



**Kobilo Farm Limited & another v Elfam Limited; Commodities Fund (Interested Party)
(Civil Appeal (Application) E054 of 2024) [2025] KECA 834 (KLR) (16 May 2025) (Ruling)**

Neutral citation: [2025] KECA 834 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPEAL (APPLICATION) E054 OF 2024
JM MATIVO, PM GACHOKA & GV ODUNGA, JJA
MAY 16, 2025**

BETWEEN

KOBILLO FARM LIMITED 1ST APPLICANT

METROPOLE HOLDINGS LIMITED 2ND APPLICANT

AND

ELFAM LIMITED RESPONDENT

AND

COMMODITIES FUND INTERESTED PARTY

(Being an application for stay and execution of the decree and Judgment in the High Court of Kenya at Eldoret (E. Obaga, J.) dated 3rd October 2024 in ELC No. 24 of 2020)

RULING

1. Before us is an application dated 16th October 2024 brought by Kobilo Farm Limited, (the 1st applicant), and Metropole Holdings Limited, (the 2nd applicant,) under Rule 5 (2) (b) of the Court of Appeal Rules, 2022 and Articles 48 & 159 of *the Constitution*. In the main, the applicants pray for stay of execution of the decree and judgment issued in Eldoret ELC No. 24 of 2024 delivered on 3rd October 2024 pending hearing and determination of their intended appeal.
2. The application is supported by grounds listed on its body and the supporting affidavit sworn on 16th October 2024 by Wilson K. Maina who is the Director of the applicants, together with annexures thereto. It has been opposed by the respondent vide replying affidavit sworn on 26th February 2025 by Prof. Margaret Jepkoech Kamar who is a director of the respondent. The interested parties did not file any affidavit in support of their respective position.



3. The application was canvassed through rival pleadings, oral and written submissions and legal authorities relied upon by advocates for the respective parties in support of their opposing positions. The applicants' submissions are dated 10th March 2025 while the respondent's submissions are dated 26th February 2025. Mr. Kibii learned counsel appeared for the applicants while Mr. Ngaira learned counsel appeared for the respondent.
4. A brief background to the application is appropriate. On 9th July, 2018, the respondent entered into two sale agreements with 2nd applicant. After the expiry of the 90 days from the date of the agreements, the 1st applicant entered into fresh agreements with the respondent which superseded the previous agreements. These new agreements were backdated to the initial date of the agreements between the respondent and the 2nd applicant and the completion date was now 365 days from 9th July, 2018. The fresh agreements also stipulated that the 1st applicant was purchasing LR No Sergoit/Koiwoptaoi Block 13/9 measuring 36.7 hectares and LR No Sergoit/Koiwoptaoi Block 13/4 measuring 18.62 hectares and the purchase price was increased to Kshs 205,000,000/=.
5. Subsequently, LR No Sergoit/Koiwoptaoi Block 13/9 was transferred to the 1st applicant and a title issued on 3rd September 2019. However, the balance of the purchase price for LR No Sergoit/Koiwoptaoi Block 13/4 was never cleared resulting to a 21 days' notice dated 15th October 2019 to which there was no compliance by the 1st applicant. The agreement in respect of LR No Sergoit/Koiwoptaoi Block 13/4 was considered as having been rescinded by the respondent.
6. Aggrieved, the applicants vide their amended plaint dated 18th June 2020 sought the following reliefs, inter alia, that: (a) that they be allowed to repay all the outstanding loan arrears owing to the interested party with corresponding order of reimbursement of the same by the respondent herein; (b) an order of specific performance compelling the respondent to effect transfer of LR No Sergoit/Koiwoptaoi Block 13/4 immediately by supplying discharge of charge, duly transfer forms in triplicate, original title deed, valid rates clearance certificate, certificate of incorporation, KRA PIN, copies of identity cards and coloured passport size photographs of the directors of the defendant herein; and (c) a declaration that the applicants were the lawful and legal owners of that parcel of land known as LR No Sergoit/Koiwoptaoi Block 13/4.
7. The respondent raised a defence and counter claim dated 8th July 2020 in which it sought, inter-alia, a declaration that the applicants have breached the terms of the sale agreement dated 9th July 2018 by defaulting in completion of payment for land title LR No. Sergoit/Koiwoptaoi/Block 13/4 and a declaration that the defendant is the legal, bona fide and indefeasible owner /proprietor of the title for land parcel title LR No. Sergoit/Kojwoptaoi/Block 13/4 and ownership by the respondent be and is hereby upheld as true, genuine and lawful.
8. Vide judgment delivered on 24th March 2024 the subject of this ruling, Obaga, J. found that the agreement was lawfully terminated time having been made of essence by issuance of the notice of 15th October 2019 and therefore, the applicants could only get a refund of what was paid by them less what the sale agreement stipulated in case of default. Consequently, the applicants' claim failed save for the refund of the amount paid less 10% forfeited deposit. On the other hand, the learned judge found that the respondent had proved its counter-claim on a balance of probabilities.
9. Aggrieved by the said judgment, the applicants are now before this Court pursuant to Rule 5 (2) (b) of the Court of Appeal Rules, 2022. The grounds in support of the application are: (a) that their appeal is arguable and it deserves ventilation before this Court as demonstrated by the ten-grounds contained in the annexed memorandum of appeal dated 16th October 2024.



