



REPUBLIC OF KENYA



LN v JEN (Civil Application E613 of 2024) [2025] KECA 1130 (KLR) (20 June 2025) (Ruling)

Neutral citation: [2025] KECA 1130 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E613 OF 2024
W KARANJA, K M'INOTI & P NYAMWEYA, JJA
JUNE 20, 2025**

BETWEEN

LN APPLICANT

AND

JEN RESPONDENT

(Application for stay of execution pending the hearing and determination of an appeal from the ruling and order of the High Court of Kenya at Nairobi (Chemitei, J.) dated 7th November 2024 in HCCC No. 077 of 2017)

RULING

1. The application before the Court arises from a protracted matrimonial dispute between the applicant, LN (N) and the respondent, JEN (N). In the application dated 14th November 2024, N prays for an order of stay of execution pending appeal from the ruling and order of the High Court at Nairobi, (Chemitei, J.) dated 7th November 2024.
2. By the impugned order, the High Court made the following orders, which have aggrieved N:
 - a. The applicant (N) and the respondent (N) do agree on a professional valuer to value the rent collected from 11th February 2019 to date.
 - b. In the event of any disagreement on valuers, each of the parties shall be at liberty to engage separate valuers and the reports be filed to this court within 30 days from the date herein.
 - c. Each party shall be responsible for the costs of the valuation.
 - d. The respondent to immediately hand over the management of the premises to the applicant and in default the applicant can engage the services of the nearest police station to oversee the said compliance without notice to the applicant.
 - e. This matter be mentioned before the Deputy Registrar to oversee compliance.



- f. Costs to the applicant.
3. The above orders were made in an application by N dated 2nd August 2023, seeking an order to compel N to deposit in court Kshs. 8,448,510, which he claimed she had been illegally collecting as rent from two tenants on LR No. xxxx/xxxx in Karen, Nairobi (the suit property), since 2019. In opposing the application, N contended that the portion of the suit property from which she was collecting rent was her property; that there was no order directing N to collect rent therefrom; and that in any event, the issue was res judicata.
 4. To properly appreciate the application before us, it is imperative to briefly sketch the background to the application. On 11th February 2019, in a bid to settle their matrimonial dispute, the parties entered into a consent agreement by which they agreed on how to share the property known as LR No. xxxx/xxx between themselves and some other parties. They agreed to have that parcel sub-divided into two, namely LR No. xxxx/xxxx and LR No. xxxx/xxxx. LR No. xxxx/xxxx was to be further sub-divided into two parcels, with N taking Portion A and N Portion B. The portion that eventually went to N became the suit property (LR No. xxxx/xxxx).
 5. The consent agreement contained 9 clauses, but for purposes of this application, the relevant clause is clause 8, which provided as follows:

“ 8. The first defendant (N) shall have occupation of the property until the subdivision and the title in favour of the the plaintiff/applicant (N) is issued.”
 6. On 11th January 2021, N applied for committal of N for contempt of court for violation of the consent order and failing to remit rent Kshs. 4,894,000 that she was collecting from two houses on the suit property, which he claimed he was entitled to. He also prayed for an order that she deposits the said amount, presumably in court, and an order that he should collect future rents.
 7. On her part, N applied on 22nd February 2022 for committal of N for violating the consent order by refusing to sign the transfer to enable registration of the suit property in the name of N.
 8. Muchelule, J. (as he then was) heard the applications and by a ruling dated 3rd November 2023, held that the consent order dated 11th February 2019 had not been fully complied with by both parties. Accordingly, he directed the Deputy Registrar to supervise the implementation of the consent and to report to the Court within 90 days.
 9. In the report of the Deputy Registrar dated 11th July 2024, all clauses in the consent order were marked as completed, except clause 8, where the Deputy Registrar noted as follows:

“ Conclusion

Item 8 of the consent order which is occupation of the property by the defendant (N) remains outstanding going by the status reports.

