



Kikambala Housing Estate Limited v Bank of Africa Limited & 25 others; Bank of Africa Limited (Interested Party) (Civil Application E026 & E029 of 2024 (Consolidated)) [2025] KECA 938 (KLR) (23 May 2025) (Ruling)

Neutral citation: [2025] KECA 938 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E026 & E029 OF 2024 (CONSOLIDATED)
F TUIYOTT, KI LAIBUTA & GWN MACHARIA, JJA
MAY 23, 2025**

BETWEEN

KIKAMBALA HOUSING ESTATE LIMITED APPLICANT

AND

BANK OF AFRICA LIMITED 1ST RESPONDENT

THE LAND REGISTRAR KILIFI 2ND RESPONDENT

**AS CONSOLIDATED WITH
CIVIL APPLICATION E029 OF 2024**

BETWEEN

KIKAMBALA HOUSING ESTATE LIMITED APPLICANT

AND

AMINA MOHAMED KASINGA 1ST RESPONDENT

THE LAND REGISTRAR, KILIFI COUNTY & 22 OTHERS & 22 OTHERS & 22 OTHERS & 22 OTHERS & 22 OTHERS 2ND RESPONDENT

AND

BANK OF AFRICA LIMITED INTERESTED PARTY

(eing an application for stay of execution of the Judgement/Decree of the Environment and Land Court of Kenya at Malindi (Makori, J.) delivered on 18th July 2024 in Malindi ELC No. 355 of 2016 AND Malindi ELC No. 207 of 2015))



RULING

1. By an order of this Court dated 9th December 2024 made in the presence and by consent of learned counsel Dr. Khaminwa for Kikambala Housing Estate Limited (the applicant), learned counsel Mr. Ananda appearing alongside Mr. Mogaka for Amina Mohamed Kasinga & 22 Others (the 1st respondents), learned counsel Mr. Lutta appearing for The Land Registrar, Kilifi County (the 2nd respondent) and learned counsel Mr. M'court representing Bank of Africa Limited (the 3rd respondent), it was agreed that Civil Application No. E029 of 2024, which was due for hearing on this day be called out on 11th December 2024 when Civil Application No. E026 of 2024 was to be heard, as both related to the same parties.
2. On 11th December 2024, it was confirmed that, indeed, the two Notices of Motion in the respective files involved the same parties, save that the 1st respondents in Civil Application No. E029 of 2024 are not parties in Civil Application No. E026 of 2024. Accordingly, and by consent of all counsel, Civil Application Nos. E029 and E026 of 2024 dated 23rd October 2024 and 14th September 2024 respectively (hereinafter the motions where applicable) were consolidated. It was further agreed that the order(s) made in one motion do apply to the other.
3. Civil Application No. E029 of 2024 shall be the lead file and its outcome shall apply to Civil Application No. E026 of 2024. This is in view of the fact that the 1st respondents in this application are the central respondents in the dispute. For purposes of this ruling, we shall consider the respective affidavits interchangeably where need be. The two motions were accordingly heard together on 11th December 2024.
4. The applicant in both motions is seeking similar orders, namely that:
 - a. spent;
 - b. spent;
 - c. this court be pleased to issue interim orders for stay of execution of the Judgement of the Environment & Land Court delivered virtually on 18th July 2024 by Honourable Justice Evans K. Makori and Ruling made on 30th August 2024 in Malindi ELCC/207/2015 and any other consequential orders issued by this Honourable Court pending the hearing and determination of the intended appeal; and
 - d. costs of this application be in the cause.
5. The applications are supported by the affidavits of Osman Erdinc Elsek, the director of the applicant sworn on 14th September 2024 in Civil Application No. E026 of 2024 and on 16th September 2024 in Civil Application No. E029 of 2024.
6. In Civil Application No. E029 of 2024, he deposed that the applicant is the registered owner of Title Number Kilifi/Mtwapa/867 (the suit property) whereby, in the year 2012, it commenced construction of 308 low-cost houses; that, in furtherance of this project, the applicant engaged the 3rd respondent in acquisition of credit facilities; and that, by reasons of the negligence of the 3rd respondent, several suits were filed, among others, being Malindi ELCC No. 355 of 2016.
7. On 18th July 2024, the learned Judge (Makori, J.) allowed the 3rd respondent's Notice of Motion dated 20th December 2016 by issuing the following orders:



