



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mbogoh v Chironda (Civil Application E012 of 2024)  
[2025] KECA 1098 (KLR) (20 June 2025) (Ruling)**

Neutral citation: [2025] KECA 1098 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPLICATION E012 OF 2024  
KI LAIBUTA, GWN MACHARIA & SG KAIRU, JJA  
JUNE 20, 2025**

**BETWEEN**

**SAMUEL MATAZA MBOGOH ..... APPLICANT**

**AND**

**SELINA BEGONJA CHIRONDA ..... RESPONDENT**

*(Being an application for stay of further proceedings in Kilifi MCCC No. 176 of 2018 and stay of the ruling of (Makori, J.) dated and delivered on 21st February 2024 in ELCL Misc. Application No. E002 of 2023)*

**RULING**

1. The dispute between the applicant, Samuel Mataza Mbogoh and the respondent, Selina Begonja Chironda, was in relation to the ownership of Plot No 53, Kijipwa Settlement Scheme (the suit property). The respondent filed a suit before Kilifi Senior Principal Magistrate's Court, being Civil Suit No 176 of 2018. She pleaded that she had settled on the suit property and that, in the year 2012, the applicant allegedly invaded the suit property without permission or authority. She thus prayed: that the court do issue an order compelling the applicant to vacate the suit property; costs of the suit; and for any further orders.
2. The applicant filed a Statement of Defence dated 12<sup>th</sup> June 2018 by which he denied the allegations made against him by the respondent in the plaint. On his part, he contended that he purchased the suit property on 15<sup>th</sup> July 1989; that he solely developed the suit property by constructing a house thereon; and that the respondent moved into the house when it was complete by virtue of being his wife.
3. In a judgement delivered on 14<sup>th</sup> September 2021, Hon. Kituku, SPM. held that he had no jurisdiction to determine the suit before him since the suit property in question was matrimonial property; that the jurisdiction to determine ownership of matrimonial property fell with the High Court; and that,



- even if he had been sitting to determine the ownership of the suit property, he would have dismissed the suit since, in his opinion, the respondent had not proved ownership.
4. Aggrieved, the respondent filed an application dated 14<sup>th</sup> November 2022 seeking injunctive orders against the applicant from interfering with the suit property, and for review of the judgement delivered on 14<sup>th</sup> September 2021. The respondent stated that the judgement was entered without sufficient material disclosure and/or through misapprehension of material facts which, if they had been presented before the court, the court would have arrived at a different conclusion.
  5. In response, the applicant filed grounds of opposition dated 13<sup>th</sup> December 2022 whose gist was that the trial court did not have jurisdiction to determine the respondent's application.
  6. The trial court delivered its ruling on 3<sup>rd</sup> May 2023 in the absence of both parties and allowed the respondent's application for review. The learned Magistrate directed the respondent to file and serve additional documents within 14 days, and corresponding leave was granted to the applicant to file further documents in response, if need be.
  7. Aggrieved by the ruling, and after the lapse of 30 days required to mount an appeal, the applicant filed an application dated 3<sup>rd</sup> July 2023, being Malindi ELRC Misc. Application No E002 of 2023 seeking: leave to file an appeal out of time against the ruling delivered on 3<sup>rd</sup> May 2023; and stay of proceedings before the trial court pending determination of the intended appeal. Among the grounds proffered for seeking leave to file appeal out of time was that the trial court did not communicate the date when the ruling was to be delivered, and that he only got to know of the outcome of the impugned ruling after being served with pre-trial documents.
  8. In his ruling delivered on 21<sup>st</sup> February 2024, the learned Judge (Makori, J.) declined to grant leave to appeal out of time on the basis that the applicant had not demonstrated that the trial court had given judgement without his knowledge or that of his counsel; and that, in reviewing its judgement, the trial court was exercising its discretion which was not proved to have been exercised injudiciously.
  9. That decision prompted the applicant to commence proceedings before this Court vide a Notice of Appeal dated 26<sup>th</sup> February 2024, which was followed by the instant application, the Notice of Motion dated 26<sup>th</sup> April 2024. It is brought under rule 5 (2) (b) of this Court's Rules, 2022 seeking orders: that pending the hearing and determination of the intended appeal against the ruling of the superior court delivered on 21<sup>st</sup> February 2024 in Malindi ELCL Misc. Application No E002 of 2023- Samuel Mataza Mbogoh v Selina Begonja Chironda, this Court do grant stay of proceedings in Kilifi MCCC No 176 of 2018- Selina Begonja Chironda v Samuel Mataza Mbogoh; and that costs of the application be awarded to the applicant.
  10. The application is supported by the grounds on its face, the affidavit of the applicant deposed on even date, and a further affidavit dated 22<sup>nd</sup> May 2024. The applicant deposed that the ruling of the trial court dated 3<sup>rd</sup> May 2023 by which he is aggrieved was delivered in the absence of the parties; that the statutory period of 30 days within which to lodge an appeal had lapsed by the time he came to learn of the ruling; and that his application to the superior court seeking leave to file the appeal out of time was dismissed. Hence the instant appeal.
  11. On the arguability of the intended appeal, the applicant has annexed to the further affidavit a draft memorandum of appeal by which he faults the learned Judge for: holding that the applicant did not show or demonstrate that the impugned ruling of 3<sup>rd</sup> May 2023 was delivered without the knowledge of the applicant or his counsel; proceeding to pronounce himself on the Motion dated 3<sup>rd</sup> July 2023 as if the application was an appeal against the ruling of 3<sup>rd</sup> May 2023, and not an application seeking leave