Mention on 31/7/24 before Justice Chemtai for further orders.”
 10. From the record before us it is not clear whether the matter was mentioned on 31st July 2024. Be that as it may, Chemtai, J. heard the parties on N’s application dated 2nd August 2023 to compel N to deposit the rent, and issued the orders we have already referred to in this ruling. The learned judge found that the issue of deposit of rent was not determined in the ruling of Muchelule, J. (as he then was) and was therefore not res judicata. In addition, he found that clause 8 of the consent judgment entitled N to occupation of the suit property pending subdivision, which gave him the right to rent or lease it out.



- The learned judge also found that N was entitled to refund of the rent that N was collecting for the period he was entitled to have occupation of the suit property per the consent agreement.
11. That is what has aggrieved N and led to the application for stay of execution now before us, in support of which her learned counsel, Mr. Wekesa relied on N's affidavit sworn on 13th November 2024 and written submissions dated 25th November 2024.
 12. To demonstrate that the intended appeal is arguable, counsel submitted that the High Court erred by ignoring that N is the absolute owner of the suit property; by dispossessing N of her property; by granting N an interest in N's property after it was transferred to her; by conflating "occupation" with "possession"; and by misinterpreting and misapplying the consent agreement.
 13. As regards the risk of the appeal being rendered nugatory, counsel submitted that unless an order of stay of execution is granted, N would suffer substantial loss because she would be dispossessed of her property and the income it was generating for an indefinite period.
 14. In support of the application counsel relied on a number of decisions of this Court, among them Cabinet Secretary Ministry of Health v Aura & 13 Others [2024] eKLR and Dennis Mogambi Mang'are v Attorney General & 3 Others [2012] eKLR.
 15. N opposed the application vide his replying affidavit sworn on 22nd November 2024 and submissions dated 27th November 2024. He contended that although he was entitled to possession of the suit property under the consent agreement, which extended to collection of rent, N had evicted his tenants and replaced them with her own, from whom she had been collecting rent from 2019. It was his position that the intended appeal was not arguable because it was N who was acting contrary to the consent agreement. He maintained that the trial court had not ordered any change in ownership of the suit property and that N's allegation of violation of the right to property was baseless. Lastly, N contended that the intended appeal will not be rendered nugatory because the possession ordered by the High Court was limited to collection of rent. In support of his submissions N relied on, among others, Githaiga & another v Karanja [2024] KECA 605 (KLR) and Theophile v Chemfest Ltd. [2023] KECA 189 (KLR).
 16. We have anxiously considered the ruling of the High Court, the application, the submissions and authorities cited by both parties. Starting with the first consideration of whether the N has presented an arguable appeal, we have looked at the draft memorandum of appeal and are satisfied that indeed the issues framed therein are arguable. We particularly take into account the fact that she is not required to present a multiplicity of arguable issues and further that an arguable appeal does not necessarily have to succeed when the appeal is heard.
 17. As regards whether the intended appeal is arguable, we note that both parties are disputing the actual meaning of clause 8 of the consent agreement, although it is plainly clear under that clause N was entitled to possession, whatever that is ultimately interpreted to mean. The learned judge directed the computation of the rent collected from 2019 and "management" of the suit property by N, clearly for purposes of collection of rent.
 18. We do not see how computation of the rent collected from 2019 will render the intended appeal nugatory, particularly granted the fact that N's prayer was for deposit of the said amount. If the appeal is successful, that amount will be available to whichever party is ultimately found to have been entitled to it. From the order of the High Court, we do not see anything that is irreversibly fatal to any of the parties to this application.



19. In Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR, this Court explained as follows on what may render an appeal nugatory, which is dependent on the peculiar circumstances of each case.

“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 not reversible whether damages will reasonably compensate the party aggrieved.”

20. To entitle a party to a remedy under rule 5(2)(b), such party must satisfy the two principles we have mentioned above. (See Republic v Kenya Anti-Corruption Commission & 2 Others [2009] KLR 31).

21. The application must fail if the applicant establishes only one of the principles. In this case, N has only established the first principle, but failed to establish the second. In the event, this application is hereby dismissed with costs to N. It is so ordered.

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

W. KARANJA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

