



Registered Trustees of Ruiru Sports Club v Njeru Nyaga & Company Advocates LLP (Civil Appeal (Application) E463 of 2023) [2025] KECA 1124 (KLR) (20 June 2025) (Ruling)

Neutral citation: [2025] KECA 1124 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E463 OF 2023
W KARANJA, K M'INOTI & P NYAMWEYA, JJA
JUNE 20, 2025**

BETWEEN

THE REGISTERED TRUSTEES OF RUIRU SPORTS CLUB APPELLANT

AND

NJERU NYAGA & COMPANY ADVOCATES LLP RESPONDENT

(Applications for striking out of appeal and for 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 OF2024)

RULING

1. This ruling is on two applications, the first one dated 31st January 2024 was filed by the Njeru Nyaga & Company Advocates LLP (hereinafter the “respondent”) and seeks orders that the appeal herein be struck out with costs and the judgement of the Environment and Land Court (hereinafter the “ELC”) be upheld as entered on 31st May 2023 in ELC Miscellaneous Application Case No. E083 of 2022; while the second application dated 24th September 2024 was filed by The Registered Trustees of Ruiru Sports Club (hereinafter the “appellant”) and seeks to stay of execution of the orders given by the ELC at Nairobi (Oguttu Mboya J.) on 2nd November 2023 in ELC Miscellaneous Application Case No. E083 of 2022, attaching all money held by the National Land Commission (NLC) to satisfy the ruling given on 31st May 2023, pending the hearing and determination of the appeal filed by the appellant.
2. We heard the applications on 23rd January 2025 on this Court’s virtual platform, and learned counsel Mr. Preston Wawire appeared for the appellant while learned counsel, Mr. Martin Njeru, appeared for the respondent. The two counsel highlighted their respective written submissions that they lodged with this Court, dated 21st January 2025 and 15th February 2024 on the first application, and 8th October 2024 and 20th January 2025 on the second application.



3. We will commence with a consideration of the first application, since if found to be merited, it will obviate a consideration of the second application. The grounds for the first application are that the Record of Appeal filed by the appellant is fatally defective, as it does not include the subordinate court proceedings and the decree being appealed against. Further, on 7th December, 2023, the appellant was granted leave to file and serve the respondent with a Supplementary Record of Appeal comprising of the certified copies of subordinate court's proceedings and decree within 14 days, but has failed to comply. Therefore, as a result, there is no valid appeal before this Court. These grounds were reiterated by Mr. Njeru in the affidavit he swore in support of the application and his submissions, and he urged that the appeal is brought in bad faith and solely intended to unjustly deny the respondent from recovering their due and legally entitled legal fees.
4. The appellant opposed the application in a replying affidavit sworn by Mr. Wawire on 21st January 2025 and in its submissions. The appellant relies on three grounds. Firstly, that the appellant was not sent a copy of the ruling delivered on 3rd December 2023 granting leave to file the Supplementary Record of Appeal, nor was the ruling, although indicated as having been delivered on the Court's online portal, uploaded thereon, and the appellant was therefore not in a position to determine on what terms leave was granted to file the Supplementary Record. In addition, the respondent did not attach a copy of the said ruling to his application dated 31st January 2024.
5. Secondly, the appellant is yet to receive the said certified copies of proceedings from the trial Court to enable it file the Supplementary Record of Appeal, and the delay in obtaining the proceedings has partly been caused by the respondent who has consistently been filing contempt applications against the trustees of the appellant. Thirdly, that the decretal amount has already been deposited in a joint escrow account held by advocates for both parties, in the event the appeal proceeds and the respondent succeeds, it will not suffer any prejudice as it will still get the decretal amount, however, if the appeal struck out, the appellant will lose its money without hearing the appeal on merit.