- a. a declaration be and is hereby issued that the applicant's failure, neglect and refusal to execute the instrument of surrender of the freehold estate in respect to the suit property as well as the lease regarding the leasehold interest for the suit property is in breach of the applicant's obligations as contained in the Agreement to Create Security dated 28th October 2013;
- b. an order of specific performance be and is hereby issued compelling the applicant to avail its Directors to the 2nd respondent within 14 days of the date of this judgement and further compelling the applicant to execute the surrender of the freehold estate in respect to the suit property as well as the lease regarding the leasehold interest for the suit property, in addition to any other documents as shall be required by the 2nd respondent for purposes of issuance of the leasehold title;
- c. in default of compliance with order (b) above, the 2nd respondent be compelled to transmit the instrument of surrender on the lease concerning the suit property to the Deputy Registrar of the superior court and the Deputy Registrar in such an event, be and is hereby directed by the court to execute the said instrument of surrender and the said lease on behalf of the applicant under the seal of this court in addition to any other documents as shall be required by the 2nd respondent for purposes of issuance of a leasehold title;
- d. an order be issued compelling the 2nd respondent to make such entries as are necessary to close the freehold register and open the leasehold register and to register the 3rd respondent as the leasehold proprietor of the suit property and contemporaneously with such registration of the instrument of surrender and the lease, the 2nd respondent to issue a certificate of lease for the suit property, which shall be retained by the 2nd respondent after issuance, subject to further orders as set out below;
- e. an order of specific performance be and is hereby issued compelling the applicant to execute a legal charge in respect to the leasehold interest in the suit property in favour of the 3rd respondent in the format set out in the Agreement to Create Security between the applicant and the 3rd respondent dated 28th October 2013 within 14 days after the issuance of the Certificate of Lease pursuant to Order (b) above;
- f. in default of order (e) above, the applicant be and is hereby ordered to present the legal charge concerning the suit property in the format set out in the Agreement to Create Security dated 28th October 2013, to the Deputy Registrar of the superior court and the Deputy Registrar in such an event be and is hereby directed by this court to execute the said legal charge on behalf of the applicant under the seal of this court;
- g. the 2nd respondent be and is hereby directed to register the 3rd respondent's legal charge in the leasehold register for the suit property after execution of the same pursuant to Order (e) of (f) above within three days of presentation for registration subject to the same complying with the requirements of the law and upon the 3rd respondent's due payment of stamp duty and the requisite fees and to after that release the duly registered legal charge, the lease and the Certificate of Lease to the 3rd respondent and the 3rd respondent's duly authorised agent;
- h. pursuant to findings in Malindi ELC No. 207 of 2015, the implementation of the orders above is to be simultaneous with the Partial Settlement Agreement dated 11th June 2018; and
- i. To achieve the preceding, orders of inhibition placed on the suit property be removed;
- j. The applicant shall bear the costs of the suit.



