



Settlement Funds Trustees & 2 others v Mohammed & 5 others; Mohammed (Interested Party) (Civil Application E115 of 2024) [2025] KECA 782 (KLR) (9 May 2025) (Ruling)

Neutral citation: [2025] KECA 782 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E115 OF 2024
SG KAIRU, KI LAIBUTA & GWN MACHARIA, JJA
MAY 9, 2025**

BETWEEN

**SETTLEMENT FUNDS TRUSTEES 1ST APPLICANT
COMMISSIONER FOR LANDS 2ND APPLICANT
HON. ATTORNEY GENERAL 3RD APPLICANT**

AND

**FATUMA MOHAMMED 1ST RESPONDENT
ASHA MOHAMMED 2ND RESPONDENT
WANANCHI RANCHING LIMITED 3RD RESPONDENT
WANANCHI ESTATES LIMITED 4TH RESPONDENT
HARRIS HORN ALIAS HARRY HORN 5TH RESPONDENT
NATIONAL LAND COMMISSION 6TH RESPONDENT**

AND

LEILA ZAMZAM MOHAMMED INTERESTED PARTY

(Being an application for stay of execution pending appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Mombasa (E. K. Wabwoto, J.) delivered on 18th October 2024 in E.L.C Case No. 7 of 2024 Formerly Nairobi Civil Case No. 1663 of 2000)



RULING

1. By a Notice of Motion dated 23rd October 2024, the applicants essentially seek, inter alia, stay of execution of the judgment and decree of the Environment and Land Court at Voi (E. K. Wabwoto, J.) dated 18th October 2024 pending appeal therefrom; and costs of the application.
2. The applicants' Motion is supported by the annexed affidavit of Shantal Saru Lenjo, State Counsel for the 1st, 2nd and 3rd applicants, sworn on 23rd October 2024 mainly deposing to the grounds on which the Motion is founded, namely: that the suit to which the impugned judgment relates was commenced in *Nairobi HCCC No. 1663 of 2000* and subsequently transferred to *Mombasa as HCCC No. 40 of 2017* before being transferred yet again to *Voi as ELC case No. 7 of 2024*; and that the applicants had no notice of the proceedings in respect of the hearing and determination of the suit, and that, therefore, they did not actively participate therein.
3. The State counsel deponed further that the suit premises, to wit, LR No. 12924-CR 20403 situated in Mwatate and measuring 9,070 Hectares has been the only home for more than 1,000 individuals who were not joined as party to the suit; that the property was at all material times administered by the 1st applicant (the Settlement Fund Trustees), who had legally acquired it; that the 4th and 5th respondents fraudulently and without the 3rd applicant's knowledge constituted themselves directors of the 3rd respondent company (Wananchi Ranching Limited believed to have been formed by the late Haji Mohamed Adam and his late brother Ahmed Mohamed Haji Adam) and subsequently transferred the suit premises to the 4th respondent (Wananchi Estates Limited), which purported to sell it to the 1st respondent (Fatuma Mohammed) for Ksh. 40,000,000; that the 1st respondent admitted that her late father had sworn an affidavit denying having consented to the 4th and 5th respondents fraudulently acquired directorship of the 3rd respondent; that, by reason of the admission aforesaid, the 1st, 2nd and 3rd respondents were aware that the 4th respondent had title to the suit property by virtue of the unprocedurally acquired directorship, which they now challenge, but about which they did nothing, thereby prompting the suit in *ELC No. 7 of 2024*; that the suit was heard and determined in favour of the 1st to 3rd respondents as against the applicants, who were condemned unheard, thereby prompting the appeal to this Court.
4. It is noteworthy that, apart from the Motion, the supporting affidavit and the impugned judgment, the scanty record as put to us does not contain a memorandum of appeal, the pleadings in the suit culminating in the impugned decision, the proceedings in the trial court or any affidavit in reply to the Motion before us.
5. Reading from the impugned judgment, we gather that the 1st to 3rd respondents had sued the applicants and the 4th, 5th and 6th respondents vide a plaint dated 11th June 2024 (which is not on the record as put to us) praying for:
 - (a) a permanent injunction to restrain the 1st to 3rd applicants and the 4th to 6th respondents by themselves, their agents, servants, employees, attorneys, assigns and/or any other of their representatives from selling, disposing, evicting, alienating, demarcating and issuing of titles, interfering with the 1st to 3rd respondents' quiet possession, or in any way dealing with L.R. No. 12924 – CR 20403 situated in Mwatete;
 - (b) orders that the transfer to the 1st applicant be declared null and void and all consequential transfers be so declared;



