



**Noru v Gitau & 4 others (Civil Application E109 of 2024)
[2025] KECA 1087 (KLR) (5 June 2025) (Ruling)**

Neutral citation: [2025] KECA 1087 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E109 OF 2024
JW LESSIT, FA OCHIENG & A ALI-ARONI, JJA
JUNE 5, 2025**

BETWEEN

MICHAEL KIGAYA NORU APPLICANT

AND

DANSON MURIGI GITAU 1ST RESPONDENT

AGRICULTURAL FINANCE CORPORATION 2ND RESPONDENT

HEZRON MBUGUA 3RD RESPONDENT

DIGIT AUCTIONEERS 4TH RESPONDENT

LAND REGISTRAR MURANG'A 5TH RESPONDENT

*(An application for stay of execution of the Judgment and Decree
of the Environment and Land Court of Kenya at Murang'a (L.N.
Gacheru, J.) dated 3rd October 2024 in ELC Case No. E002 of 2023)*

RULING

1. Before us is a notice of motion dated 5th November 2024, in which the applicant, Michael Kigaya Noru, seeks an order for stay of execution of the judgment and decree made against the applicant on 3rd October 2024 in the Environment and Land Court at Murang'a (L.N. Gacheru, J.) pending the lodging, hearing an determination of the intended appeal. The applicant also prayed for the costs of the application.
2. A brief background of the application is that the judgment of the Environment and Land Court at Murang'a, delivered on 3rd October 2024, pertained to a dispute over land known as LOC. 2/ Gacharage/3XX5, (hereinafter, the "suit land"). The applicant purchased the said property at a public auction conducted on 7th December 2022, by the 4th respondent, pursuant to instructions from the



- 2nd respondent. This was due to the loan default by the 1st respondent. The trial court found that the auction was conducted fraudulently and irregularly, therefore, it nullified the sale.
3. Aggrieved by this decision, the applicant indicated his intention to appeal to this Court and filed this application for a stay of execution pending the hearing of the intended appeal.
 4. The application is premised on the grounds that the applicant purchased the suit land at a public auction. However, he was ordered to vacate the suit land by the judgment dated 3rd October 2024. Aggrieved by this, the applicant filed a notice of appeal on 14th October 2024 and is awaiting the necessary documents to compile the record of appeal. The trial court initially granted a 30-day stay of execution, which expired on 19th November 2024, prompting the applicant to file this notice of motion, seeking a stay of execution.
 5. The applicant stated that he had developed the suit land by constructing permanent residences and settling his elderly mother there. He contended that if execution were to proceed, the residences would be demolished, causing significant hardship.
 6. Citing past court rulings, the applicant emphasized that the court should consider the relative hardships of the parties and preserve the status quo. The applicant asserted that without a stay, the appeal would be rendered nugatory and his constitutional right to appeal would be compromised.
 7. The applicant further stated that granting the stay would not prejudice the 1st respondent, who had never resided on the suit land.
 8. In the supporting affidavit sworn by the applicant on 5th November 2024, he reiterated the grounds on the face of the application.
 9. In response to the application, the 1st respondent, Danson Murigi Gitau, in his replying affidavit sworn on 9th November 2024, stated that he was the legal and registered owner of the suit land, having obtained absolute ownership on 27th April 2017.
 10. He pointed out that the trial court had issued a status quo order on 6th March 2023, which preserved the suit land. He contended that the applicant's appeal was improperly filed, lacked substance, and was based on false claims.
 11. He disputed the applicant's assertions about building permanent structures on the suit land and argued that the photos provided by the applicant were not supported by proper evidence.
 12. The 1st respondent also claimed significant financial loss as he derived income from the tea bushes and avocados he planted on the suit land. He claimed that the applicant was benefiting from the 1st respondent's investments, including harvesting the avocados.
 13. The respondent asserted that the applicant's claim about judicial errors and mortgagee damages were misleading, and emphasized that the applicant could not claim to be an innocent purchaser, due to an illegal transfer process.
 14. Furthermore, the respondent stated that the applicant held no legal rights to the suit land; had failed to file an appeal promptly; and had had sufficient opportunities to resolve the issue through civil action. He maintained that the harm the applicant claims was not irreparable.
 15. In his further affidavit sworn on 13th November 2024, the applicant noted that when the suit land was sold at a public auction on 7th December 2022, there were buildings under construction, and building materials, which were included in the sale. The applicant disputed the 1st respondent's denial



of knowledge about the permanent residences on the land, arguing that these buildings were extensions of structures on neighboring land owned by the respondent's relatives.