8. As to the arguability of the appeal, the applicant deposed that the 3rd respondent fraudulently proceeded to charge the suit property on its tenure of freehold instead of first converting it into a leasehold title as per the Constitution and attendant laws, thus delaying the entire process; that, this then gave rise to a related suit, being Malindi ELC No. 207 of 2015 consolidated with others; and that the 1st respondents filed the subject suit so as to disguise their illegalities on the manner in which they handled the suit property.
9. On the nugatory aspect, the applicant deposed that, if the stay orders are not granted, it stands to suffer substantial and irreparable loss and prejudice, including being denied an opportunity to ventilate a legal case against the respondents through the appeal process; that this would result in deprivation of its constitutional right to the suit property, which will cause it to suffer substantial financial and irreversible loss, and more so if the suit property is auctioned by the 3rd respondent; and that the respondents may not be able to reasonably compensate it for any monetary damage that might be awarded to it in the event that the appeal is successful.
10. The applicant is also aggrieved that the learned Judge settled the suit while relying on a Settlement Agreement dated 11th June 2018 regardless of the fact that the applicant, together with the 3rd respondent, were not parties to it; that the resultant action of the charging of the suit property against the disputed amount of Kshs. 364,000,000 is still the bone of contention between the applicant and the 3rd respondent in Mombasa HCCC No. 2 of 2018 consolidated with Mombasa HCCC No. 58 of 2018; that the two suits are subject of an audit of the principle amount, and which audit is yet to be finalised; that, pursuant to the Settlement Agreement, and as attested in Malindi ELCC No. 207 of 2015 consolidated with others, some 125 houses belonging to plaintiffs therein were to be issued with subleases; that, however, some of the buyers had not met part of their bargain, including Houses No. B26 of Margaret Wambui Lindijer, B29 of Irene Njambi Migwi, C10 and C11 of Mercy Nyambura Kanyara, D6 of Rose Wanjiru Ngumi, C53 of Amina Mohamed Kasinga and Gerard Mugwiza, C35 and C36 of Nehemiah Kiptum Chemilil and Naomi Nyamusi Chemilil, C60 of Daniel Mwangangi Ndambuki, D31 and D32 of Lilian Akinyi Olesi Mogare; and that their rights will be jeopardized in the event the progression of the said Agreement commences.
11. In opposing the application, the 1st respondents relied on a replying affidavit sworn on their behalf by Ms. Amina Mohamed Kasinga on 22nd October 2024. She denied that there is a likelihood that the respondents may execute the judgment as no process of execution has commenced, and that no Bill of Costs has been filed by the respondents; that there is no evidence that the applicant has complied with the orders and directions issued on 18th July 2024 in ELC No. 355 of 2016; that the applicant has not shown willingness to furnish security for the costs of the respondents' housing units, or the costs granted to the respondents for due performance of the appeal; and that, as such, the applicant is not deserving of the orders sought.
12. The 1st respondents further depose that the applicant has been employing delaying tactics so as to avoid processing of their subleases, yet they have been in occupation of their houses for the last 10 years; and that there are no arguable issues raised in the memorandum of appeal, more so because, in ELC No. 207 of 2015 and other consolidated suits, the applicant did not object to the 1st respondents being allowed to take possession of the housing units as long as they paid the full purchase price.
13. It was also deposed that the ELC's Judgment in ELC No. 207 of 2015 dated 18th July 2024 gave a road map for its implementation; that none of the alleged owners of the houses affected by the Judgment has complained; that they have not requested the applicant to complain on their behalf; that Malindi ELC No. E043 of 2023 was filed at the instance of the applicant to frustrate the implementation of the orders issued in ELC No. 207 of 2015 and the consolidated suits; that, therefore,



