



**Japheth & 2 others v Mbesa Investments Limited & 2 others (Civil Appeal (Application) E058 of 2022) [2023] KECA 385 (KLR) (31 March 2023) (Ruling)**

Neutral citation: [2023] KECA 385 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL (APPLICATION) E058 OF 2022  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
MARCH 31, 2023**

**BETWEEN**

**LYDIA KAGUNA JAPHETH ..... 1<sup>ST</sup> APPLICANT  
LUCY ADHIAMBO NYALWAGA ..... 2<sup>ND</sup> APPLICANT  
HAMDAN IQBAL BAYUSUF ..... 3<sup>RD</sup> APPLICANT**

**AND**

**MBESA INVESTMENTS LIMITED ..... 1<sup>ST</sup> RESPONDENT  
THE COUNTY GOVERNMENT OF MOMBASA ..... 2<sup>ND</sup> RESPONDENT  
THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY  
(NEMA) ..... 3<sup>RD</sup> RESPONDENT**

*(An application under Rule 5 (2) (b) of the Court of Appeal Rules for injunction pending the hearing and determination of the intended appeal against the Ruling of the Environment and Land Court at Mombasa (L. Naikuni J.) delivered on 10th February 2022 in Mombasa ELC Petition No. 16 of 2020)*

**RULING**

1. The notice of motion application before us for ruling is dated January 18, 2023, and is brought by the applicants herein pursuant to rule 5 (2) (b) of the *Court of Appeal Rules, 2010*. The applicants seek an order of injunction to restrain the 1<sup>st</sup> respondent from constructing and/ or continuing with the construction of 3 towers known as Towers A, B and C comprising of 126 units, swimming pools, underground water tanks, sea walls and associated facilities and amenities on the properties known as LR No MN/ 1/5503, LR MN/5504 and MN/1/3412 (hereinafter collectively referred to as “the suit properties”), pending the hearing and determination of the intended appeal from the ruling delivered by Naikuni J on February 10, 2022 in Mombasa ELC petition No 16 of 2020.



2. The application is supported by an affidavit sworn on January 18, 2023 by Hamdan Iqbal Bayusuf, the 3<sup>rd</sup> applicant herein and a supplementary affidavit sworn on February 3, 2023 by Willis Oluga, the applicants' advocate. The applicants' case is that they filed an application in the Environment and Land Court at Mombasa (hereinafter "the ELC") seeking conservatory orders to restrain the 1<sup>st</sup> respondent from proceedings with the construction at the suit properties, which orders were granted by the said court in a ruling dated December 6, 2021, while awaiting the outcome of the National Environment Tribunal (hereinafter "NET") in NET Appeal No 30 of 2020. That the 1<sup>st</sup> respondent then filed an application dated December 16, 2021 for review of the ruling, which was allowed in a ruling dated February 10, 2022 on account of an errors on the face of record, resulting in the setting aside of the conservatory orders previously granted.
3. Consequently, that the 1<sup>st</sup> respondent resumed the construction of the project with the sole purpose of completing the same. Additionally, the 1<sup>st</sup> respondent was undertaking its development without a valid approval from the County Government of Mombasa. Therefore, that this court needed to intervene to stop the 1<sup>st</sup> respondent from undertaking the construction in the manner it was doing and in a manner likely to defeat the intended appeal that would render the same nugatory. The applicants argue that the 1<sup>st</sup> respondent will not suffer any prejudice if the construction is stopped momentarily because should the appeal fail, they would be at liberty to continue with the construction. Further, it was in the interest of the 1<sup>st</sup> respondent that the construction is stopped to avert a possible demolition should the court find that the 1<sup>st</sup> respondent did not follow the law. The applicants annexed copies of the rulings dated December 6, 2021, and February 10, 2022, the photographs showing the development on the suit properties.
4. The 1<sup>st</sup> respondent opposed the application by way of a replying affidavit sworn on February 7, 2023 by Hussein Sharriff Alwy, its managing director, who gave a background to its acquisition of, and applications of approval for the development of the suit properties. The 1<sup>st</sup> respondent averred that on November 27, 2019, it made an application for development permission of said properties which was granted on April 8, 2020 and that it subsequently commenced construction on the suit properties. However, that on June 24, 2020, the 2<sup>nd</sup> respondent served it with an enforcement notice suspending the approval, and being aggrieved by the issuance of the enforcement notice, the 1<sup>st</sup> respondent first filed a suit in the High Court in constitutional petition No 43 of 2020 - MBESA Investment Limited v the County Government of Mombasa, in which it was granted stay orders of the enforcement notice. The said suit was struck out by this court in a judgment delivered on June 10, 2022 in civil appeal 64 of 2020 after the 1<sup>st</sup> applicant herein challenged the High Court's jurisdiction, whereupon the 1<sup>st</sup> respondent filed another suit challenging the 2<sup>nd</sup> respondent's Enforcement Notice in the ELC, being ELC constitutional petition No 23 of 2020, which is pending hearing, and in which conservatory orders to stay enforcement and implementation of the Enforcement Notice were granted on June 20, 2020. Further, that on June 30, 2022, the County Executive Committee Member, Department of Lands & Planning wrote a letter to the 1<sup>st</sup> respondent confirming the rescission of the enforcement notices it had earlier issued.
5. The 1<sup>st</sup> respondent therefore denied that the development was being undertaken without the approval of the 2<sup>nd</sup> respondent, or that the conservatory orders issued on December 2, 2021 were mysteriously reviewed as alleged by the applicants, since the application to review the said orders was argued by both parties. The 2<sup>nd</sup> respondent argued that they would be greatly prejudiced for the reason that: the building being commercial in nature, they engaged prospective purchasers and some had even paid deposits, secondly, the agreements had a 'time being of the essence' clause and as such if the project was to stall, it would expose the 1<sup>st</sup> respondent to endless litigation.