- to appeal against the ruling out of time; failing to exercise his discretion to grant the applicant leave to appeal against the ruling of the subordinate court; and dismissing the applicant's application, thereby denying him his right to appeal against the decision of 3<sup>rd</sup> May 2023.
12. As to whether the appeal will be rendered nugatory if the orders sought are not granted, the applicant maintains that, if the trial court proceedings are not stayed, the primary suit will commence afresh and be determined before the appeal is heard, thus rendering the appeal an academic exercise.
  13. On her part, the respondent filed a replying affidavit dated 9<sup>th</sup> May 2024. It is her case that, since the applicant did not demonstrate the steps he took in following up on the pending ruling before the trial court, the learned Judge was correct in dismissing his application; that, during the pendency of the matter before the ELC, the applicant sold off part of the unsurveyed land to third parties and that, therefore, there was no basis on which the application should be allowed; that the parties should instead be directed to proceed with the matter before the trial court to its logical conclusion; that the application is frivolous, not arguable and a waste of court's time; and, as such, it should be dismissed.
  14. We heard this application on 4<sup>th</sup> February 2025. Learned counsel Mr. Lewa was present for the applicant while learned counsel Ms. Omollo was present for the respondent. Both counsel relied on their respective parties' written submissions, which they orally highlighted. Those of the applicant are dated 27<sup>th</sup> May 2024 while those of the respondent are dated 30<sup>th</sup> May 2024, and we have duly considered them.
  15. While referring to his draft memorandum of appeal and the case of *Dennis Mogambi Mang'are v Attorney General & 3 others* (2012) KECA 251 (KLR), the applicant urged that an arguable appeal is not one that must necessarily succeed, but that it is one deserving of the Court's consideration; and that he has been able to demonstrate that his appeal is worthy of consideration.
  16. On the nugatory limb, the applicant urges that, if the proceedings in the lower court are not stayed so as to accord him an opportunity to appeal the decision of the learned Judge, the intended appeal will be rendered an academic exercise. Reliance was placed on the decision of the Supreme Court in *Teachers Service Commission v Kenya National Union of Teachers & 3 others* [2015] KESC 29 (KLR) where it was held that this Court has jurisdiction to preserve the substratum of an appeal or intended appeal.
  17. On her part, the respondent relied on *Nairobi City Council v Tom Ojienda & Associates* [2022] KECA 1326 (KLR) and *Mbarak Said Ali & another v Sultan Palace Development Limited* [2021] KECA 443 (KLR) in submitting on the twin principles that an applicant should satisfy in an application of this nature.
  18. She submitted that stay of proceedings is a serious and fundamental interruption of the right of a party and that, therefore, the Court should weigh the circumstances of a case before granting or refusing to grant the orders sought; that the application is merely intended to impede the proceedings before the trial court; that the applicant has not demonstrated that there are exceptional circumstances to warrant stay of proceedings as opposed to having the case concluded and all grievances addressed in a single appeal; and that the applicant did not demonstrate in the superior court what steps he took to follow up on the next ruling date which had been fixed by the trial court.
  19. In urging us to dismiss the application, the respondent submitted that both courts below exercised their discretion judiciously; and, consequently, the applicant was not deserving of the reliefs sought.
  20. We have considered the application, the submissions of both parties, the authorities relied upon and the law. Our task is to determine whether the applicant has satisfied the twin principles under rule 5(2) (b) of this *Court's Rules, 2022* to warrant us to stay the proceedings before the trial court.