- the application is intended to serve the applicant's selfish interest at their expense; that the applicant has come to court with unclean hands; and that, accordingly, we should dismiss the application with costs.
14. The application was also opposed by the affidavit of Mercy Nyambura Kanyara sworn on 31st October 2024 and filed by the firm of Mogaka Mabeya Advocates. She deposed that she was the 3rd plaintiff in Malindi ELC No. 61 of 2015, which was consolidated with ELC Case No. 207 of 2015; that there is no arguable appeal against the Judgement in ELC Case No. 61 of 2015 in so far as it related to House No. B27 for Lucy Mwhaki Njuguna, House No. D5 & D6 for Rose Wanjiru Ngumi. House No. C10 & C11 for Mercy Nyambura Kanyara, House No. B69 for Irene Njambi Migwi, House No. B26 for Margrate Wambui Lindijer and House No. D57 for Loice Wairimu Mwangi since the plaintiffs therein have paid the purchase prices in full, and were already in possession of the houses; that, as such, a stay of execution in so far as it relates to these houses would be unfair and unjust since they are lawfully entitled to enforce the Judgement, so as to be issued with the titles/certificates of lease for their respective houses; that, in the event a stay of execution is issued, it should be on condition that the houses for the plaintiffs in Malindi ELC Case No. 61 of 2015 be excluded therefrom; and that, partial enforcement orders of the judgement/decree be effected in their respect.
 15. The 3rd respondent did not file a response in Civil Application No E029 of 2024, but in Civil Application No. E026 of 2024 where it is the 1st respondent. For good order and flow of the ruling, we shall consider the response in E026 of 2024 at this stage, and we shall refer to it as the Bank. Indeed, learned counsel Mr. M'court submitted that we consider the replying affidavit in E026 of 2024 as the response to both applications. The response is contained in a replying affidavit of Felix Muhati, the Bank's officer sworn on 30th September 2024.
 16. He deposed that the approvals for change of use of the suit property from 'agricultural' to 'business cum residential (multiple dwelling units)' had been granted and that, once a lease is issued by the Government of Kenya, the applicant would surrender its freehold title in exchange for a leasehold title; that the Bank financed the construction of the housing units on the suit property, some of which were sold by the applicant; that, in order to secure the various banking facilities advanced to the applicant, the applicant charged the suit property to the Bank by way of a Charge dated 19th September 2012, which was registered on the register and title of the suit property by the 2nd respondent on 24th September 2012; and that the Bank obtained expert opinion through a letter dated 25th September 2013 from Mashariki Geosurveys Limited on the steps to be taken to obtain the leasehold title.
 17. It was also deposed that the applicant and the Bank entered into an Agreement to Create Security which provided that the Bank would discharge the Charge which was already registered against the suit title to facilitate the surrender thereof to the Government of Kenya; that, upon issuance of a leasehold title, the applicant and the Bank would create a security by way of a new charge to be registered in the leasehold title and leasehold register for the suit property; that, pursuant to a letter dated 25th October 2013 in which the Bank appointed Mashariki Geosurveyors Limited (the Surveyors) to complete the process of change of user, collect the new certificate and register a lease for the suit property, on or about 7th November 2013, the Surveyors submitted to the National Land Commission a banker's cheque of Kshs.5,000/=, being change of user approval fees; and that, they also submitted the original title deed as well as the Commissioner of Lands' Consent for change of user dated 7th May 2012.
 18. On or about 4th December 2013, the Surveyors communicated to the Bank of the existence of a change of policy in regard to peppercorn land rent, and that the rent payable for the suit property was undergoing assessment; that, on or about 4th February 2014, the National Land Commission assessed the annual rent payable for the suit property at Kshs.50,564 together with other charges, such as surrender and new grant fees, and demanded from the applicant a sum of Kshs.54,470; and that, due