6. We heard the application on the court’s virtual platform on February 28, 2023, and learned counsel Mr Willis Oluga was present for the applicants, while learned counsel Mr Mohamed Ali, appeared for the 1<sup>st</sup> respondent. There was no appearance for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, despite their advocates having been served with the hearing notice on February 15, 2023. Mr Oluga and Mr Ali highlighted the written submissions they filed in court dated February 3, 2023 and February 23, 2023 respectively.
7. The principles applicable in the exercise of the court’s unfettered discretion under rule 5(2)(b) to grant an order of stay are well settled. An applicant has to satisfy two requirements. Firstly, that he or she has an arguable appeal. Secondly, that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this court in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR. In addition, this court exercises original jurisdiction under rule 5(2)(b) as held in *Ruben & 9 others v Nderitu & another* (1989) KLR 459. In *Teachers Service Commission v Kenya National Union of Teachers*, Sup. Ct Appl No 16 of 2015, the Supreme Court considered the nature and scope of the jurisdiction under this provision, and stated as follows:
 

“It is clear to us that rule 5 (2)(b) is essentially a tool of preservation. It safeguards the substratum of an appeal, if invoked by an intending appellant, in consonance with principles developed by that court over the years...

Rule 5 (2) (b) of the Court of Appeal Rules of 2010 is derived from article 164 (3) of the *Constitution*. It illuminates the Court of Appeal’s inherent discretionary jurisdiction to preserve the substratum of an appeal, or an intended appeal.”
8. On the first limb of arguability, the applicants’ counsel urged that there is an arguable appeal because the court embarked on review of a decision and yet there were no grounds for review but for appeal, and refuted that there was an error on the face of the record to warrant a review, hence this is an arguable ground of appeal. According to counsel, Naikuni J. did not cede his jurisdiction by referring the matter to NET, as the decision refers part of the dispute to NET but retains the rest of the issues for determination alongside any issue that may be appealed after the decision of NET. In addition, that the said orders were given by Yano J. in a ruling delivered on October 19, 2020 and not in the ruling by Naikuni J. of December 6, 2021. Therefore, by holding that there was an error apparent on the face of the record by the referral of part of the dispute pending appeal that may arise from the decision of NET, Naikuni J. in his ruling of February 22, 2022 effectively overturned and sat on appeal of the decision of Yano J, a judge of the same status, and that the proper decision in the circumstances of the case was to hold the hearing and determination of the petition pending the outcome of the decision of NET as recommended by the Supreme Court in the case of *Benson Ambuti Adege & 2 others v Kibos Distillers Limited & 5 others* [2020] eKLR.
9. Furthermore, that the 1<sup>st</sup> respondent expressly brought the ruling in constitutional petition No 43 of 2020 granting conservatory orders to the attention of Naikuni J. through its replying affidavit filed on July 23, 2020, and it was captured in the ruling of December 6, 2021. Therefore, that the learned judge erred when he held that the ruling in petition No 43 of 2020 was not brought to his attention and used the purported failure to review and set aside the orders of December 6, 2021.
10. The 1<sup>st</sup> respondents’ counsel contested the arguability of the appeal, and submitted that the Naikuni J. in the ruling of December 6, 2021 in effect stayed further proceedings in the petition including the hearing of any application, pending the outcome of the dispute touching on the legality of the EIA Licence to the NET, and therefore, there was an error apparent on the face of the record that needed to be rectified when Naikuni J. granted the applicants’ application for conservatory orders.



