



**Masters Kenya Limited & another v desert Runner Services Company Limited & 5 others  
(Civil Application E562 of 2024) [2024] KECA 1493 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1493 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E562 OF 2024  
K M'INOTI, F TUIYOTT & FA OCHIENG, JJA  
OCTOBER 25, 2024**

**BETWEEN**

**MASTERS KENYA LIMITED ..... 1<sup>ST</sup> APPLICANT**

**STEPHEN KAMAU NGUNGU ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JOHN SALEH OKETCH ..... 1<sup>ST</sup> RESPONDENT**

**DESERT RUNNER SERVICES COMPANY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**SYLVIA ALIVITSA LITUNDA ..... 3<sup>RD</sup> RESPONDENT**

**HOUSING FINANCE CORPORATION OF KENYA ..... 4<sup>TH</sup> RESPONDENT**

**THE NGONG LAND REGISTRAR ..... 5<sup>TH</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR ..... 6<sup>TH</sup> RESPONDENT**

*(Being an application for stay of execution pending the hearing and determination of an intended appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (E. K. Wabwoto, J.) dated 19th September 2023 in HCCC No. 916 of 2013)*

**RULING**

1. Before us is an application dated July 26, 2024, in which the applicants pray for the following orders pending the hearing and determination of this application and CACA E562 of 2024:
  1. Spent.
  2. The Honourable Court be pleased to stay the execution of the judgment by the 4<sup>th</sup> respondent (sic) entered on 19<sup>th</sup> September 2023 in Civil Case No. 916 of 2013 pending the hearing and



determination of Civil Appeal No. E562 of 2024 which seeks to challenge the ruling on the review delivered in the above-captioned suit.

3. The Honourable Court be pleased to grant an order of stay barring the 4<sup>th</sup> respondent from exercising its statutory of sale over land parcel No. LR Ngong/Ngong/20987, (hereinafter, “the suit property”), pending the hearing and determination of Civil Appeal No. E562 of 2024.
  4. Costs of this application be provided for.”
2. The application is brought under Rule 5(2)(b) of the Court of Appeal Rules, Articles 159 & 164 of the *Constitution*, Sections 3, 3A & 3B of the *Appellate Jurisdiction Act*, and Sections 1A, 1B & 3A of the *Civil Procedure Act*. The application is based on the following grounds:
- a. The suit property, which belongs to the applicants was advertised for sale in the Standard Newspaper on 18<sup>th</sup> July 2024 by the 4<sup>th</sup> respondent, through Taifa Auctioneers.
  - b. The 4<sup>th</sup> respondent’s loan with its co-respondents was not ascertained and approved by the court and as such there is no monetary decree in force capable of execution.
  - c. In the impugned judgment, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents were to pay the applicants the outstanding purchase price of Kshs. 8,000,000 before the 4<sup>th</sup> respondent exercises its statutory power of sale which to date has not been honoured.
  - d. The impugned judgment and the subsequent ruling were couched in such nebulous terms that could partially allow execution on the side of the 4<sup>th</sup> respondent only and thus it would be discriminatory to allow the 4<sup>th</sup> respondent to proceed with the execution while leaving the applicants stranded yet all parties ought to enjoy the fruits of the judgment.
  - e. The 2<sup>nd</sup> applicant has been staying on the suit property with his family for the past 24 years as their matrimonial property, yet the 4<sup>th</sup> respondent is about to sell it without due compliance with Orders 3 and 4 of the impugned judgment.
  - f. The 4<sup>th</sup> respondent has since advertised the suit property for sale and an auction has been scheduled for 2<sup>nd</sup> August 2024.
  - g. If the stay order is not granted, the applicants will suffer irreparable damage and they lack the financial muscle to purchase an alternative settlement as the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> respondents failed to pay them the full purchase price resulting from the sale of the suit property.
  - h. The applicants have an arguable appeal with high chances of success as enumerated in the filed memorandum of appeal, and if the orders sought are not granted, the appeal will be rendered nugatory, and they will suffer irreparable loss by losing their matrimonial home.
3. The application was supported by the 2<sup>nd</sup> applicant’s affidavit sworn on 26<sup>th</sup> July 2024 in which he reiterated the grounds on the face of the application and further stated that:
- a. He was the director of the 1<sup>st</sup> applicant and therefore had the authority to swear the affidavit on its behalf.
  - b. The applicants’ attempts to have the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents comply with order 3 of the impugned judgment and pay them the outstanding balance of the purchase price have been in vain.



