



**APA Homes (K) Limited v Omar & another (Civil Appeal (Application)  
E040 of 2024) [2025] KECA 1035 (KLR) (5 June 2025) (Ruling)**

Neutral citation: [2025] KECA 1035 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL (APPLICATION) E040 OF 2024  
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA  
JUNE 5, 2025**

**BETWEEN**

**APA HOMES (K) LIMITED ..... APPLICANT**

**AND**

**NAGIEB ALI OMAR ..... 1<sup>ST</sup> RESPONDENT**

**SHUKRI OMAR ALI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgement and Decree of the Environment and Land Court of Kenya at Mombasa (Matheka, J.) delivered on 27th February 2024 in Mombasa ELC No. 111 of 2018)*

**RULING**

1. The dispute between the APA Homes (K) Limited (the applicant) and Nagieb Ali Omar and Shukri Omar Ali (the respondents) stems from the sale of Apartment No. E5 situated in Nyali on Plot No. MN/I/2XX1 (the suit property) that were developed by the applicant. The respondents' case was that, despite payment of the purchase price of Kshs.16,000,000, the applicant refused to transfer the suit property to them.
2. In a judgement delivered on 27<sup>th</sup> February 2024 (N. Matheka, J.), the trial court ordered the applicant to refund the sum of Kshs.16,000,000, costs and interest at court rates from the date of filing suit within 90 days from the date of the Judgement.
3. Aggrieved, the applicant commenced appeal proceedings against the decision of the trial court but, in the meantime, it filed the instant application, which is a Notice of Motion dated 7<sup>th</sup> March 2024 brought under rule 5(2) (b) of the Court of Appeal Rules, 2022 praying: that pending the hearing and determination of this appeal, this Court do issue an order of stay of execution of the entire judgement delivered by the superior court on 27<sup>th</sup> February 2024 which reads, provides and/or orders that: 'the defendant is to refund the sum of Kenya Shillings Sixteen Million (Kshs.16,000,000) plus costs and



interest at court rates from the date of filing suit within the next ninety (90) days from today”; and that costs of this application abide the result of the substantive appeal.

4. The application is supported by 18 grounds on its face and an affidavit of Alina Waseem, a Director of the applicant company sworn on 7<sup>th</sup> March 2024. He deposed that the Environment and Land Court (the ELC) delivered its judgement on 27<sup>th</sup> February 2024 in Mombasa ELC No. 111 of 2018 in favour of the respondents; that the ELC ordered the applicant to refund the sum of Kshs.16,000,000, plus costs and interest at court rates from the date of filing suit within the next 90 days from 27<sup>th</sup> February 2024; and that the respondents were also awarded the costs of the suit.
5. As to the arguability of the appeal, the grounds listed to be argued include: that the superior court erred in finding that the payment of purchase price was completed in the year 2018, however, the apartment has since been sold to a third party and specific performance was no longer possible; that the superior court erred in finding that the appellant was in breach of contract even after demonstrating that it did not receive any payment from the respondents; that the superior court erred in finding that the applicant was in breach of the agreement despite evidence that the party who did the transfer was not part of its directors and thus not authorised to execute business on behalf of the applicant as per the terms of the agreement to transfer shares; that the learned Judge erred in finding that the agreement between the respondent and a nominee shareholder was valid despite the fact that there was a binding clause excluding transfer of shares and involvement of other directors, and hence the purchase or sale was nugatory; and that the learned Judge erred in finding that the contract was properly executed by the directors of the applicant by relying on the doctrine of indoor management or turquand rule without exemptions to the doctrine.
6. As to whether the appeal will be rendered nugatory absent stay, the applicant deposes that it is apprehensive that it will suffer substantial loss since its property may be auctioned, thereby occasioning losses which will affect its operations; and that, in the unlikely event that the appeal succeeds, the respondents will not be able to indemnify or compensate it in terms of daily losses and the judgment sum.
7. Opposing the application, the respondent filed grounds of opposition dated 10<sup>th</sup> June 2024 and a replying affidavit sworn by the 2<sup>nd</sup> respondent, Shukri Omar Ali, of even date.
8. In the grounds of opposition, the respondents contended that:
  - i. the entire application is fatally defective, incompetent and legally unattainable for want of compliance with Rule 77 of the Court of Appeal Rules, 2022;
  - ii. the entire application is fatally defective with no legal basis as it is filed on the basis of a withdrawn appeal as per the provisions of Rule 84 as read with Rule 85 of the Court of Appeal Rules, 2022;
  - iii. the entire application is an abuse of the court process.
9. In the replying affidavit, the 2<sup>nd</sup> respondent deposed that he learnt of this application when his counsel on record were served with the Court directions on 4<sup>th</sup> June 2024; that his counsel on record wrote to the firm representing the applicant informing them that they were not aware of the appeal, nor had they been served with a Notice of Appeal; that, this application was served upon his counsel via email on 5<sup>th</sup> June 2024 and, even as at the time of filing his response, his counsel was yet to be served with a Notice of Appeal notwithstanding the fact that he had made subsequent enquiries on 10<sup>th</sup> June 2024; and that, in view that there is no Notice of Appeal on record, stay of execution cannot be issued.