Lastly, Mr. Wawire pointed out that the application was filed out of time under Rule 86 of the Court of Appeal Rules of 2022, and Rules 42(1) and 43(1) cited by the respondent were inapplicable.
6. The last ground raised by the appellant is whether the application for striking out of the appeal is competently before us in light of the timelines provided for in Rule 86, which requires the filing of such an application within thirty days of service of the record of appeal. We have perused the Record of Appeal, and note that the Record and Memorandum of Appeal are dated 26th June 2023. Rule 92(1) of the Court of Appeal Rules of 2022 require an appellant to serve each respondent with the Record and Memorandum of appeal before or within seven days of their lodging. The respondent did not contest that the record of appeal that it seeks to strike out was lodged and served within time, and its complaint is that the said record is incomplete, as it does not include the proceedings of the trial Court, which the appellant was required to provide in a Supplementary Record of Appeal.
7. Given that the application to strike out the record of appeal was filed on 30th January 2024, over six months after the filing and service of the record of appeal, it is clearly filed out of time and incompetent. We accordingly have no option but to strike it out. We shall accordingly proceed to consider the second application which was filed by the appellant, and which seeks stay of execution of the orders given by the ELC on 2nd November 2023. The said application is supported by an affidavit sworn on 24th September 2024 by Gabriel Mutwale, one of the trustees of the appellant, and a further affidavit sworn on 9th October 2024 by Mr. Wawire.
8. A brief background to the said application as set out in the said pleadings is necessary to place it in context. The ELC entered judgment in the sum of Kshs 41,289,401. 80 against the appellant in the



ruling dated 31st May 2023. The said ruling found that an application filed by the respondent was merited and granted the following orders that had been sought in the said application:

- i. Judgment be and is hereby entered against the Respondent (the appellant herein) in the sum of kes.41, 289, 401.801= only being the agreed costs in favor of the Applicant (the respondent herein).
 - ii. Interest be and is hereby awarded to the Applicant at the rate of 14% per annum w.e.f 15th January 2019, in line with the provisions of Rule 7 of The Advocate Remuneration Order.
 - iii. Cost of the Application be and are hereby awarded to the Applicant and same to be agreed upon and default (sic) to be taxed by the Deputy Registrar of the court.
9. The appellant, being aggrieved, filed Civil Appeal No. E463 of 2023 in this Court and an application dated 3rd July 2023 seeking a stay of execution of the said ruling. The said application came up for hearing in this Court on 13th December 2023, when the appellant and the respondent recorded a consent order, in which the sums payable by NLC in the said ruling of Kshs.41,289,401.80 were to be deposited in an escrow account in the joint names of the advocates for the parties herein within 30 days. The appellant and the respondent timeously opened the said escrow account, however NLC delayed in depositing the said amount within the 30 days.
10. In the meantime, the respondent had also filed an application dated 9th August 2023 against NLC as garnishee, and on 2nd November 2023, the said application was allowed whereby the ELC ordered all money held by the NLC to be attached to answer and/or satisfy the ruling given on 31st May 2023. Upon failure by the NLC to deposit the said decretal sum in an escrow account within the 30 days as ordered by this Court on 13th December 2023, the respondent filed an application in the ELC dated 6th June 2024 seeking to cite various officials of NLC for contempt of court which is pending hearing. The NLC subsequently deposited the decretal sum in the escrow account on 8th October 2024, as evidenced by a copy of the payment advice exhibited by the appellant.
11. The appellant consequently abandoned the prayers it had included in its application dated 24th September 2024 for extension of time by a further thirty days within which the NLC should deposit the sum of Kshs.41,289,401.80 as ordered on 13th December 2023 as they had evidently been overtaken by events, and only urged the outstanding prayer for stay of execution of the ruling of 2nd November 2023. The main grounds put forward by the appellant are that its appeal is arguable, as it raises fundamental arguable points concerning the correct interpretation and application of sections 45, 51(2) and 46 of the *Advocates Act* and sections of Sections 3 (3) and 4 of the *Trustees (Perpetual Succession) Act*. Further, that the appeal will be rendered nugatory if an injunction is not granted because if the appeal succeeds and the decretal amount of Kshs.41,289,401.80 has already been paid to the respondent, the appellant shall not be in a position to recover the same, and the respondent has not demonstrated its capability of refunding the said decretal sum in the event the same is deposited in its sole account and utilized.
12. The respondent opposed the application for stay of execution in a replying affidavit sworn on 30th September 2024 by Mr. Njeru Nyaga, who stated that the respondent represented the appellant before the NLC and successfully recovered 30 acres grabbed from the appellant; evicted persons who had constructed permanent residential houses on the grabbed land; subsequently had compensation to the appellant reviewed from Kshs.66 million to Kshs.516 million, for which the respondent filed a bill of costs for Kshs.75,547,998.51 which the Client insisted should not be taxed and that the parties should revert to the agreed compensation of Kshs.41,289,401.80; only for the appellant to turn around and oppose enforcement of the same in the ELC.



13. Further, when the application citing the NLC for contempt came up for hearing in the ELC on 19th September, 2024, their counsel communicated to the court that they were in the process of complying with the Garnishee Orders, NLC acknowledged in its replying affidavit that this Court's orders for depositing the principal amount in an escrow account had abated. It is therefore unconstitutional to deny the respondent the right to fair remuneration which amount was agreed upon by the Executive Committee of the appellant and the Trustees, and further to discriminate against it after part of the funds had already been released to the appellant as confirmed by its Chairman on 25th September, 2024. The respondent's counsel urged this Court to strike out the Further Affidavit by Mr. Wawire sworn on 9th October 2024 for being filed without the leave of the Court and submitted that the purported payment of funds into a defunct escrow account was in contempt of the Garnishee Order given by the ELC.
14. We have considered the second application and arguments made by the appellant and respondent. The principles applicable in the exercise of this Court's discretion under Rule 5 (2) (b) of the Court of Appeal Rules of 2022 to grant a stay of execution are well settled. An applicant has to satisfy two requirements. Firstly, that he or she has an arguable appeal. Secondly, that unless an order of stay of execution 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 v Tony Ketter & 5 others [2013] eKLR. Both limbs must be demonstrated before a party can obtain a relief under rule 5(2)(b).
15. A preliminary issue which has troubled us is whether our jurisdiction has been properly invoked as regards the second application. We note that the application seeks to stay orders granted by the ELC on 2nd November 2023. The appeal filed in Civil Appeal No. E463 of 2023 is against the ruling and orders given by the ELC on 31st May 2023, for which there is a notice of appeal by the appellant dated 2nd June 2023 on record. There is no record of any notice of appeal filed against the orders of the ELC given on 2nd November 2023 which are the subject of the second application dated 24th September 2024. No such notice of appeal was exhibited by the appellant, and the application is expressed as being brought in Civil Appeal No. 463 of 2023.
16. This court is properly seized of an application for stay of execution under Rule 5(2) (b) where a notice of appeal has been lodged in accordance with Rule 75 of the Court of Appeal Rules. The said rule requires the said Notice of Appeal to be lodged within 14 days of the judgment or orders intended to be appealed against. This position was also confirmed by this Court in Halai & Another v Thornton & Turpin [1963] Ltd. [1990] KLR 365. This Court also emphasised in Equity Bank Ltd v West Link MBo Ltd, Nbi Civil Application No. NAI 78 of 2011 and Safaricom Limited v Ocean View Beach Hotel Limited and two others Civil Application No. 327 of 2009 [2010] eKLR that if there is no notice of appeal lodged, one cannot get an order under Rule 5 (2)(b) because the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and Courts of equal status, and if there is no appeal or intended appeal as manifested by lodgment of the notice of appeal, the Court of Appeal would have no business to meddle in the decision of the trial court.
17. Likewise, in Nguruman Limited v Shompole Group Ranch & Another [2014] eKLR, this Court affirmed the position that there is no provision allowing a notice of appeal lodged in a later decision being used in an application for stay of execution of an earlier decision. The same reasoning would also apply to the use of a notice of appeal filed in an earlier decision to stay a later decision. In effect, without a notice of appeal against the orders of the ELC delivered on 2nd November 2023 we have no jurisdiction to grant a stay of execution of the said orders.
18. We are accordingly bereft of jurisdiction to determine both the application dated 31st January 2024 filed by the respondent, and the application dated 24th September 2024 filed by appellant, for the reasons



explained in this ruling. The two applications are accordingly struck out, and each party shall bear their costs of the two applications.

19. Orders accordingly.

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

ANJIRU KARANJA

JUDGE OF APPEAL

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K. M'INOTI

JUDGE OF APPEAL

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P. NYAMWEYA

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

