



**Kenya Airports Authority v Kahia & another (Civil Application E098 of 2023) [2024] KECA 576 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 576 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E098 OF 2023  
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA  
MAY 24, 2024**

**BETWEEN**

**KENYA AIRPORTS AUTHORITY ..... APPLICANT**

**AND**

**OSMAN AHMED KAHIA ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for stay of execution of the Judgment of the Environment and Land Court of Kenya at Mombasa (L. Naikuni, J.) delivered on 30th May 2023 in ELC Petition No. 13 of 2022)*

**RULING**

1. By a Notice of motion dated 1<sup>st</sup> November 2023 brought pursuant to rules 5(2) (b), 41, 42 and 43 of the [Court of Appeal Rules](#), sections 3A and 3B of the [Appellate Jurisdiction Act](#), the applicant, Kenya Airports Authority seeks:
  - i. an order for stay of execution of the judgment of 30<sup>th</sup> May, 2023 in Mombasa Environment and Land Court Petition No. 13 of 2022 pending the hearing and final determination of the intended appeal; ii) that costs of this application abide by the intended appeal; and (iii) that this Court be at liberty to issue such further orders as deemed necessary in the interest of justice.
2. The Notice is brought pursuant to the grounds on its face and an affidavit in support sworn by Margaret Munene, the Acting Corporation Secretary of the applicant, in which she contended that the 1<sup>st</sup> respondent filed a Petition in Environment and Land Court at Mombasa Constitutional Petition No. 13 of 2022 claiming that the applicant had unlawfully acquired his land known a Title No. CR. 68272 Land Reference No. 5145/VI/MN (the suit land) situated adjacent to Mombasa Moi International Airport; and that it was allegedly excavating and digging trenches on the land in violation of his rights as enshrined in the [Constitution](#). He sought compensation for the unlawful actions



- amongst other orders. In response, the applicant opposed the Petition and filed a replying affidavit. After the parties had filed written submissions, the trial court reserved judgment for 12<sup>th</sup> April 2023; that, on that date, the court did not sit and the judgment was not delivered; and that the applicant was informed by the registry that judgment would be delivered on notice.
3. It was further deponed that no notice of delivery of judgment was ever sent to the applicant, but that it learnt of such delivery on 21<sup>st</sup> August 2023 when the 1<sup>st</sup> respondent's advocates demanded payment of the decretal amount and threatened execution against the applicant; that, thereafter, they were served with a copy of the judgment dated 30<sup>th</sup> May 2023, which allowed all the prayers sought in the Petition including a monetary award in favor of the 1<sup>st</sup> respondent of Kshs. 291,500,000, whereafter the court granted the applicant stay of execution of the judgment for 180 days which lapsed on 30<sup>th</sup> November 2023.
  4. The deponent averred that the applicant was dissatisfied with the judgment, sought leave to file a Notice of appeal out of time, and lodged an application seeking stay of execution, which application came up for hearing before a three (3) judge bench on 23<sup>rd</sup> October 2023; and that this Court directed that the application for extension of time be listed for hearing before a single judge. It was contended that the application was pending hearing, and that there is an imminent threat of execution as the 1<sup>st</sup> respondent has obtained a decree and threatened to execute against the applicant upon the expiry of thirty (30) days from the date of service of the demand, and hence the urgency of this application.
  5. The deponent contended further that it has an arguable appeal with high chances of success, and which will be rendered nugatory if the orders sought are not granted, and that the applicant stands to suffer substantial loss as the decretal amount is colossal and, if paid to the decree holder, there is no certainty that he will be in a position to refund the amounts in the event the appeal is successful; that, further, the applicant is a public institution playing a critical role in the management of airports in Kenya, and that execution against it will disrupt air traffic control and movement in the entire country and beyond and, therefore, it is of paramount importance as well as for the public good that the orders are granted pending hearing and determination of the appeal.
  6. In a replying affidavit sworn on 7<sup>th</sup> December 2023, the 1<sup>st</sup> respondent opposed the application and deposed that there is no valid Notice of appeal to warrant grant of the stay sought; and that the present application is incompetent and bad in law and ought to be dismissed with costs. It was deponed that a notice of delivery of the judgment on 30<sup>th</sup> May 2023 was dispatched to the Advocates on 23<sup>rd</sup> May 2023 via their respective email addresses and that, therefore, the allegation that the cause of delay in lodging Notice of appeal was the non-service of Notice of delivery of judgment was false.
  7. The 1<sup>st</sup> respondent further averred that it is not in dispute that he is the registered owner of the suit land bordering the applicant's Mombasa Moi International Airport, and that the applicant had installed pipelines on the suit land; that as a consequence, the applicant is in constructive occupation and use of the land; that the appeal will not be rendered nugatory as no irreparable loss will be occasioned to the applicant because, upon payment of compensation to him, his rights to the suit land shall be extinguished in favour of the applicant.
  8. During the hearing of the application on a virtual platform, learned counsel for the applicant, Mr. Okeyo, submitted that the appeal is arguable as demonstrated in the Memorandum of appeal. On the nugatory aspect, counsel submitted that the decretal amount of Kshs. 291,000,000 is colossal and that, if paid to the decree holder, there was no certainty that he will be in a position to refund it in the event the appeal succeeds; that, further, any execution of the judgment will cripple the applicant's operations and air traffic control and movement in the entire country and beyond, and adversely affect its business; that, if the pipes are removed as ordered by the lower court, the airport will have to shut down its



operations as the drainage system will have been disrupted. It was also submitted that the payment which is grossly excessive could lead to loss of public funds contrary to the interests of the public. Finally, counsel submitted that no prejudice would be suffered by the 1<sup>st</sup> respondent were execution to be stayed as the land in question will remain intact.

