



**Mwangi v Okello & 4 others (Civil Application E108 of 2023)  
[2024] KECA 197 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KECA 197 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E108 OF 2023  
HA OMONDI, A ALI-ARONI & GWN MACHARIA, JJA  
FEBRUARY 23, 2024**

**BETWEEN**

**FLORAH WAMBUI MWANGI ..... APPLICANT**

**AND**

**COLLINS ODHIAMBO OKELLO ..... 1<sup>ST</sup> RESPONDENT**

**THE CHIEF MAGISTRATE’S COURT AT KIKUYU ..... 2<sup>ND</sup> RESPONDENT**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ... 3<sup>RD</sup>  
RESPONDENT**

**NATIONAL TRANSPORT AND SAFETY AUTHORITY ..... 4<sup>TH</sup> RESPONDENT**

**OFFICER COMMANDING POLICE STATION – KIKUYU ... 5<sup>TH</sup> RESPONDENT**

*(Being an application from the Judgment of the High Court of Kenya at Kiambu  
(Kassango, J.) dated 17th March 2014 in Constitutional Petition No. E032 of 2021)*

**RULING**

1. The application before us is the Notice of Motion dated 20<sup>th</sup> March 2023 brought pursuant to rule 5(2) (b) of the *Court of Appeal Rules*, supported by the affidavit of even date, sworn by Florah Wambui Mwangi, seeking that pending the hearing and determination of the appeal, there be a stay of execution of the judgment dated 17<sup>th</sup> March 2023; an injunction/conservatory orders to preserve the motor vehicle in question; and that costs in the cause.
2. The applicant filed Kiambu High Court Constitutional Petition No. E032 of 2021 alleging violation of her fundamental rights and freedom under Articles 35 and 40 of the *Constitution* of Kenya, and sought a permanent injunction to restrain the 1<sup>st</sup> respondent and/or his agents from transferring, dealing, or interfering with motor vehicle registration number KCE 716E. The applicant’s position



was that she bought the said motor vehicle from Smart Autos, and had a log book issued by National Transport and Safety Authority (NTSA) in her name on 31<sup>st</sup> July 2015; she then decided to sell the vehicle to one Dennis Gitobu at a price of Kshs.652,500/=, and the cheque for the agreed sum issued; and the applicant released the logbook to the named purchaser.

3. Subsequently, the cheque drawn by the purchaser in the applicant's favour was returned unpaid. Efforts to reach the purchaser were futile and when it dawned on the applicant that she had been conned, she reported the matter to Kikuyu Police Station where her complaint was registered in the Occurrence Book (OB). She also placed a caveat with NTSA stopping the transfer of said motor vehicle.
4. This eventually led to the arrest of the 1<sup>st</sup> respondent who was found in possession of said motor vehicle and he was charged in court with the offence of theft of a motor vehicle, with an alternative charge of handling stolen property; the trial court found that the 1<sup>st</sup> respondent had no case to answer, and the applicant's advocate sought for stay of the decision to release the motor vehicle.
5. The applicant then filed a petition for declaratory orders, inter alia, that being the owner of the said vehicle, her right to property had been violated under Article 40 of the *Constitution*; that her right to access to justice had been curtailed by the prosecutor's failure to call certain witnesses to testify at the trial; a declaration that she was the rightful owner of the said motor vehicle; an order compelling the 2<sup>nd</sup> to 5<sup>th</sup> respondents to release the vehicle to her; a permanent injunction to prevent the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents from transferring, charging, conveying, dealing or otherwise interfering in any manner with the said motor vehicle and its parts; and for rectification of the records which may have been tampered with.
6. The 1<sup>st</sup> respondent maintained that he was the registered owner of the motor vehicle which he purchased from the applicant on 8<sup>th</sup> January 2018, who handed over to him the original logbook, whereupon he applied to the 5<sup>th</sup> respondent for transfer of the motor vehicle to his name. Basically, the respondents urged the trial court to dismiss the petition, terming it frivolous, and pointing out that it was an evasion of challenging ownership of the motor vehicle through the civil process.
7. The petition was dismissed with costs on the ground that it raised matters of a civil nature, and could not be used to determine a property dispute. The trial court also ordered the applicant to pay to the 1<sup>st</sup> respondent a sum of Kshs.150,000/- being the costs of the suit, and directed that the motor vehicle be released to the 1<sup>st</sup> respondent.
8. The applicant urges us to grant the orders sought arguing that she has at least one arguable issue as regards whether the trial Judge usurped the jurisdiction of the taxing officer, thus denying her a chance to file a reference; that the respondent will at any moment take possession of the motor vehicle and dispose of the same; and she will suffer irreparable harm that cannot be compensated for in damages, thus rendering the appeal nugatory.
9. The applicant has expressed a willingness to issue an undertaking as to damages for any loss suffered by the respondent.
10. The respondent contends that the applicant has not met the threshold for grant of orders for stay, pointing out that any orders arising from the judgment are reversible and that the vehicle can be repossessed if the appeal succeeds. Further, that the 1<sup>st</sup> respondent is unable to transfer the motor vehicle as there is a caveat with NTSA, that is yet to be lifted; that partial execution has already taken place, as the vehicle has already been released to him; and that there is no loss to be suffered by the applicant that cannot be made good by an award of damages as the damages can be quantified. In



addition, the 1<sup>st</sup> respondent states that he is in a position to pay the applicant damages should the appeal succeed.

