order of injunction being issued pending hearing and determination of the appeal. Costs shall abide the outcome of the appeal.

DATED AND DELIVERED AT KISUMU THIS 4TH DAY OF APRIL, 2025.

H. A. OMONDI

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

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

signed

DEPUTY REGISTRAR