- to a stalemate between the functions of the Ministry vis a vis those of the National Land Commission which had resulted in the delay in the issuance of leasehold title for the suit property, the Surveyors returned the original title on 17th October 2014 to the Bank's Advocates for safe keeping.
19. By a further request made on 25th March 2015, the Surveyors asked for the release of the original title of the suit property as the process of new grant titles' issuance had started; that the original title deed was released to the Surveyors on 30th March 2015; that, on 8th January 2016, the Surveyors obtained a letter from the Ministry of Land, Housing and Urban Development addressed to the 2nd respondent confirming that: the instrument of surrender of the lease for the suit property had been dispatched to them for purposes of execution of the lease and surrender by the applicant; and registration of the lease, surrender and issuance of a certificate of lease by the 3rd respondent; and that, on 4th February 2016, on the instructions of the 1st respondent, the firm of Anjarwalla & Khanna, Advocates obtained a certificate of official search from the 2nd respondent, which indicated that there was an inhibition order issued on 13th November 2015 registered against the suit property.
 20. In addition to the foregoing, it was the Bank's case that the Partial Settlement Agreement (the PSA) dated 11th June 2018 was consented to and signed by the applicant after mediation between the parties; that it was recorded as an order of the court in Mombasa HCCC No. 2 of 2018 (consolidated with Mombasa HCCC No. 58 of 2015); that, pursuant to the PSA, the applicant consented to charge the suit property to secure the sum of Kshs.364,000,000 pending an audit by an independent auditor; that the audit results by PKF Consulting Limited dated 3rd September 2019 indicated that, as at 11th June 2018, the applicant owed the Bank Kshs.1,074,809,580, an amount in excess of the agreed figure of Kshs.346,000,000; and that, despite the consent in the PSA, the applicant failed to execute the charge, resulting in a full trial and the consequent judgement it seeks to appeal.
 21. The Bank further stated that there were 125 houses identified as sold by the applicant; that the applicant consented not to sell the remaining 183 houses pending the determination of the Mombasa suits which would be the subject of the charge; and that the Bank conceded that the parties in Malindi ELCC No. 207 of 2015 were to be joined as parties to the PSA, but that only the firm of Mogaka Omwenga and Mabeya Advocates signed the PSA consent.
 22. According to the Bank, the purpose of the judgement in Malindi ELC No. 355 of 2016 was: that the Land Registrar was to issue a new leasehold title for the suit property; that the 1st respondent do charge the suit property for the sum of Kshs.364,000,000; and that the 1st respondent do issue a separate discharge for the 125 houses based on the information availed by the applicant which would enable the Bank to perfect its security for the loan to the applicant pending determination of the suits in Mombasa.
 23. On the alleged impecuniosity of the Bank, it was deposed that the Bank is a reputable financial institution and the 2nd respondent is an arm of the Government; that the Bank and the 2nd respondent would be able to compensate the applicant in the event that the appeal succeeds; that, in Malindi E043 of 2023, the Advocate acting on behalf of the plaintiffs therein, Mkan Advocates, acted on behalf of the applicant in Mombasa HCCC No. 2 of 2018 consolidated with Mombasa HCCC No. 58 of 2015 and participated in the mediation, the creation of the PSA and recording of the PSA in Mombasa HCCC No. 2 of 2018; that Mkan Advocates are conflicted in suing their client and the applicant, more so for initiating Malindi ELC No. E043 of 2023 while they knew of the terms and effects of the PSA; and that the conflict raises suspicions that the actions by the Advocates might have been undertaken by a proxy of the applicant.