11. In considering whether the applicant has satisfied the requirements necessary for granting an order for stay, we are alive to what this Court has previously stated in numerous decisions that the principles applicable in an application for injunction, stay of execution or stay of proceedings are the same. To succeed in an application under rule 5(2) (b), the applicant has to establish that:

- i. The appeal is arguable.
- ii. The appeal is likely to be rendered nugatory if the stay is not granted and appeal succeeds.

12. The principles for granting relief in an application under Rule 5(2) (b) are well settled as observed in the case of *Trust Bank Limited & Another v Investech Bank Limited & 3 Others* [2000] eKLR where the Court stated:

“the jurisdiction of the court under rule 5(2) (b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, it is not frivolous and secondly that unless he is granted a stay in the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles, but these principles must be considered against facts and circumstances of each case...”

13. On whether or not the appeal is arguable, we have to consider whether there is a single bona fide arguable ground that has been raised by the applicant in order to warrant ventilation before this Court. In *Stanley Kangethe Kinyanjui v Tony Keter & 5 Others* [2013] eKLR this Court described an arguable appeal as an appeal:

“... not one which must succeed but one which ought to be argued fully before this court, one which is not frivolous... in considering an application brought under rule 5(2) (b) the court must not make a definitive finding or final findings of either fact or law at that stage as so doing may embarrass the hearing of the main appeal.”

14. After carefully considering the grounds set out in the motion, we have noted that there is at least one arguable issue regarding whether the trial Judge usurped the role of the Taxing Master. We shall say no more than that lest we embarrass the bench that will be seized of the main appeal.

15. On the appeal being rendered nugatory, this Court has held in the case of *Reliance Bank Limited v Norlake Investment Limited* [2002]1 EA 227 that the factors which render an appeal nugatory are to be considered within the circumstances of each case, and in so doing, the Court is bound to consider the conflicting claims of both sides.

16. In the case of *African Safari Club Limited v Safe Rentals Limited*, Nai. Civ. App. 53 of 2010 this Court held:

“...with the above scenario of almost equal hardship by the parties, it is incumbent upon the court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... we think that the balancing act is in keeping with one of the principle aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable.”

17. As a matter of fact, the nugatory aspect in this matter is two- fold, on one hand is the sum awarded as assessed costs, and on the other hand is the preservation of the vehicle. The applicant says the respondent’s abode is unknown, and is apprehensive that if paid out, there may be no chance of



recovery to the assessed costs. Certainly not knowing one's abode does not translate to proof of being impecunious; and we are in agreement that the assessed sum of Kshs 150,000/- is a specific amount, which in our view can be reversed by directing the 1st respondent to pay back.

18. There is however the other nagging aspect relating to the motor vehicle, taking into account that there are court orders for the release of the vehicle to the 1<sup>st</sup> respondent; that the respondent will take possession of the motor vehicle which is currently preserved at Kikuyu police station; and dispose it to a third party, or even charge it as a collateral to some financial institution. The applicant's apprehension is borne out of the fact that even with the existence of the caveat lodged with the National Transport and Safety Authority, the vehicle got to weave its way into the 1<sup>st</sup> respondent's hands. We recognize the possibility of the respondent disposing of the motor vehicle to a third party, thus taking it away from the applicant's reach, but is this a situation that is irreversible, or cannot possibly be adequately compensated by way of damages? The respondent laments that the vehicle had been held at Kikuyu Police Station from the year 2018, and was exposed to depreciation due to non-mobility as well as being exposed to the harsh conditions of the elements. That in the event that the appeal does not succeed, then he will be greatly affected by having the vehicle exposed to further waste. We reiterate that the value of the motor vehicle is known, and that in the event that the appeal succeeds, it can be quantified, and damages of a monetary nature be awarded to the applicant as compensation.
19. The same applies to the assessed costs, which in our view can be reversed by directing the 1st respondent to pay back the sum of Kshs. 150,000. In the circumstances the applicant has failed to satisfy the 2nd second limb of the requirement under rule 5(2) (b) of this Court's Rules. The upshot is that the Notice of Motion dated 20<sup>th</sup> March 2023 is not merited and is hereby dismissed. Costs shall be in the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2024.**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

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**ALI-ARONI**

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**JUDGE OF APPEAL**

**G. W. NGENYE-MACHARIA**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**