10. On the nugatory aspect, the applicants averred that the respondents have already fixed its party-to-party bill of costs for taxation and shall thereafter commence execution of the impugned judgment to defeat any outcome of the intended appeal and that the assets of the respondent are unknown and as a result the applicants stand to suffer irreparable harm if the respondent is allowed to execute the impugned judgment.
11. In opposition to the application, the respondent averred that the intended appeal is not arguable since it is only a delaying tactic by the applicants to deny the respondent from enjoying the fruits of a valid judgment. The respondent also stated that the applicants have failed to demonstrate that the intended appeal will be rendered nugatory if the stay of execution is not granted.
12. During hearing of the application, Mr. Kibii, representing the applicant's reiterated the contents of the affidavit in support of the application and submitted that the decree being a money decree, the same can be satisfied by the money that is being held in the joint account in the name of the advocates which is far and above what the respondent intends to execute.
13. On the part of the respondent, Mr. Ngaira reiterated the contents of the replying affidavit and on the nugatory aspect, he submitted that the respondent is the owner of the property in dispute and therefore it cannot be said that the respondent has no known property and that provision of security is only a requirement in stay of executions under order 42 rule 6 and not before this Court under Rule 5(2) (b) of the Court of Appeal Rules.
14. We have given due consideration to the application, the affidavits in support and in opposition thereto, as well as the submissions filed and made before us and the authorities cited. Our invitation to intervene on behalf of the applicants has been invoked under Rule 5 (2) (b) of the Court of Appeal Rules which provides that in any civil proceedings, where a notice of appeal has been lodged in accordance with Rule 77, this Court may order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just.
15. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5 (2) (b) of this Court's Rules are well settled. In *Chris Munga N. Bichage vs. Richard Nyagaka Tongi, Independent Electoral & Boundaries Commission & Robert K. Ngeny* [2013] KECA 141 (KLR), this Court stated:

“The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.”
16. On the first principle, that is, whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicants in order to warrant ventilation before this Court. In *Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR this Court described an arguable appeal in the following terms:
 - vii). 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.
 - viii). 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.”



- 17. In satisfaction of the first prerequisite, the applicants have raised ten (10) grounds in their memorandum of appeal dated 16th October 2024. One of the grounds is that the learned Judge erred in law and fact in finding that the appellants were in breach of the agreement in issue despite being ready and willing at all times to complete the purchase price. Without going into the merits of the appeal as this will be the preserve of another bench, we take the view that the question whether the learned judge erred in law and fact in finding that the appellants were in breach of the agreement is arguable, and it is certainly a matter for resolution by this Court on appeal.
- 18. On whether the appeal will be rendered nugatory should the impugned judgment and decree not be stayed, we are alive to the fact that each case must depend on its own facts and the peculiar circumstances. (See *Ngetich vs. Goren & Ano*. (Civil Application E021 of 2024) [2025] KECA 565 (KLR) (28TH March 2025) (Ruling)). Furthermore, 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 reversible, whether damages will reasonably compensate the aggrieved party. (See *Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others* (supra).
- 19. The dispute before us is not about a money decree per se. The parties entered into an agreement for sale of land. There is an admission that some money was paid and it is held in a bank account. The determination of who was in breach of the agreement and the need for appellate court to determine the parties' rights under the agreement, and whether the consequences of execution, if it proceeds, will be reversible is a peculiar circumstance for this court to consider in determining the nugatory aspect. In our view, if stay is declined, and execution proceeds, should the appellate court allow the appeal, then there is a risk of the judgment being rendered nugatory because the jointly held funds or even the land or both may have changed hands, rendering such an occurrence irreversible.
- 20. Accordingly, we find that the applicant has satisfied the two prerequisites. We allow the application dated 16th October 2024 and order that there shall be stay of execution of the decree and judgment issued in Eldoret ELC No. 24 of 2024 delivered on 14th March 2024 pending hearing and determination of the applicant's intended appeal on condition that the applicant shall deposit Kshs.10,000,000/= in a joint interest earning account in the names of the advocates for both parties within 45 days from today. In default, the stay herein granted shall lapse. The costs of this application shall abide with the outcome of the appeal.

DATED AND DELIVERED AT NAKURU THIS 16TH DAY OF MAY, 2025.

J. MATIVO

.....

JUDGE OF APPEAL

M. GACHOKA CIArb, FCIArb.

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed.



DEPUTY REGISTRAR.