10. Without prejudice to the foregoing, the 2<sup>nd</sup> respondent further deposed that, if this Court is inclined to issue the stay orders, the applicant ought to deposit, within 30 days of the Judgement, the sum of Kshs.16,000,000 in a joint interest earning account in the names of the Advocates on record for both parties, failing which execution should proceed.
11. At the virtual hearing of this application on 27<sup>th</sup> January 2025, learned counsel Mr. Kimani Mwangi appeared for the applicant while learned counsel Ms. Julu appeared for the respondents. Both counsel did not file written submissions but argued the application orally.
12. Mr. Mwangi basically reiterated the averments in the supporting affidavit. He relied on this Court's case in Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others (2013) KECA 378 (KLR) for the submission that the applicant had met the threshold for grant of the orders sought under rule 5(2) (b) of this Court's Rules, 2022.
13. Likewise, Ms. Julu did not raise new issues other than what was enunciated in the Grounds of Opposition and the replying affidavit, save to emphasise that the application was incompetent for want of a Notice of Appeal on record. It is on this ground that she submitted that this Court had no jurisdiction to entertain the application. She also stressed that the respondent had not commenced execution proceedings as alleged by the applicant because the properties have been charged to a bank and its ownership keeps changing, but that, nonetheless, the applicant was keen to still pursue the right of execution.
14. After considering the application, the response thereto, the respective oral submissions and the law, we have settled on two issues for determination, namely whether this Court has jurisdiction to determine the application and whether we should issue the stay of execution orders sought.
15. On whether this Court has jurisdiction to determine the application, Ms. Julu complains that, there being no Notice of Appeal on record, and a notice of appeal being the document that confers this Court with jurisdiction to entertain an application of this nature, it follows that, for want of a notice of appeal, this Court has no jurisdiction to hear the application. Simply put, that the application is incompetent and it ought to be struck out ab initio.
16. Jurisdiction is the court's power or authority to hear and decide a case. The Black's Law dictionary 10<sup>th</sup> edition defines jurisdiction as a 'court's power to decide a case or issue a decree, also termed as competent jurisdiction.'
17. In the renowned case of Owners of the Motor Vessel  
"Lillian S" v Caltex Oil (Kenya) Ltd (1989) KECA 48 (KLR), Nyarangi, JA. held:  
"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter or commission under which the court is constituted and may be extended or restricted by the like mean."
18. The Supreme Court in Macharia & another vs. Kenya Commercial Bank Limited & 2 others (2012) KESC 8 (KLR) stated on the source and extent of the jurisdiction conferred upon a court as follows:  
"A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."



19. It is trite that, when the jurisdiction of a court is challenged or raised, the court must determine that issue, otherwise the failure to do so may imply that, it may arrogate to itself powers that it does not have. Indeed, the challenge to jurisdiction is a legal issue which when raised, a court is obligated to determine it in the first instance. This was underpinned by this Court in *Rafiki Enterprises Limited vs. Kingsway Tyres & Automart Limited* (1996) KECA 199 (KLR).

20. In this case, the starting point is to address the issue as to what confers this Court with jurisdiction. Rule 77(1) of the Court of Appeal Rules, 2022 provides:

77.

- (1) A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court.

21. This Court in the case of *Abok James Odera T/A A.J Odera & Associates vs. John Patrick Machira T/ A Machira & Co. Advocates* (2013) KECA 208 (KLR) quoted with approval the decision of *Pepeco Construction Company Limited vs. Carter & Sons Limited Nairobi* CA No. 80 of 1979 (UR) wherein it was held that:

“A notice of appeal is what gives this court jurisdiction in any appeal. It is a primary document in terms of rule 85(1) of the Rules (now Rule 77(1)). A record of Appeal must contain a valid copy of the notice of appeal. The omission to include a valid copy renders the appeal incompetent...”

22. In *Safaricom Limited vs. Ocean View Beach Hotel Limited & 2 others* (2010) KECA 346 (KLR), Omolo, JA. explained the application of rule 5(2) (b) vis a vis the importance of a notice of appeal in very simple terms thus:

“Under Rule 5 (2) (b), the Court is entitled to give a preservative order where a notice of appeal has been lodged. It has been said time without number that in an application under Rule 5 (2)

(b) what gives the Court the jurisdiction to hear and determine the motion is the filing of the notice of appeal...At the stage of determining an application under Rule 5(2)

(b) there may be no actual appeal. Where there is no actual appeal already lodged there nevertheless must be intention to appeal which is manifested by lodging a notice of appeal. If there is no notice of appeal lodged, one cannot get an order under Rule 5 (2) (b) because as I have already pointed out the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or no intention to appeal as manifested by

lodgement of the notice of appeal the Court of Appeal would have no business to meddle in the decision of the High Court.”

23. At the hearing of this appeal, we asked Mr. Mwangi to ensure that he transmits the Notice of Appeal for the Court’s benefit, but, he did not. Needless to say, a review of the Record of Appeal that has already been lodged, disclosed that a Notice of Appeal dated 7<sup>th</sup> March 2024 was filed within 14 days from the date of the impugned judgement.



24. This then settles the first issue for our determination.
25. We now turn to the merits of the application. The twin principles that must be satisfied under rule 5(2)(b) of this Court’s Rules, 2022 are that the appeal or intended appeal should be arguable, and the applicant should demonstrate that, if the orders sought are not granted, the appeal will be rendered nugatory. These principles are enunciated in the case of Stanley Kang’ethe (supra).
26. On the first limb, we take into account the principle that an arguable appeal is not one which must necessarily succeed, but one which is not frivolous; it should be worthy of consideration. In Cleophas Wasike vs. Mucha Swala (1984) KECA 55 (KLR), this Court held that an applicant need not show that his appeal has an overwhelming probability of success; an applicant just needs to show that there is merit in his appeal.
27. We also underscore the fact that grant of reliefs under rule 5(2) (b) is discretionary. Further, the twin principles must be satisfied conjunctively.
28. In addition, this Court in Housing Finance Company of Kenya vs.5 Sharok Kher Mohamed Ali Hirji & another (2015) KECA 447 (KLR) made reference to the decision of Carter & Sons Ltd vs. Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997 (UR), which we find instructive as follows:

“...the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay ...the applicant must establish a sufficient cause; secondly, the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly, the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”

29. We have considered the grounds of appeal that the applicant proposes to argue in the appeal, some of which we have restated elsewhere in this ruling. We find that the issue as to whether the alleged director who executed the sale agreement with the respondents without authority, and the allegations that the applicant did not receive any money from the respondents are arguable grounds worthy of consideration in the appeal.
30. On the nugatory limb, the applicant is apprehensive that, if execution ensues, the respondent will not be able to refund the sum of Kshs.16,000,000 plus costs and interest. In addressing what is nugatory or not, this Court in Julius Wahinya Kang’ethe & Another vs. Muhia Muchiri Nga’ng’a (2017) KECA 30 (KLR) held as follows:

“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.”

31. We make three observations. First, the decree in question is a money decree. However, we hasten to add that the success of an application for stay of execution pending appeal is not hinged on the fact that the decree in question is or is not a money decree. This Court in Kenya Hotel Properties Limited vs. Willesden Properties Limited (2007) KECA 401 KLR stated thus:

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with



time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree.”

32. The second observation is that the applicant has not advanced a proper argument that if the respondents are paid, they will not be able to refund.
33. Thirdly, Ms. Julu informed us that the suit apartment in question is already in the hands of a third party and charged to a bank. Ultimately, what the applicant is purporting to plead is a relief on behalf of third parties. The applicant is already a beneficiary of the money alleged to have been advanced to it and, therefore, it cannot state that the appeal will be rendered nugatory absent stay.
34. For the foregoing, we find that the applicant has failed to satisfy the conjunctive twin principles under rule 5(2)(b). Accordingly, the Notice of Motion dated 7<sup>th</sup> March 2024 is hereby dismissed.
35. The dismissal of the application notwithstanding, we take to mind the holding of this Court in *Housing Finance Company of Kenya vs. Sharok Kher Mohamed Ali Hirji & another* (2015) KECA 447 (KLR) that:

“In seeking to balance the interests of the respective parties, the approach we have always taken in determining whether or not to grant a stay of execution is to ensure that applicants are not denied their opportunity to ventilate their legal cases as afforded under the laws through the appeal process, with the possibility of success, while at the same time, respondents are not denied the fruit of judgment in their favour and their rights are safeguarded.”

36. For the reasons set out in the above decision, and in the interest of justice, we hereby order that the applicant deposits the decretal sum of Kshs.16,000,000 in an escrow account to be opened in the names of the advocates for the two parties in a reputable bank to be agreed upon by the parties within 30 days of this ruling, failure to which the respondents will be at liberty to execute.
37. The costs of this application will abide the outcome of the appeal.
38. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 5<sup>TH</sup> DAY OF JUNE, 2025.**

**A. K. MURGOR**

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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**