21. The jurisdiction of this Court in so far as the reliefs that it can grant under rule 5(2) (b) was enunciated in, among other decided cases, the case of *Peter Anyang' Nyong'o & 2 others v Minister for Finance & another* [2007] KECA 117 (KLR) as follows:

“It is trite law that this court is a creature of statute and can only exercise the jurisdiction conferred on it by statute. The jurisdiction of this Court to grant interim reliefs in Civil Proceedings pending appeal is circumscribed by Rule 5(2)(b). It is apparent that under Rule 5(2)

(b) this Court can only grant three different kinds of temporary reliefs pending appeal, namely, a stay of execution, an injunction, and a stay of further proceedings. This Court has consistently construed Rule 5(2) (b) to the effect that each of the three types of reliefs must relate to the decision of the superior court appealed from.”

22. Therefore, under rule 5(2)(b), the reliefs available are three- fold, namely stay of execution, an injunction or stay of further proceedings.

23. The object of rule 5(2) (b) in granting the interim relief of stay of proceedings is to preserve the substratum of the subject matter so that the appeal is not rendered nugatory if it is successful. A party seeking stay orders must demonstrate to the satisfaction of the Court that the appeal or the intended appeal is arguable and that, if the stay of proceedings is not granted, the appeal or the intended appeal will be rendered nugatory. In *Republic v Kenya Anti-Corruption Commission & 2 others* [2009] KECA 387 (KLR), this Court delineated the twin principles thus:

“The law as regards the principle that guide the court in such an application brought pursuant to rule 5(2)(b) of the rules are now well settled. The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the court, first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the results or success could be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he fails to demonstrate the other limb.”

24. Turning to the first limb as to whether the intended appeal is arguable, it is trite that an arguable appeal is not one which must necessarily succeed, but one which is not frivolous. It is one which is deserving consideration by the Court. It is also trite that a single bona fide ground of appeal will suffice for consideration by the Court. See *Yellow Horse Inns Limited & another v A.A. Kawir Transporters Ltd & 4 others* [2014] KECA 839 (KLR) where the Court held:

“It is now trite that only one arguable point is sufficient for the granting of the relief under Rule 5(2) (b) of this Courts’ Rules.”

25. From the grounds on which the applicant’s Motion is founded, and on our perusal of the Draft Memorandum of Appeal, we are satisfied that the applicant deserves his day in Court to argue the appeal. We say no more under this limb as it is left to the bench that will hear the appeal to determine the merits or otherwise of the grounds of appeal.



- 26. As to the nugatory limb, the Court should consider if what is sought to be stayed is allowed to happen would not be reversible, and that damages would not be sufficient to compensate the aggrieved party. See: *University of Nairobi v Ricatti Business of East Africa* [2020] KECA 463 (KLR). In this case, the applicant is concerned that if stay is not granted, the trial court will proceed to hear the main suit and most likely issue an alternative second judgment over the same subject matter.
- 27. We have considered the decision of the trial court vide the ruling dated 3<sup>rd</sup> May 2023. The reasoning of the learned Magistrate in allowing the review application was that there were previous proceedings touching on the suit property, being Misc. Application No 381 of 2009; that the findings thereof may have a bearing on any other proceedings touching on the suit property; and that it was critical that such proceedings be brought to the attention of the court.
- 28. More importantly is the fact that the learned Magistrate in his ruling granted leave to all parties to adduce further evidence during the rehearing of the case in support of, and/or and in opposition to, the suit before it. Thus, the applicant will have the opportunity to counter the evidence which the respondent will adduce and cannot be heard to say that the order of rehearing the case and of presenting additional evidence was only intended to favour the respondent. We are unable to see what prejudice the applicant will suffer if the proceedings continue. On that note, we are not satisfied that the applicant has demonstrated that the appeal will be rendered nugatory if the order to stay proceedings is not issued.
- 29. In view of the foregoing, and bearing in mind that both limbs under rule 5(2)(b) must be satisfied, we arrive at the conclusion that the application is unmeritorious. Accordingly, the Notice of Motion dated 26<sup>th</sup> April 2024 is hereby dismissed with costs to the respondent.

**DATED AND DELIVERED AT MALINDI THIS 20<sup>TH</sup> DAY OF JUNE, 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 the true copy of the original.

Signed

**DEPUTY REGISTRAR**