24. The Bank contended that the appeal would not be rendered nugatory because the issuance of a new leasehold title of the suit property by the 2nd respondent would be to the advantage of all the parties; that, further, the registration of a Charge on the title protects all parties to all suits for the reason that the Charge can be discharged at any time; and that the applicant, through its conduct, had sought to prevent it (the Bank) from registering the Charge; and that it has breached its own agreement by selling the houses without releasing the purchase price into an account held with it.
25. With regard to the Notice of Motion dated 14th September 2024 in Civil Application No. E026 of 2024, we have considered the grounds on which it is anchored and the averments in the supporting affidavit of Osman Erdinc Elsek, its Director, sworn on 14th September 2024. The issues deposed to are similar to those deposed to in Civil Application No. E029 of 2024 dated 16th September 2024. We shall therefore not restate them.
26. As stated herein above, the 1st respondent opposed the application vide a replying affidavit of Felix Muhati sworn on 30th September 2024, which we have considered in extenso. We say no more of it.
27. At the plenary hearing, learned counsel Dr. Khaminwa was present for the applicant, learned counsel Mr. Ananda and Mr. Matoke for the 1st respondents, learned counsel Mr. Makuto for the 2nd respondent and learned counsel Mr. M'court for the 3rd respondent.
28. The applicant relied on the cases of Total Kenya Limited vs. Kenya Revenue Authority (2013) KECA 437 (KLR); and Musa Kipkoror Arap Baringila vs. Mansoor Nandlal (2006) KECA 319 (KLR), submitting that the twin principles under rule 5(2)(b) of this Court's Rules, 2022 have been satisfied.
29. As regards the arguability of the appeal, reliance was placed on Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 others (2017) KECA 79 (KLR), submitting that the superior court issued orders that a charge be registered on the suit property in excess of its jurisdiction; Aineah Liluyani Njirah vs. Agha Khan Health Services (2013) KECA 481 (KLR); and National Bank of Kenya vs. Pipeplastic Sankolit (K) Ltd & another (2001) eKLR for the proposition that the court's primary duty is to interpret a contract and not rewrite it, and faulted the trial court for relying on the PSA which the applicant did not execute; and Samuel Kamere vs. Land Registrar, Kajiado (2015) eKLR; and Weston Gitonga & 10 others vs. Peter Rugu Gikanga & another (2017) eKLR, submitting that, among other issues to be determined on appeal is whether the 1st respondents were bona fide purchasers for value without notice as defined in the two cases.
30. On the nugatory limb, the applicant submitted that it stands to suffer irreparable loss in excess of Kshs.364,000,000, which is not recoverable by any means; and that it is in the best interest of justice to preserve the status quo pending hearing and determination of the appeal.
31. The 1st respondents relied on submissions dated 29th October 2024. They referred to this Court's decision in Nairobi City Council vs. Tom Ojienda & Associates (2022) KECA 1326 (KLR), highlighting the principles an applicant should satisfy under rule 5(2)(b). In particular, it was submitted that the applicant had no objection to the issuance of subleases; that they are therefore entitled to specific performance; that their interest is to get the subleases transferred to their names; that they are already in occupation of their respective houses; that the appeal is a scheme to prevent them from enjoying the fruits of their judgment; that, by filing the applications, the applicant is guilty of abuse of court process; and that the applications should be dismissed with costs.
32. Mr. Makuto submitted that the 2nd respondent is not opposed to the application.
33. On behalf of the 3rd respondent, there are two sets of submissions dated 30th October 2024 and 4th December 2024 respectively, which we have considered concurrently.



34. On the issue as to whether the appeal is arguable, it was submitted that, under the PSA dated 11th June 2018, the applicant already agreed that only a figure of Kshs.364,000,000 would be charged against the suit property, save for the disputed amounts which are subject of an independent audit report filed in Mombasa HCCC No. 2 of 2018; that there are no orders emanating from the Judgement of the superior court which imposed a new charge; that the 1st respondents moved the court for orders of specific performance in order to allow completion of the process of change of user and facilitate the registration of a legal Charge and orders to the effect that some of the 1st respondents in ELC No. 207 of 2015 be registered as owners of specific housing units; that the decision in ELC No. 355 of 2016 enforced a contractual obligation already agreed upon by the applicant; that the ELC had jurisdiction to determine the issues pursuant to Section 13(2) of the *Environment and Land Court Act*, Cap 8D as was held by this Court in *Willy Kimutai Kitilit vs. Michael Kibet (2018) KECA 573 (KLR)*; and that it is in the applicant's own interest that the old title is surrendered and a new one issued so as to prevent more suits being filed against it.
35. On the nugatory limb, the 3rd respondent contended that, in the event that the applicant succeeds in the appeal, discharging a Charge pursuant to this Court's order would be straightforward; that, as was held by this Court in *Eric V.J. Makokha & 4 others vs. Lawrence Sagini & 2 others (1994) KECA 75 (KLR)*; and *David Kamau Gakuru vs. National Industrial Credit Bank Limited Civil Appeal No. 84 of 2001*, reliefs under rule 5(2) (b) are equitable remedies, and that the applicant, by reason of its conduct, does not merit the reliefs sought; and that the application should be dismissed with costs.
36. We have considered the applications, the respective responses in opposition to the application, the parties' submissions and the law. The applicant is seeking this Court's exercise of discretion under rule 5(2) (b) of this Court's Rules, 2022 to stay the decision of the ELC (Makori, J.) dated and delivered on 18th July 2024.
37. The long-standing principles for applications brought before this Court under rule 5(2) (b) is that the supplicant must demonstrate that the intended appeal is arguable and that, if stay order is not issued, the appeal would be rendered nugatory. This Court aptly articulated the principles to consider in discharge of its mandate under rule 5(2) (b) in the case of *Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 others (2013) KECA 378 (KLR)* as follows:
- “In dealing with Rule 5(2) (b), the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the Judge's discretion to this Court. The first issue for consideration is whether the intended appeal is arguable. This court has often stated that an arguable ground is not one which must succeed but should be one that is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”
38. We are also cognizant of the fact that, even as we consider whether the appeal is arguable, we are not to delve into the merits and demerits of the appeal so as not to embarrass the hearing of the main appeal. The importance of the rule 5(2) (b) is to preserve the substratum of an appeal or intended appeal, which illuminates this Court's inherent jurisdiction. This was the finding by the Supreme Court in the case of *Teachers Service Commission vs. Kenya National Union of Teachers, Sup. Ct. Appl. No. 16 of 2015 (2015) eKLR*.