16. The applicant also accused the 1st respondent of contradictory statements regarding the destruction of crops (1,200 Hass avocado trees and 4,800 tea bushes), stating that the respondent benefited from these crops despite claiming their destruction. Additionally, the applicant questioned how the 1st respondent, who defaulted on a loan despite having tea plantations, could now use the suit land to service the loan.
17. The applicant challenged the credibility of the 1st respondent's claims about harvesting avocados, stating that the 1st respondent did not live near the suit land and that the valuer relied on verbal information from the 1st respondent about the number of tea bushes and trees when preparing the valuation report.
18. Finally, the applicant believed that the 1st respondent had misunderstood the provisions of rule 5(2) (b) of this Court's rules.
19. When this matter came up for hearing on 21st January 2025, Mr. Baragu, learned counsel, appeared for the applicant, the firm of Purity Mureithi & Company Advocates was on record for the 1st respondent, the firm of Mabonga & Company Advocates represented the 2nd to 4th respondents, while the 5th respondent was not represented.
20. Mr. Baragu stated that the appeal in this matter had already been filed and registered as Civil Appeal E012 of 2025. Counsel submitted that there was an arguable ground of appeal. He contended that the trial judge erred by finding fraud without sufficient proof, thus reducing the burden of proof to be discharged by the 1st respondent.
21. He relied on the case of *Stanley Kang'ethe Kinyanjui vs. Tony Keter & 5 Others* [2013] eKLR, where the Honourable Court held that on whether or not the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. Counsel further relied on the case of *National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike; Lantech Ltd* [2006] KECA 333 (KLR), where this Honourable Court held that all that an applicant was required to do, was to point out to the court the ground or grounds which he believed were arguable and leave it to the court to decide on the issue of whether or not the matters raised are arguable.
22. Counsel addressed the nugatory aspect, stating that the applicant had assumed possession in January 2024, made significant developments, including constructing permanent residences and settling his family there. Counsel was of the view that the applicant's eviction and the demolition of property were irreversible actions, which, unless an order of stay of execution was granted, the appeal would be rendered nugatory.
23. Counsel further submitted that the 1st respondent had admitted to defaulting on the loan, and the applicant reasonably feared the 1st respondent would be unable to repay the cost of the developments if the appeal succeeded. He submitted that the 1st respondent was impecunious, and he reasonably feared that he would be unable to pay back the cost of the developments undertaken on the suit land.
24. He further submitted that the applicant was apprehensive, that he would not be able to recover from the 1st respondent the cost of the vast developments should his appeal succeed. In support of this submission, the applicant relied on the *National Industrial Credit Bank Ltd's case* (*supra*), where this Honourable Court held that once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has as those were facts which were particularly within his knowledge.



25. Counsel further referred to *Stanley Kangethe Kinyanjui case* (supra), where this Honourable Court held that where it is alleged by the applicant that an appeal would be rendered nugatory on account of the respondent's alleged impecuniosity, the onus shifts to the respondent to disprove the assertion.
26. Counsel submitted that the title of the suit land was still in the 1st respondent's name and charged to the bank, as the 1st respondent was still paying the loan. Counsel also addressed the issue of the appeal having been filed, and stated that under rule 5(2)(b) of the *Court of Appeal Rules*, this Court was seized of the matter of stay of execution after the notice of appeal had been filed, and he had filed one.
27. Ms. Mureithi countered by submitting that the applicant was improving their case at the appellate stage by claiming to have made improvements, which she stated was contrary to their earlier submissions in the superior court. Counsel was of the view that granting a stay would cause greater hardship to the 1st respondent, who had a loan accumulating interest and had been deprived of his property, which was found to have been fraudulently sold. She emphasized that the 2nd and the 4th respondents had not appealed the superior court's judgment.
28. Counsel also raised the issue of whether the appeal was filed within the stipulated time according to rule 82 of this *Court's rules*.
29. The 1st respondent submitted that the applicant had not lodged his record of appeal at the time of the submissions; had no memorandum of appeal or a draft thereof attached to the application; and had not outlined any grounds in respect of which the intended appeal was preferred. He contended that the court could not properly determine whether there was any substantive appeal before the honorable court. The 1st respondent relied on the case of *Mathupaper International Limited vs. Kerr* [1985] eKLR, in which the court held that:

“...under rule 5(2)(b) the court has its own jurisdiction to grant an injunction pending an appeal... It is a matter for this court's discretion according to the rule. It is exercised judicially and not in whimsical or arbitrary fashion”. ... “There are cases, however, where it would be wrong to grant an injunction pending appeal. These would include where the appeal is frivolous or to grant it would inflict greater hardship than it would to avoid. And there will be others which we have not experienced yet.”
30. On whether the intended appeal is arguable, the 1st respondent submitted it was not, and that the applicant was improving his case at an appellate stage, by introducing the issue of his elderly mother living on the suit land. He pointed out that the superior court correctly found that no witnesses testified to rebut the allegation of fraud. He relied on the case of *Charles Karathe & 2 Others vs. Administrators of the Estate of John Wallace Mathare (Deceased) & 5 Others* [2013] eKLR, in support of this submission.
31. The 1st respondent concluded by submitting that this application was not justified for the reason that it was a frivolous, one that seeks to unjustly confer rights not envisaged in section 24(a) of the *Land Registration Act*. He believed that no prejudice would be occasioned to the applicant.
32. We have carefully considered the application, affidavits, rival submissions, authorities cited, and the law. The issue for determination is whether the application has met the threshold for the grant of a stay of execution. The principles governing the grant of a stay of execution pending appeal are well established.
33. It is trite that the jurisdiction of this Court under rule 5(2)(b) is original, independent, and discretionary. However, we must exercise this discretion judiciously and rationally, and not out of



impulsiveness or sympathy. As held in numerous decisions of this Court, including the Stanley Kangethe Kinyanjui case, an applicant must demonstrate that they have an arguable appeal and that, unless a stay is granted, the appeal will be rendered nugatory. The court also considers the balance of hardship between the parties. In this case, this Court held that:

- i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See *Ruben & 9 Others v Nderitu & Another* (1989) KLR 459.
- ii. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
- iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. *Halai & Another v Thornton & Turpin (1963) Ltd.* (1990) KLR 365.
- iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni*, Civil Application No. Nai 189 of 2001.
- v. An applicant must satisfy the court on both of the twin principles.
- vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.
- vii. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. *Joseph Gitabi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.
- viii. In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. *Damji Pragji* (supra).
- ix. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.
- x. 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.
- xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403.”

34. On the issue of arguability, the applicant raised concerns regarding the learned trial judge's finding of fraud and the standard of proof applied. Having perused the excerpts of the submissions and



considered the arguments advanced by Mr. Baragu, we are satisfied that the intended appeal raises at least one arguable ground that warrants the attention of this Court.

35. Turning to the nugatory aspect, the applicant asserted that he had made significant developments on the suit land, and that his elderly mother resided thereon. The potential eviction of these individuals pending the appeal raises a valid concern that the appeal, if successful, could be rendered nugatory as the consequences of eviction may be irreversible.
36. We have also considered the submissions regarding the balance of hardship. In the case of *Reliance Bank Ltd vs. Norlake Investments Ltd* [2002] E.A. 227, this Court stated that:
- “To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicant’s appeal to be heard and determined.”
37. The 1st respondent is undoubtedly suffering prejudice due to being out of possession of the suit land, and the accruing interest on the loan. However, the potential displacement of the applicant’s family, who have established residence on the suit land, also presents a significant hardship. In considering this, we note the trial court’s initial order of status quo, albeit limited to registration, which suggests a prior recognition of the need to preserve the situation pending a more comprehensive determination.
38. We have noted the arguments regarding the applicant allegedly improving his case on appeal. This is a matter that can be fully canvassed during the hearing of the appeal itself and does not, at this stage, negate the possibility of the appeal being arguable. Similarly, the concerns raised about the timing of the filing of the appeal under rule 82 are preliminary in nature and can be addressed appropriately if a formal application to strike out the appeal is made.
39. Considering all the circumstances of this case, we are persuaded that the applicant has met the threshold for the grant of a stay of execution. It is just and equitable to preserve the status quo pending the hearing of the intended appeal to prevent potential irreparable harm and to ensure that the appeal, if successful, is not rendered nugatory.
40. Costs of this application shall be in the cause of the appeal.

Orders Accordingly.

DATED AND DELIVERED AT NYERI THIS 5TH DAY OF JUNE, 2025.

J. LESIIT

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed



DEPUTY REGISTRAR