The counsel also maintained that the 1<sup>st</sup> respondent had the requisite approvals dated April 8, 2020 from the 2<sup>nd</sup> respondent, and that the Enforcement Notice dated June 24, 2020 issued by the 2<sup>nd</sup> respondent was subject to litigation in ELC Petition No 23 of 2020 - Mbesa Investment Limited v County Government of Mombasa & others, where the court had issued conservatory orders staying its enforcement and implementation.

11. We need to point out at the outset that an arguable appeal is not one which must necessarily succeed, but one which is not frivolous and merits to be argued fully. Further, that it is sufficient if the appeal raises only one triable issue. In the instant application, there is contention as to whether there were valid grounds for review of the orders granted by Naikuni J. on December 6, 2021, and to this extent there is an arguable issue for determination. The applicants have therefore established the existence of the first limb.
12. On the second limb, it was held in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [supra] that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed or enjoined, if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. Mr Oluga in this respect submitted that the 1<sup>st</sup> respondent's development violated the applicants' constitutional right to a clean and healthy environment, and referred to medical documents to show that the construction had adverse effects to her health, and that the 2<sup>nd</sup> applicant's business was adversely affected due to the adverse environmental and noise pollution. Further, that the impact on the applicants' health could not be compensated, and no amount of compensation or damages can compensate loss of life. Besides, that the 1<sup>st</sup> respondent would resume constructions should the appeal succeed. The 1<sup>st</sup> respondent's counsel on his part submitted that no evidence of the effects of the development on the applicants' health have been provided, and reiterated the prejudice they would suffer as the development has been approved.
13. We note that the medical evidence provided by the 1<sup>st</sup> applicant in the applicants' petition that was annexed to their supplementary affidavit are medical reports from 2014 and 2015, before the development of the suit properties commenced, and the nexus with the development is not apparent. In addition, from the photographs annexed, it appears that the construction on the suit properties is at an advanced stage, and the 1<sup>st</sup> respondent, who has demonstrated that he has approval to continue with construction, therefore stands to suffer greater prejudice, and the loss that may be incurred may not adequately be compensated by an award of damages. The applicants in this respect did not indicate that they are able to compensate the 1<sup>st</sup> respondent for any such loss, and it is the 1<sup>st</sup> respondent who ultimately assumes the risk of demolition, in the event the applicants' appeal succeeds.
14. We have therefore come to the conclusion that even though the applicants have shown that they have an arguable appeal, the nugatory aspect of their application has not been established. The notice of motion application dated January 18, 2023 is accordingly dismissed. However, in light of the multiple proceedings involving the parties, the costs of the application shall abide the outcome of the substantive appeal.
15. Orders accordingly.

**Dated and delivered at Mombasa this 31<sup>st</sup> day of March 2023.**

**S. GATEMBU KAIRU (FCI Arb)**

.....

**JUDGE OF APPEAL**

**P. NYAMWEYA**



.....  
**JUDGE OF APPEAL**

**J. LESIIT**

.....  
**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