- (c) a declaration that L.R No. 12924 belongs to Wananchi Ranching (Directed Agricultural) Limited;
- (d) damages; and (e) costs of the suit.
6. The 1st to 3rd respondents' case was that the 3rd respondent was at all material times the registered owner of the suit property; that the 4th and 5th respondents fraudulently sold it to other persons for Kshs. 40,000,000; and that the 1st to 3rd respondents were in possession of the certificate of title dated 1st February 1975 issued to the 3rd respondent.
 7. In the absence of a defence on the applicants' part and their failure to participate in the proceedings, and the 4th and 5th respondents having entered appearance but failed to file a defence or participate in the trial, the learned Judge found that the evidence on record showed that the 3rd respondent was the registered proprietor of the suit property before it was fraudulently transferred to other parties without their consent and knowledge. In the absence of any evidence to the contrary, the learned Judge allowed the 1st to 3rd respondents' suit as prayed, thereby prompting the appeal and the appurtenant Motion before us.
 8. Despite the scanty record, the grounds on which the intended appeal is preferred are clearly discernible from the grounds on which the Motion is founded as well as from the supporting affidavit of learned State counsel, who avers that the learned Judge was at fault in failing to appreciate: that the applicants were not given notice of the proceedings culminating in the impugned judgment; that the more than 1,000 individuals resident on the suit premises were not joined as party to the suit; and that they stand to be rendered homeless without being accorded the right to be heard in circumstances where the suit property belonging to the 1st applicant had been fraudulently acquired by the 4th respondent, who sold it to the 1st respondent to the detriment of the more than 1,000 residents .
 9. In support of the Motion, learned State counsel, Ms. Shantal Saru Lenjo, filed written submissions dated 26th November 2024 citing the High Court decision in [Matata & Another v Rono & Another](#) [2024] KEHC 2799 (KLR), highlighting the principles in determining whether or not to grant a stay of execution pending appeal. Counsel urged us to grant the orders sought.
 10. In rebuttal, counsel for the 1st, 2nd and 3rd respondents, M/s. KKOAA Advocates LLP filed written submissions dated 29th November 2024 citing the cases of *Trust Bank Limited & 3 Others v Investech Bank Limited & 3 Others* [2000] eKLR, submitting that the applicants have no arguable appeal; [Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others](#) [2013] eKLR; and [JKK v MWK](#) [2023] KECA 470 (KLR) for the proposition that the jurisdiction of this Court cannot be invoked in a vacuum. According to counsel, the applicants did not demonstrate the desire to participate in the proceedings though duly served when the suit proceeded to final determination in the High Court (see [Kibara v Ajele & 2 Others](#) [2021] KECA 104 (KLR)).
 11. In conclusion, counsel submitted that the applicants had not met the requirements for grant of orders under rule 5(2) (b) of the [Court of Appeal Rules](#), having failed to show that they have an arguable appeal or that the appeal, if successful, would be rendered nugatory absent stay. They urged us to dismiss the Motion.
 12. In order to succeed in an application under Rule 5(2) (b) of the [Court of Appeal Rules, 2022](#) for stay of execution or of proceedings pending appeal, an applicant has to satisfy the twin principles enunciated in numerous decisions of this Court, namely that: an applicant must demonstrate that they have an arguable appeal; and that the intended appeal (or appeal if already filed) will be rendered nugatory if the execution of the impugned decree, order or proceedings is not stayed.



