



**Executive Super Rides Limited & another v NCBA Bank of Kenya
PLC; Regent Auctioneers (Interested Party) (Civil Appeal (Application)
E900 of 2024) [2025] KECA 1171 (KLR) (20 June 2025) (Ruling)**

Neutral citation: [2025] KECA 1171 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E900 OF 2024
W KARANJA, K M'INOTI & P NYAMWEYA, JJA
JUNE 20, 2025**

BETWEEN

EXECUTIVE SUPER RIDES LIMITED 1ST APPLICANT

ERICK KIMATHI KIRIMA 2ND APPLICANT

AND

NCBA BANK OF KENYA PLC RESPONDENT

AND

REGENT AUCTIONEERS INTERESTED PARTY

(An application for a stay of execution pending appeal of the Ruling of the High Court at Nairobi (P. Mulwa J.) delivered on 17th October 2024 in HCCOMM/E434 OF 2024)

RULING

1. The principles applicable in the exercise of this Court's discretion under Rule 5 (2) (b) of the Court of Appeal Rules of 2022 are settled. An applicant has to satisfy two requirements. Firstly, that he or she has an arguable appeal. Secondly, that unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this Court in Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 others [2013] eKLR. Both limbs must be demonstrated before a party can obtain a relief under rule 5(2) (b) (see Republic vs Kenya Anti-Corruption Commission & 2 others (2009) KLR 31; Reliance Bank Ltd vs Norlake investments Ltd (2002) I EA 227 and Githunguri vs Jimba Credit Corporation No (2) (1988) KLR 838). In addition, this Court exercises original jurisdiction under Rule 5 (2)(b) as held in Ruben & 9 others vs Nderitu & another (1989) KLR 459 and Trust Bank Limited and Another vs Investech Bank Limited and 3 Others (2000) eKLR.



2. This ruling is on an application dated 19th December 2024 in which Rule 5 (2) (b) amongst other provisions has been invoked by Executive Super Rides Limited and Erick Kimathi Kirima, the 1st and 2nd applicants herein. The outstanding prayers for determination in the said application are as follows:
 - “ 5. That pending the hearing and determination of COACA/E900/2024 an order for status quo to be maintained on the suit property to the effect that there shall be no interference whatsoever by the respondent, its agents, servants and/or anyone acting under their instructions, with the Appellants/Applicants' quiet possession of all that parcel of land known as LR Number 1/445 (Original No.1/432/1) situate along Ngong Road, Nairobi.
 6. That pending the hearing and determination of COACNE900/2024, a temporary injunction be and is hereby issued restraining the Respondent and Interested Party whether by themselves, their employees, servants, agents and/or anyone acting under their instructions, from carrying on any acts that directly and/or indirectly interfere with the Appellants/Applicants' peaceful and quiet enjoyment/possession of the demised premises and from further interrupting the Appellants/Applicants' business, in any manner whatsoever of the demised premises being LR Number 1/445 (Original No.1/432/1) situate along Ngong Road-Nairobi.
 6. That a permanent injunction do issue to restrain the Respondent either by themselves, their servant, agents and/or employees and/or any other person acting on their instructions from carrying on any acts that directly and/or indirectly interfere with the Appellants/Applicants' peaceful and quiet enjoyment/possession of the demised premises and from transferring, or alienating the whole or any portion of the parcel of land known as LR Number 1/445 (Original No.1/432/1) situate along Ngong Road-Nairobi, to any other third parties.”
3. We heard the application on 21st January 2025 on the Court's virtual platform, and learned counsel Mr. Otieno, appeared for the applicants while learned counsel, Mr. Billy Kong'ere, appeared for the respondent and interested party. The two counsel highlighted their written submissions that they lodged with this Court, dated 16th January 2025 and 15th January 2025 respectively, in which the above cited cases were relied upon for their respective arguments.
4. The grounds for the application are detailed in the affidavit in support thereof on 29th December 2024 and a further affidavit sworn on 16th January 2025 by the 2nd applicant, and submissions highlighted during the hearing by Mr. Otieno. Briefly, the applicants aver that they have filed an appeal in this Court, being Civil Appeal No. E900 of 2024, challenging a ruling made by the High Court on 17th October 2024 in HC COMM/E434 of 2024 that found that the applicants had not established a prima facie case for the grant of an order of interlocutory injunction they had applied for to stop the transfer of the suit property. The High Court accordingly dismissed the applicants' application and awarded costs thereof to the respondent and interested party.
5. The applicants aver and submit that they have an arguable appeal with good prospects of success as detailed in their memorandum of appeal dated 18th November 2024. In particular that the said ruling determined the applicants' suit at the interlocutory stage without hearing the parties on merit, contrary to Article 50(1) of *the Constitution*; the issuance and service of statutory notices for the sale of the suit property was disputed; the validity of the auction which purportedly took place contradicted the



