



**Omumbo & another v Mayfair Holdings Limited (Civil Appeal (Application)  
E151 of 2023) [2024] KECA 875 (KLR) (19 July 2024) (Ruling)**

Neutral citation: [2024] KECA 875 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL (APPLICATION) E151 OF 2023  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
JULY 19, 2024**

**BETWEEN**

**WILSON AKWACHA OMUMBO ..... 1<sup>ST</sup> APPLICANT**

**PAULINE MAUA AKWACHA T/A HANGOVER HOTEL ..... 2<sup>ND</sup> APPLICANT**

**AND**

**MAYFAIR HOLDINGS LIMITED ..... RESPONDENT**

*(Being an application for stay of execution pending the hearing and determination of the intended appeal from the judgment of the Environment and Land Court at Kisumu (S. Okongo, J.) dated 12th October 2023 in Case No. 874 of 2015)*

**RULING**

1. The Notice of Motion dated 27<sup>th</sup> November 2023 brought under Certificate of Urgency Pursuant to rule 5(2)(b) of the Court of Appeal Rules seek for orders that:- This court be pleased to stay execution of judgment and decree of the Superior Court delivered on 12<sup>th</sup> October 2023 in Kisumu Environment and Land Court (ELC) No. 874 of 2015 pending the hearing and determination of the application and intended appeal; an interim order restraining the respondents in any way dealing with the suit property known as Kisumu/Municipality/Block 8/297; and that costs be in the cause. The application is supported by an affidavit of even date sworn by Pauline Akwacha, the 2<sup>nd</sup> applicant.
2. The background to this matter is that the respondent had filed a suit against the applicants being Kisumu ELC 874 of 2015 claiming that the applicants unlawfully encroached onto its parcel of land by piling bricks and constructing a structure without the respondent’s authority, thereby barring it from developing the suit property in spite of the fact that the plans for such development had been approved by the relevant local authority. The result was that the respondent lost the use of and prospective income from the premises. The respondent sought: a declaration that the applicants had trespassed upon the suit property and ought to be evicted; an order of permanent injunction restraining the



applicants either by themselves, their agents, servants or invitees from continuing to trespass on the suit property; loss of user at the rate of Kshs.20,000/- per month from the date of trespass until vacant possession; general and exemplary damages for trespass until the date of vacant possession; and costs of the suit.

3. Judgment was entered in favour of the respondent on 12<sup>th</sup> October 2023 (Okong'o, J), declaring that the applicant had trespassed upon the suit property; the applicant do vacate from the suit property within 60 days from the said judgement, in default of which the respondent was at liberty to apply for a warrant for her forceful eviction; order of a permanent injunction restraining the applicant either by herself, her agents, servants, employees or assigns from trespassing upon the suit property after vacating or being evicted; Kshs.100,000/- being general damages for trespass; and costs of the suit.
4. Aggrieved by this outcome, the applicant intends to appeal against the decision, but is apprehensive that if the interim orders of stay are not granted the respondent will proceed to execute the decree, leading to her suffering irreparable loss as she has been running a hotel business on the suit property for the last 16 years, and said hotel is the applicant's only source of income; and such execution will render the intended appeal nugatory; yet the intended appeal raised triable issues with a chance of success.
5. The application is opposed through a replying affidavit dated 11<sup>th</sup> November 2023, sworn by Amin Gilani, the Managing Director of Mayfair Holdings Limited, the respondent company, who says there is no need for an order of stay as the applicants did not challenge the respondent's title to the suit property; that the respondent being the owner of the suit property as adjudged by the ELC, have been unable to use the suit property due to the trespass by the applicants; that this case has been in court for 13 years with the applicants declining to move out of the suit land despite not having proof of ownership; the applicants have not complied with the court order to pay Kshs.100,000/-, being general damages for trespass, as such is before this Court with unclean hands; there is no arguable appeal the ELC having found that the suit property belongs to the respondent; and the applicants are guilty of laches as the application was brought 48 days after the judgment; and the application ought to be dismissed.
6. The Superior Court delivered a judgment on 12<sup>th</sup> July 2022 dismissing the applicants' suit and in effect ordering the applicants to vacate the suit property within 60 days from the date of judgment and in default the respondent shall be at liberty to execute the decree.

**a.-Whether the applicant has satisfied the requirements Necessary for granting an order for stay of execution.**

7. This Court has stated that whether it be an application for injunction, stay of execution or stay of proceedings the applicable principles are the same. To succeed in an application under Rule 5(2)(b) of the Court Rules, the applicants have 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.
8. The applicants have a duty to satisfy the Court that the appeal is arguable and that should the Court decline the orders sought, and the appeal is ultimately successful, the same will be rendered nugatory. In the case of Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR, this Court described an arguable appeal in the following terms:

- “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.



- 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.”
9. We have carefully considered the grounds set out in the motion and the memorandum of appeal. We have also considered the written submissions filed by the applicants’ counsel – the respondent did not file any written submissions. The main grievance revolves around the issue of ownership. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, in our view the issue raised is not frivolous; indeed, the appeal is arguable, inter alia being whether the court erred in its finding of the ownership of the suit property.
10. On the nugatory aspect, which is whether the appeal, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others* (*supra*) this Court stated that:
- “ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
- 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.
11. In determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties and each case has to be determined on its merits. In the instant application, the applicants are apprehensive that they will be evicted, and their hotel business set up on the suit property left to waste, rendering the appeal nugatory. In *Housing Finance Company of Kenya Limited v Sharok Kher Mohamed Ali Hirji & Another* [2015] eKLR This Court stated as follows:
- “With time it became necessary to put certain riders to the 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”.
12. The upshot of the ELC’s judgment was that the respondent was the lawful and registered owner of the suit property. The applicants have raised the issue that the appeal will be rendered nugatory because they will be evicted from the suit land despite the fact the applicants have been running a hotel business on the suit land which is the only source of income for the applicants for 16 years or so.
13. The respondent has also confirmed that the applicants have been on the suit property and as such it has been unable to use the same due to the trespass by the applicants; but of greater significance is the fact that the 2<sup>nd</sup> applicant admitted at the trial that she had constructed the property on a road reserve; riding on the strength of a purported letter of allocation. This situation certainly calls for circumspection, and a balancing of interests. What would be the effect of allowing the applicant to remain on property that she admits is a road reserve? In *Reliance Bank Ltd v Norlake Investments Ltd* [2002] EA 227, this Court stated:
- “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 applicants appeal to be heard and determined.”



14. In the circumstances of the instant application, this Court is persuaded that the applicants have demonstrated an arguable appeal. We have anxiously considered that if the applicant's prayer for stay of execution is denied and the appeal eventually succeeds, they will have already been evicted from the suit property and rendered bereft of their hotel business; and whereas damages may not totally sooth the damage, the nugatory aspect is dented by what would in effect be endorsing an action that would run counter to public policy.
15. We, thus, find that whereas that the applicants have satisfied the first limb of the test in a 5(2)(b) application, they have failed to satisfy the second limb. Consequently, we hold that the application before us is not merited and is dismissed. Costs to abide the outcome of the appeal.

**DATED AND DELIVERED AT KISUMU THIS 19<sup>TH</sup> DAY OF JULY, 2024.**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**H. A. OMONDI**

.....

**JUDGE OF APPEAL**

**JOEL NGUGI**

.....

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