13. 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 be rendered nugatory absent stay. The two conjunctive requirements constitute what is commonly referred to as the twin principles that must be satisfied before such orders can avail (see *Anne Wanjiku Kibeh v Clement Kungu Waibara and IEBC* [2020] eKLR; and *Yellow Horse Inns Limited v A.Kawir Transporters & 4 Others* [2014] eKLR).
14. Regarding the sufficiency of the pleaded grounds of appeal to warrant stay of execution of the impugned orders and of the proceedings in the trial court, we call to mind this Court's decision in *Yellow Horse Inns Ltd v A.A Kawir Transporters and 4 others* (*ibid*) where the Court observed that an applicant need not show a multiplicity of arguable points to merit stay orders pending appeal. In effect, one arguable point would suffice (see *Ahmed Musa Ismael v Kumba Ole Ntamorua & 4 others* [2014] eKLR).
15. Simply defined, an arguable appeal is one that raises a bona fide arguable point that deserves to be considered and determined by the Court. In other words, an arguable appeal is one that is not frivolous (see *Kenya Tea Growers Association & Another v Kenya Planters & Agricultural Workers Union* [2018] eKLR).
16. In addition to the foregoing, the Court of Appeal set out the guiding principles in considering an application for stay of execution in *Butt v Rent Restriction Tribunal* [1979] eKLR thus:
 - a. The power of the Court to grant or refuse an Application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 - b. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the judge's discretion.
 - c. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicant at the end of the proceedings.
 - d. The Court in exercising its discretion whether to grant or refuse an Application for stay will consider the special circumstances of the case and its unique requirement."
17. The High Court in *RWW v EKW* [2019] eKLR considered the purpose of a stay of execution order pending appeal, in the following words with which we identify:

"The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.



Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

18. A cursory look at the record as put to us clearly shows that the applicant’s Motion heralding the appeal discloses such arguable grounds as to, inter alia, whether the suit culminating in the impugned judgment and decree was heard and determined without notice to the applicant; whether the applicant was condemned unheard; whether the more than 1,000 individual resident on the suit property ought to have been joined as party to the suit, and whether it would defeat the course of justice to have them evicted from the suit property unheard; whether the suit property allegedly belonging to the 1st applicant had been fraudulently acquired by the 4th respondent; and whether the 4th respondent sold it to the 1st respondent to the detriment of the more than 1,000 residents.
19. To our mind, the afore-mentioned grounds on which the learned Judge is faulted are not idle. Accordingly, we form the considered view that the intended appeal is arguable, and that satisfies the 1st limb of the twin principles for grant of orders under rule 5(2) (b) of the [Rules of this Court](#).
20. Turning to the 2nd limb of the twin principle, the question is whether the appeal would be rendered nugatory if the orders sought are not granted. The term ‘nugatory’ was defined in *Reliance Bank Ltd v Norlake Investments Ltd* (2002) 1 EA p 227 at p 232 thus: ‘it does not only mean worthless, futile or invalid. It also means trifling.’ The Court also expressed the view that what may render the success of an appeal nugatory must be considered within the circumstances of each case.
21. The circumstances of this case are: that it involves allegations of fraudulent acquisition of the suit property said to belong to the applicant; that the applicant contends that it had no notice of the proceedings leading to the impugned judgment and decree; that more than 1,000 persons resident on the suit property stand the risk of eviction in enforcement of a decree obtained in a suit to which they were not party; that the applicant and the more than 1,000 residents on the suit property stand to suffer irreparable loss should the orders of stay sought pending appeal not be granted; and that the respondents would not be prejudiced by grant of the orders sought. Accordingly, it becomes necessary to preserve the subject matter of the dispute by stay of execution of the decree orders that would avert untold suffering of those resident on the suit property were eviction and demolition of their residential properties to proceed.
22. Having carefully examined the record as put to us, the applicant’s Motion, the grounds on which it is anchored, the affidavits in support and in reply, the rival submissions of learned counsel for the parties, and the cited authorities, we form the view that the intended appeal would be rendered worthless or futile if we declined to grant the orders sought. Indeed, enforcement of the judgment and decree sought to be stayed would result in tremendous loss to more than 1,000 residents, which loss cannot be adequately compensated by an award of damages.
23. In view of the foregoing, we reach the inescapable conclusion that the applicant has satisfied the twin principles for the grant of the orders sought pursuant to rule 5(2) (b) of this [Court’s Rules](#). Accordingly, the applicant’s Notice of Motion dated 23rd October 2024 succeeds and is hereby allowed. Consequently, we hereby order and direct that:
 - a. There be stay of execution of the judgment and decree of the Environment and Land Court at Voi (E. K. Wabwoto, J.) dated 18th October 2024 pending appeal;
 - b. The applicant do file and serve the record of appeal within forty-five (45) days from the date hereof failing which the stay orders hereby granted shall automatically lapse;



c. The costs of the Motion do abide the outcome of the appeal.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF MAY 2025.

S. GATEMBU KAIRU, FCIArb

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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