9. In rebuttal, Mr. Mogaka, learned counsel for the 1<sup>st</sup> respondent, conceded that the intended appeal is arguable. Counsel went on to submit that, since the applicant's apprehension was in respect of refund of the decretal amount, it was urged that the Court grants the orders on condition that the decretal amount is deposited in joint interest earning account in the names of the parties' advocates in Kenya Commercial Bank within a specified period.
10. Mr. Mbutia learned counsel for the 2<sup>nd</sup> respondent submitted that the 2<sup>nd</sup> respondent supports the application; that the appeal is arguable, and would be rendered nugatory as the 1<sup>st</sup> respondent would not be in a position to refund the amount if paid and the appeal were to succeed.
11. As a brief background of the suit, the 1<sup>st</sup> respondent, filed an Amended Petition against the applicant and the 2<sup>nd</sup> respondent seeking reliefs for infringement and violation of his fundamental rights as enshrined under the provision of Articles 10, 27, 40 and 47 of the Constitution.
12. In the petition, the 1<sup>st</sup> respondent sought a declaration that the applicant and 2<sup>nd</sup> respondent's actions of causing and permitting excavation of trenches and installation of pipelines on the suit land without his notification or consent or the payment of compensation violated his rights. The 1<sup>st</sup> respondent also prayed for an order for payment of compensation, and in the alternative that the applicant to be ordered to excavate and remove the installed pipelines from the suit land within 14 days amongst other orders.
13. In response, the applicant opposed the petition and simultaneously raised a Preliminary objection against the suit contending that the suit was incompetent and fatally defective as it was in direct contravention of sections 33(1) and 34 (a) of the *Kenya Airports Authority Act*, in that, the 1<sup>st</sup> respondent did not engage the applicant for an agreement on an amount of compensation, if any, and failed to serve the applicant with a written notice at least one month before institution of the suit.
14. Upon hearing the parties, the trial Judge dismissed the applicant's Preliminary objection, allowed the Petition and entered judgment in favour of the 1<sup>st</sup> respondent. It is this judgment against which the applicant seeks to lodge an appeal, and the basis upon which it has brought this application for stay of execution.
15. Before addressing the application for stay of execution brought under rule 5(2) (b), the 1<sup>st</sup> respondent contended that there is no competent appeal before us since the Notice of appeal was filed out of time, and that leave to extend time for filing was yet to be granted. However, a consideration of the Court's record discloses that, by a ruling delivered on 8<sup>th</sup> December 2023, this Court extended time for filing of the applicant's Notice of appeal, which thereby renders this application before us competent.
15. As stated above, the applicant is seeking a stay of execution of the judgment of the lower court under rule 5(2) (b) of this *Court's rules*. The principles that guide this Court in determination of an application under rule 5(2)(b) of this *Court's Rules* are well settled. These principles are summarised in *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR to wit;

an applicant must demonstrate that the appeal or intended appeal is arguable; and that, unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory.



16. As restated in the case of *Trust Bank Limited and Another vs. Investech Bank Limited & 3 Others* [2000] eKLR:

“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, to put another way, it is not frivolous and secondly that unless he is granted a stay 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...”

17. On whether the arguable aspect has been met, in their submissions, the 1<sup>st</sup> respondent’s counsel conceded that the intended appeal is arguable. Our consideration of the grounds of appeal set out in the draft memorandum of appeal leads us to likewise conclude that, indeed, the intended appeal is arguable.

18. Turning to the second limb on whether the intended appeal, if successful would be rendered nugatory were this Court to decline to grant the orders sought, the applicant’s apprehension is that, if the decretal sum of Ksh. 280,000,000 is paid to the 1<sup>st</sup> respondent, he will not be in a position to refund it if the appeal were to succeed.

19. This Court in the case of *Kenya Hotel Properties Limited vs. Willesden Properties Limited* Civil Application Nai. No. 322 of 2006 (UR 178/06) 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”.

20. The decretal sum of Kshs. 280,000,000 is by no means a meagre amount. The 1<sup>st</sup> respondent did not adduce any evidence to show that he is capable of repaying such an amount. In the absence of any reassurance as to the 1<sup>st</sup> respondent’s financial capability, particularly in light of the amount involved, we consider it prudent to grant stay of execution of the judgment so as to safeguard the substratum of the appeal.

21. Consequently, the applicant has satisfied the threshold requirements necessary for grant of the orders of stay of execution under rule 5(2) (b). The Notice of motion dated 10<sup>th</sup> March 2022 is merited and is hereby allowed. Costs in the intended appeal.

It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 24<sup>TH</sup> DAY OF MAY, 2024.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA C.Arb, FCI Arb.**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