- Auctioneers Act* and Rules and was never held; and the power of sale arose from contested loan arrears which were marred by illegal and exorbitant interest rates which did not form part of the offer letter and loan.
6. Further, that the intended appeal, if successful, will be rendered nugatory, since the suit property which was irregularly sold through an auction which did not take place as per the law will be transferred to a third party and at an undervalue, hence an award of damages cannot adequately compensate the applicants. In addition, the applicants host a car business with motor vehicles and various offices at the suit premises and if a third party is allowed to take possession, its business together with others will be prejudicially affected.
 7. On the other hand, the respondent and interested party will not suffer prejudice since their only defence is that they released the title documents to the successful bidder, whose identity they have not disclosed and who is yet to obtain ownership rights, and they can refund the money they received in the event the appeal succeeds. Additionally, the purported release of title documents and further payment of the purchase price was done in contravention of court orders issued by the High Court on 5th November, 2024.
 8. Jackson Nyaga King'ori, the respondent's and interested party's legal counsel, filed a replying affidavit sworn on 13th January 2025, in response. Their case, which was augmented by the submissions made by Mr. Kong'ere, was that after the dismissal of the application for injunction by the High Court, the respondent released the title documents to the successful bidder, and consequently, any order to stop the exercise of the power of sale or maintenance of the status quo as regards occupation of the property would be incapable of compliance by the respondent. The respondent in this regard annexed a copy of the release letter dated 11th November 2024. Further, that it would be against the rules of natural justice to issue any orders affecting the innocent purchaser without hearing him, and the intended appeal is therefore neither arguable nor likely to be rendered nugatory if the orders sought are denied.
 9. Mr. Kong'ere, while citing the decisions in *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others SC Application No. 5 of 2014 [2014] eKLR* and *Mbugua alia George Boniface Nyanja v Iqbal (Personal Representative of the Estate of the Late Ghulam Rasool Jammohammed) (2021) KESC 41 (KLR)*, submitted that the appeal was not arguable given that the trial Judge gave cogent reasons for his decision, and that even assuming the appeal if arguable, the applicants are seeking to stop the transfer of property sold at the public auction to the auction purchaser, and they have an available remedy in the circumstances. Reliance was placed on the decisions in *Jacob Ochieng' Muganda vs Housing Finance Company of Kenya Limited [2002] KECA 109 (KLR)*, *Kaushik Panchamatia, Sunrise Hauliers Limited, Rishi Hauliers Limited & Dunga Wholesalers Limited vs Prime Bank Limited & Garam Investment Auctioneers [2020] KECA 418 (KLR)* and *Francis JK Ichatha vs Housing Finance Company of Kenya [2005] KECA 222 (KLR)* that an appeal would not be rendered nugatory in such circumstances as damages are an adequate remedy.
 10. In addition, counsel argued that the injunction seeks to restrain the respondent from exercising the statutory power of sale, and evidence has been presented that the power has been exercised and the documents of title have been released to the purchaser who has demanded vacant possession. Therefore, the event sought to be restrained is now past, and the court will curtail the purchaser's right to enjoy its property without a hearing. Lastly, that it is doubtful that this Court has powers under Rule 5(2)(b) to grant the order sought for maintaining "status quo".
 11. We have considered the respective cases and arguments put forward by the parties and their counsel, and we shall first address the doubt expressed by counsel for the respondent and interested party, as regards this Court's jurisdiction to grant "status quo" orders under Rule 5(2)(b). Various holdings by this



Court have in this regard confirmed that this Court is possessed of inherent jurisdiction to grant status quo orders. We also adopt this position. In *Total Kenya Limited vs Kenya Revenue Authority* [2013] KECA 437 (KLR) it was noted that although under Rule 5(2)(b) the Court can only issue orders of injunction, stay of execution or stay of proceedings, this does not preclude the Court, in specific circumstances, from making any other conservatory orders under its inherent jurisdiction including maintenance of the prevailing status quo. Similarly, in *Samiyan Kaur Devinder Singh v Speedway Investments Ltd & another* [2014] KECA 355 (KLR) this Court expressed itself thus:

“In addition to rule 5(2) (b) the applicant has also invoked rule 1(2) of the Court of Appeal Rules, 2010 which provides that nothing in the Court of Appeal Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. In the circumstances of this case, we do not consider the applicant’s prayer for an order for maintenance of the status quo pending the hearing and determination of the intended appeal fatal. If we are satisfied that the ends of justice will be best served by issuing a preservative order pending the hearing and determination of the intended appeal, we have basis under Rule 1(2) to issue such an order. (See *DHIMAN V. SHAH* (2008) KLR, 165).”

12. On whether the orders sought are merited, we are alive to the interpretation of the requirement of arguability. By the term “arguable”, it is not meant an appeal or an intended appeal that will definitely succeed, but one which raises a bona fide issue worth of consideration by the Court (see *Kenya Tea Growers Association & Another vs Kenya Planters Agricultural Workers Union*, Civil Application No. Nai. 72 of 2011 UR). The appeal need not raise a multiplicity or any number of such points, and demonstration of one arguable point will suffice (see *Kenya Railways Corporation vs Ederman Properties Ltd* Civil Appeal No. Nai. 176 of 2012). In the present application, we note that the applicant has raised an issue as regards the propriety of the interlocutory findings made by the High Court and the validity of the alleged auction of the suit property. It is our view that these issues are not a frivolous, and merit consideration by this Court. We therefore find that the applicants have satisfied the first limb of arguability.
13. On the nugatory limb, an appeal or intended appeal will be rendered nugatory where the resulting effect of not granting a stay of execution is likely to be irreversible or, if it is not reversible, where damages will not reasonably compensate the party aggrieved (see *Stanley Kangethe Kinyanjui vs Tony Keter & 5 others* Civil (supra)). Hence the various decisions of this Court that the purpose of a stay of execution is to preserve the subject matter of the appeal. In the present application, concerns were raised not only as regards the legality of the subject auction, but also that sale of the suit property took place during the pendency of court orders prohibiting the same. The applicants have also demonstrated the prejudice they are likely to suffer, whereas the respondent relies on the prejudice that is to be suffered by a third- party purchaser, who has not been identified. We are therefore persuaded that this is a matter where status quo orders are merited, to preserve the suit property and balance the interests of both parties.
14. In the circumstances, we order that pending the hearing and determination of Civil Appeal No. E900 of 2024, there shall be no interference with the applicants’ possession of, or transfer of the suit property, being the parcel of land known as LR Number 1/445 (Original No.1/432/1) situated along Ngong Road Nairobi. The costs of the application dated 19th December 2024 shall abide the outcome of the appeal.
15. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE, 2025 WANJIRU KARANJA



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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