- c. It is important for this Court to analyze, evaluate, and interpret order 3 in the sense that no monetary decree can be drawn from the said judgment.
  - d. Due to the vacuum in the trial court's judgment and the review ruling, parties have been left in limbo to choose their own ways of executing a non- monetary decree which gives the 1st respondent the upper hand in execution.
4. Opposing the application, the 1<sup>st</sup> respondent in its replying affidavit sworn by its director, Stephen Gakere Macharia on 5<sup>th</sup> August 2024 stated that:
- a. The court did not make any finding that the applicants were owed Kshs. 8,000,000 being the balance of the purchase price.
  - b. The applicants already moved the trial court on review which court expressed itself that it did not make a mistake and could not superimpose the payment of Kshs. 8,000,000 in respect of order 3 of the final judgment.
  - c. As the applicants chose the remedy of review as opposed to an appeal, what is before this Court for consideration is the ruling dated 22<sup>nd</sup> February 2024 and not the judgment dated 19<sup>th</sup> September 2023.
  - d. The applicants have not demonstrated that there was an erroneous finding in the ruling.
  - e. The applicants have not met the mandatory requirements of Rule 5(2) (b) to warrant stay of execution because; the trial court already expressed itself on the ownership of the suit property and the obligations of the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> respondents to the 4<sup>th</sup> respondent, the applicants' appeal is limited to the ruling on review, and no arguable point has been made against the ruling nor has it been demonstrated how the appeal against the ruling would be rendered nugatory if stay is not granted.
  - f. The application lacks merit and it should be dismissed.
5. Further opposing the application, the 4<sup>th</sup> respondent through the affidavit of its director, legal and company secretary sworn on 6<sup>th</sup> August 2024 stated that:
- a. Being dissatisfied with the impugned judgment, the applicants filed an application for review dated 20<sup>th</sup> November 2023.
  - b. The application partially succeeded as the court corrected the names of the 1<sup>st</sup> and 3<sup>rd</sup> respondents but declined the rest of the prayers including the prayer to insert a monetary figure of Kshs. 8,000,000 at the end of order 3.
  - c. There are no adverse or executable orders made against the applicants in the ruling to warrant the grant of an order for stay of execution.
  - d. The orders sought by the applicants to bar the 4<sup>th</sup> respondent from exercising its statutory power of sale cannot be issued because the judgment giving the order is not the subject of the appeal.
  - e. As the applicants did not challenge the orders made on the ownership of the suit property, or the order permitting the 4<sup>th</sup> respondent to exercise its statutory power of sale, they do not have locus to clog the 4<sup>th</sup> respondent's rights over the suit property.



- f. The applicants are not the owners, chargors, or guarantors in the suit property, and therefore the allegation on the valuation of the suit property is baseless.
  - g. The application herein has not satisfied the conditions precedent for grant of orders of stay of execution.
  - h. The applicants' application seeking similar orders before the trial court was dismissed.
6. The applicants further filed a supplementary affidavit dated 23<sup>rd</sup> August 2024, a further supplementary affidavit dated 9<sup>th</sup> September 2024, and two affidavits in response to the 1<sup>st</sup> and 4<sup>th</sup> respondents replying affidavits dated 12<sup>th</sup> August 2024, respectively. In the said affidavits, the applicants reiterated their statements in the supporting affidavit and the grounds on the face of the application.
  7. There was no response from the other respondents.
  8. When the application came up for hearing on 1<sup>st</sup> October 2024, the 2<sup>nd</sup> applicant, Mr. Kamau Ndungu, appeared in person for the applicants whereas Ms. Kisotu, learned counsel holding brief for Mr. Makumi appeared for the 1<sup>st</sup> respondent and Mr. Ayieko, learned counsel appeared for the 4<sup>th</sup> respondent. There was no appearance by the other respondents despite having been served. Parties relied on their respective written submissions which they opted to briefly highlight.
  9. Mr. Kamau Ndungu submitted that he had filed the application dated 26<sup>th</sup> July 2024 seeking a stay of execution order of the judgment dated 19<sup>th</sup> September 2023, to stop the 4<sup>th</sup> respondent from auctioning the suit property. He submitted that the 1<sup>st</sup> respondent has yet to pay him the outstanding balance for the purchase of the suit property, yet the 4<sup>th</sup> respondent has advertised the same for sale.
  10. He further submitted that he has no liability to the 4<sup>th</sup> respondent because he was not a guarantor to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents. He was apprehensive that his appeal would be rendered nugatory if the stay of execution was not granted and the appeal succeeded because the suit property would have been sold and he and his family would not have an alternative place to stay having lived on the suit property for over 25 years.
  11. In their written submissions dated 5<sup>th</sup> August 2024, the applicants submitted on the principles for grant of stay of execution as set out in the case of *Giella v Cassman Brown*. In their further submissions dated 12<sup>th</sup> August 2024, the applicants submitted on the substantive appeal but failed to submit on the twin principles under Rule 5(2)(b).
  12. Opposing the application, Ms. Kisotu submitted that since the applicants had sought a prayer for review against the impugned judgment, they cannot in the same breath appeal against the said judgment.
  13. In its written submissions, the 1<sup>st</sup> respondent submitted that for the applicants to succeed in their application for stay of execution, they must demonstrate that the appeal is arguable and not frivolous and that, if the order of stay is not granted, the appeal will be rendered nugatory.
  14. On the first principle, the 1<sup>st</sup> respondent relied on the case of *Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 Others* [2021] eKLR in submitting that the applicants have not demonstrated that they have an arguable appeal as the ruling did not order the parties to do anything or refrain from doing anything. It was a negative order which was incapable of execution.
  15. On the second principle, the 1<sup>st</sup> respondent pointed out that the trial court found that the suit property was lawfully and validly sold to the 1<sup>st</sup> respondent, and was therefore no longer the applicants' property, hence they could not bar the 4<sup>th</sup> respondent from exercising its statutory powers of sale.



16. Citing the case of Dickson Sinket Mapi (suing as the personal representative of Benjamin Mapi Ole Partimo - Deceased v Mutunkei [2021] KECA 235 KLR, the 1<sup>st</sup> respondent submitted that the applicants had failed to satisfy the requirements under Rule 5(2)(b) and even relied on the wrong provisions of the law by relying on Order 40 Rules 1 & 2.
17. On the other hand, Mr. Ayieko pointed out that when this matter first came up for hearing, the Court noted that the prayers sought in the application were intended to stay a judgment which was not the subject of an appeal. This led to the applicants filing a supplementary affidavit attaching a fresh notice of appeal. However, the substratum of the applicants' appeal as per their memorandum of appeal, is an appeal against the ruling on review.
18. Counsel submitted that that the ruling on review was a negative order dismissing the application for review. There was no judgment, order, or decree, capable of execution to warrant a stay of execution order. Counsel further submitted that the application was misguided and without merit as it was clear that the applicants were not appealing against the judgment that found that the sale of the suit property and the charge registered against the title were valid.
19. Counsel pointed out that the applicants lost the ownership of the suit property the moment they sold it to the 1<sup>st</sup> respondent. Therefore, the applicants cannot be seen to suggest that if the 4<sup>th</sup> respondent exercises its statutory power of sale to realize the security, they will suffer loss because the suit property does not belong to them.
20. Counsel submitted that should the appeal succeed and the court finds that the 1<sup>st</sup> respondent owed the applicants the amount of money in question, it is not to be settled on account of the security that was offered to the 4<sup>th</sup> respondent. This matter can only be settled between the applicants and the 1<sup>st</sup> respondent.
21. Counsel submitted that the appeal will not be rendered nugatory as the 4<sup>th</sup> respondent will realize the security, take the amount owed to it, and the surplus will be remitted to the borrower. Should the court deem it fit, the 4<sup>th</sup> respondent can hold onto the surplus until this matter is determined.
22. Finally, counsel reiterated the 1<sup>st</sup> respondent's submissions that the applicants having chosen to seek a review of the judgment, cannot have a second bite of the cherry by seeking to appeal against the said judgment. Be that as it may, the 4<sup>th</sup> respondent is not seeking to execute the judgment but is intent on exercising its statutory power of sale, guaranteed under the law. He urged that the appeal be dismissed with costs.
23. In its written submissions, the 4<sup>th</sup> respondent relied on the case of Amina Shiraz Yakub v David Baburam Jagatram [2017] eKLR to buttress the oral submissions by counsel.
24. In a brief rejoinder, Mr. Kamau Ndungu submitted that he made a mistake which he would wish to rectify by amending the application. To his mind, the application for review was not substantive, but one for an amendment because the court did not specify the outstanding amounts to be paid.
25. We have carefully considered the application, along with the supporting documents, affidavits, submissions by the parties, relevant case law, and legal provisions. The issue for determination is whether or not the application meets the requirements under Rule 5(2)(b).
26. It is common ground that the applicants sold the suit property to the 1<sup>st</sup> respondent. It is alleged that there is an outstanding balance of the purchase price which is still owed to the applicants. The trial court ordered the 1<sup>st</sup> respondent to pay the applicants any outstanding balances within 90 days of the



judgment. The court also directed that the 4<sup>th</sup> respondent was at liberty to exercise its statutory power of sale and realize its security after the 90 days had lapsed.

27. These orders were not set aside or appealed against, hence they are still enforceable as the applicants' application for review seeking to correct the names of the parties and for the figure of Kshs.8,000,000 to be inserted in order 3 of the impugned judgment was declined. From the ruling on the application for review, the parties remained in the same position they were in after the impugned judgment was delivered. (See: Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 Others, (supra).
28. The 4<sup>th</sup> respondent advertised for the sale of the suit property on 18<sup>th</sup> July 2024, in the realization of its security, which the trial court had found to be valid.
29. This prompted the applicants to file the present application against the judgment of the court dated 19<sup>th</sup> September 2023 seeking to challenge the ruling dated 22<sup>nd</sup> February 2024 as per prayer 2 in the application.
30. From the onset, it is evident that the applicants intended to appeal against the ruling on review rather than the impugned judgment. When the applicant filed an application for the extension of time within which to lodge a notice of appeal and a memorandum of appeal, this Court by the order dated 15<sup>th</sup> July 2024 noted that the extension of time was in relation to the ruling on review and not the impugned judgment. Further to the foregoing, the applicants in their memorandum of appeal dated 22<sup>nd</sup> July 2024 refer to the ruling on review.
31. It, therefore, beats logic for the applicants to suggest that they are appealing against the impugned judgment when they have not sought leave to appeal against the said judgment. The applicants have framed their grounds around the ruling on review, yet they still claim to be appealing against the impugned judgment; that is inexplicable, in our view.
32. In the circumstances, we find that the application herein is not properly before us.
33. Nevertheless, 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.
34. Rule 5(2)(b) is a procedural provision that allows the court to protect the subject matter of an appeal or an intended appeal. In the case of Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR, the 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 Gitahi 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.*”
35. It follows therefore that, to succeed in an application for a stay of execution, the applicants must show that their intended appeal is arguable. Once this has been established, the applicants must also demonstrate that if their appeal were to be successful, it would be rendered nugatory. This principle was demonstrated in the case of *Trust Bank Limited & Another v Investech Bank Limited & 3 Others [2000] eKLR.*
36. In the case of *Dennis Mogambi Mang'are v Attorney General & 3 Others [2012] eKLR*, this Court held that:
- “An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration.”
37. On whether or not the applicants have established a valid basis for an arguable appeal, the applicants contend that the trial court ought to have inserted Kshs.8,000,000, in order 3 of the impugned judgment, as the outstanding balance of the purchase price. However, the applicants have not explained why they did not specifically plead the amount in their pleadings for the court to consider the same given that they had this figure while filing their pleadings. We do not think it is an arguable point.
38. In the case of *Reliance Bank Ltd v Norlake Investments Ltd [2002] I EA 227*, the court held that the factors which can render an appeal nugatory are to be considered within the circumstances of each



particular case, and in doing so, the court is bound to consider the conflicting claims of both sides. In the circumstances of that particular case, the Court stated inter alia:

“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.”

39. In the application before us, the applicants have not demonstrated to our satisfaction the hardship they are likely to suffer should a stay of execution order not be granted. They sold the suit property to the 1<sup>st</sup> respondent hence they have no claim of ownership over the suit property. The dispute between the applicant and the 1<sup>st</sup> respondent ought not to stand in the way through which the 4<sup>th</sup> respondent is entitled to exercise its statutory power of sale. In any event, the applicants have not suggested that the 4<sup>th</sup> respondent would be unable to refund any money found to be owing from it, should the appeal succeed.
40. In the result, we are not inclined to exercise the Court's discretion in favour of the applicants. Consequently, the application dated July 26, 2024 lacks merit and is accordingly dismissed with costs to the 1st and 4th Respondents.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF OCTOBER, 2024.**

**K. M'INOTI**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**F. OCHIENG**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