39. It suffices to note that even a single bona fide ground of appeal would suffice. In *R.F.S. vs. J.D.S* (2013) KECA 366 (KLR), this Court held that:

“Now an appeal is said to be arguable when it contains grounds, points or issues that can genuinely be asserted, on which there can be divergent legal or factual positions of some merit worthy of juridical investigation and determination. To succeed, it is enough that even a single, solitary ground of such description exists and the same need not be one that must necessarily succeed in an appeal.”

40. From a cursory look at the proposed draft memorandum of appeal dated 2nd September 2024 and the arguments set out by the applicant on the arguability of the appeal, it is clear that the dominant issue to be ventilated is whether the resultant trial court orders were from the PSA to which the applicant alleges it was not party. To our minds, this suffices as a single bona fide ground of appeal worthy of this Court’s consideration.

41. On the nugatory aspect, it is clear, and the applicant does not seem to challenge the fact, that the 1st respondents who were purchasers paid for their respective houses to the developers. Therefore, there are no plausible reasons as to why the 1st respondents who have fulfilled part of their bargain should be hindered from proceeding with the process of obtaining their individual titles after a partial discharge of charge is effected by the developer and the financier. Importantly, the 1st respondents paid their respective purchase prices with the consent of the financier and, therefore, the financier cannot hold their titles for the reasons that the developer did not fulfil its part of the bargain.

42. The only apprehension that the applicant has on its part is the disputed outstanding amounts and the ability of the 3rd respondent to pay back in the event that execution proceeds. The 3rd respondent is a reputable financial institution and, unless otherwise demonstrated, the onus of proving impecunity of a party lies with the one claiming it as was held by this Court in *National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & Another* (2006) KECA 333 (KLR) thus:

“...a legal duty is placed on the applicant to prove the allegation that its intended appeal will be rendered nugatory because the respondent will be unable to pay back the decretal sum should the applicant succeed on appeal. This requirement is however not absolute. It is qualified in that it is unreasonable to expect the applicant to know in detail the resources owned by a respondent or the lack of them. Once the applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden shifts to the respondent to show what resources he has to satisfy the decree should the appeal succeed, since that is a matter likely to be peculiarly entirely within the knowledge of the respondent.”

43. From our analysis of the facts, we are satisfied that the intended appeal raises arguable grounds, but the applicant has not aptly demonstrated the loss or damage it is likely to suffer by giving the 1st respondents what rightful belongs to them. Neither has it been demonstrated that the appeal would be rendered nugatory absent stay. Considering that the twin principles under rule 5(2)(b) must be satisfied conjunctively and not in isolation, it follows that we decline to grant the stay orders as prayed.

44. Accordingly, we find that the Notices of Motion in Civil Application Nos. E029 of 2024 and E026 of 2024 dated 23rd October 2024 and 14th September 2024 respectively are devoid of merit. They are hereby dismissed with costs to the respondents.

45. Orders accordingly.



DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF MAY, 2025.

F. TUIYOTT

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

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JUDGE OF APPEAL

F. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR

