Taib (Sued as the Legal Representative of the Estate of Sheikh Ali Taib Bajaber - Deceased) v Mayfair Establishments Limited & 3 others (Civil Appeal (Application) E118 of 2023) [2025] KECA 1392 (KLR) (31 July 2025) (Ruling)

Neutral citation: [2025] KECA 1392 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL (APPLICATION) E118 OF 2023

SG KAIRU, AK MURGOR & FA OCHIENG, JJA

JULY 31, 2025

BETWEEN

ABDULLA ALI TAIB (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SHEIKH ALI TAIB BAJABER - DECEASED) ..... APPLICANT

AND

MAYFAIR ESTABLISHMENTS LIMITED ..... 1ST RESPONDENT

KENNEDY ELLAM WAKESA (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF GEORGE ELLAM WEKESA - DECEASED) . 2ND RESPONDENT

SELINA WEKESA ..... 3RD RESPONDENT

CATHERINE WEKESA ..... 4TH RESPONDENT

(An appeal from the Ruling of the Environment and Land Court at Mombasa (L. L. Naikuni, J.) delivered on 30th May 2023 in ELC Cause No. 99 of 2022)

RULING

1. By a preliminary objection dated 7th October 2022, the applicant herein had sought the striking out of the suit before the Environment and Land Court, on the grounds that the said suit was statute-barred, as it had been filed outside the prescribed time provided for by the law.
2. On 30th May 2023, the learned trial judge delivered his ruling on the preliminary objection, dismissing it.
3. The applicant was dissatisfied with the decision and lodged an appeal before this Court.
4. The applicant also filed an application before this Court, seeking orders to stay the proceedings before the trial court until the appeal was heard and determined.

5. It was the applicant's case that the trial court lacked jurisdiction to hear and determine the case, as the suit had been instituted outside the time prescribed by the law.

6. We have been urged to appreciate that unless the proceedings before the trial court were stayed, they would be nothing short of a waste of precious judicial time.

7. As far as the applicant was concerned, the learned trial judge had made a finding that the suit was filed outside the prescribed time. Therefore, in the understanding of the applicant, his appeal is most probably going to result in the conclusion that the suit be struck out.

8. In those circumstances, the applicant was convinced that the trial court should be prevented from continuing with proceedings that would ultimately be declared a nullity.

9. The application was supported by an affidavit sworn by Khalif Salim, the advocate who has the conduct of the applicant's case. He deponed, inter alia, that the applicant had first filed an application dated 29th September 2023, through which he sought orders from the trial court to stay further proceedings until his appeal was determined. However, the said application was dismissed, leading to the filing of the application herein.

10. Following the dismissal of the application, the trial court directed that the suit before it be heard and determined on an expeditious basis.

11. The applicant's advocate went on to depone thus:

> " 11. That despite dismissing the motion for stay of proceedings, the learned Judge rightly held that the outcome of this Appeal shall determine the course of the matter before it, as the pertinent issue before this Court would be whether or not the ELC has jurisdiction to hear and determine the matter."

12. The applicant said that in the event that his appeal succeeded, yet the trial court had been permitted to continue hearing the case, that would render the proceedings at the trial court, to be a mere academic exercise, and a waste of precious time of the trial court, as well as a waste of the resources of the parties.

13. Secondly, the applicant pointed out that the success of the case at the trial court may result in the issuance of orders for their eviction.

14. The applicant said that if the trial culminated in eviction, that would cause him to suffer great prejudice and substantial loss, particularly if it is borne in mind that the property which is the subject matter of the case had been in the hands of his family for decades.

15. It was for those reasons that the applicant felt entitled to an order for a stay of proceedings.

16. In answer to the application, the Managing Director of the 1st respondent (Mayfair Establishments Limited) filed a replying affidavit. He denied the applicant's contention that the suit at the Environment and Land Court was filed out of time.

17. The two sides were unable to agree on the exact status of the proceedings. On the one hand, the respondents said that the defence case had already reached the tail end; whilst on the other hand, the applicant insisted that the defence case was yet to be heard.

18. Ms. Amina Mohamed, the learned advocate for the applicant, said:

> " The defence case has not been heard. What has been heard was the plaintiffs' case, and at that time, we had filed this application, and it was pending directions."

19. However, Mr. Asige, the learned advocate for the respondents, said:

> " The hearing has continued before the superior court; the plaintiff concluded his case. The applicant fully participated in the proceedings, and further hearing of the defence is on 27th March, 2025."

20. In the circumstances, the respondents were of the view that the applicant would suffer no prejudice if the trial was allowed to proceed.

21. In determining an application for stay of further proceedings, this Court is obliged to consider whether or not the applicant has demonstrated that he has an arguable appeal. Secondly, the court is required to determine whether or not the appeal would be rendered nugatory if the proceedings were not stayed.

22. In the case of *Stanley Kang'ethe Kinyanjui vs. Tony Keter & 5 Others* [2013] eKLR, this Court held thus:

> " 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.
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> 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.
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> 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.
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> 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.
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> v. An applicant must satisfy the court on both of the twin principles.
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> 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.
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> 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 Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.
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> 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."

23. We are called upon to bear in mind that the application for stay of proceedings is of an interlocutory nature, as it arises whilst the substantive suit has not yet been determined.

24. As far as the respondents were concerned, the applicant had decided to argue his appeal prematurely. In any event, the respondents believe that the applicant had failed to demonstrate that he has an arguable appeal, or that if proceedings were not stayed, the appeal would be rendered nugatory.

25. In determining the application, we first remind ourselves that issues pertaining to the jurisdiction of the court ought always to be determined at the earliest stage in the proceedings. It is well settled that when a court lacks jurisdiction, it must not take any steps in the proceedings. In *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd* [1989] KLR, this Court held that jurisdiction is everything and that where a court lacks jurisdiction, it must down its tools.

26. Similarly, in *Jamal Salim vs. Yusuf Abdulahi Abdi & Another* [2018] KECA 14 (KLR), this Court held that:

> "It follows that even where a party initially admits to jurisdiction, as in this case, the same does not clothe a court with jurisdiction it did not have to begin with. Similarly, an objection to jurisdiction can be raised at any stage. Nonetheless, such an objection ideally should be raised at the earliest opportunity."

27. Whereas the trial court dismissed the preliminary objection, it is still incumbent upon this Court to determine whether or not the Environment and Land Court has jurisdiction to hear and determine the case. The said determination ought to be made at the earliest opportunity, so that if the trial court lacks jurisdiction, it should not utilize judicial time, and take up the time of the parties, by engaging in actions which would be a nullity. Yet again, as the issue of jurisdiction would be the subject of the pending appeal, the court must, at this interlocutory stage, be fully alive to the need for caution against making a decisive determination at an interlocutory stage. It is for that reason that we must limit our findings to the question about whether or not the applicant had made out a prima facie case.

28. In *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 others* [2003] KECA 175 (KLR), this Court held thus:

> "As I stated at the beginning of this judgment, this is an interlocutory appeal. The dispute between the parties is still outstanding. We were informed from the bar that a hearing date for the case has not been set. So care must be exercised to obviate the risk of trespassing on the jurisdiction of the judge who will eventually hear the case. The learned Commissioner of Assize quite properly reminded himself of the fact that what was before him was an

interlocutory application for injunction. But it is quite clear that in several respects he improperly expressed a concluded view of factual issues. It is however, appreciated that it is sometimes difficult to skirt clear of the danger. But that is not to say that the danger cannot be avoided."

29. At paragraph 15 of the impugned ruling, the learned judge expressed himself thus:

> " The plaintiff filed his claim on 7th September 2022, through a plaint dated the same day, while he got registered as the proprietor of the suit property on 11th May 2010. If one was to strictly go by this measure, it therefore means that it was twelve years, 3 months and 27 days after the plaintiff became the registered owner of the suit property. Should that have been the case, then (pursuant to) the provisions of Section 7 of the *Limitation of Actions Act*, no action may have been brought to recover the land after the end of twelve years from the date on which the right of action occurred."

30. The applicant submitted that the finding above clearly showed that the suit herein ought not to have been instituted after the lapse of more than 12 years. But the respondents insist that the learned trial Judge did not make that determination.

31. In our considered opinion, the two divergent views, expressed by the parties herein, give rise to an arguable appeal.

32. On the second limb of the requirements which ought to be given due consideration in the application for stay of proceedings, we hold the view that unless further proceedings were stayed to await the determination of the appeal, the appeal would be rendered nugatory. We so held because this Court would be taking action after the fact. In other words, the court whose jurisdiction, or lack of it thereof, was being determined would have already rendered itself. In those circumstances, if this Court were to find that the trial court lacked jurisdiction, the time spent by the court as well as by the parties would have been in vain.

33. Meanwhile, if the proceedings went ahead before the appeal herein was determined, there is no possibility that the resultant decree (which could be in favour of the respondents) might be executed.

    Such a development could complicate matters and may result in the applicant's eviction.

34. Accordingly, we come to the conclusion that there is merit in the application. We order that there be a stay of proceedings before the Environment and Land Court until the appeal, herein, is heard and determined.

35. Costs of the application shall abide the outcome of the appeal.

DATED AND DELIVERED AT MOMBASA THIS 31ST DAY OF JULY, 2025.

S. GATEMBU KAIRU, FCIArb.

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR