



**Attorney General v Mucheke & 2 others (Civil Application  
58 of 2022) [2023] KECA 615 (KLR) (26 May 2023) (Ruling)**

Neutral citation: [2023] KECA 615 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION 58 OF 2022  
W KARANJA, J MOHAMMED & LK KIMARU, JJA  
MAY 26, 2023**

**BETWEEN**

**HON. ATTORNEY GENERAL ..... APPLICANT**

**AND**

**JOSHUA RUTERE MUCHEKE ..... 1<sup>ST</sup> RESPONDENT**

**HYPERTEC CONTRACTORS & EQUIPMENT ..... 2<sup>ND</sup> RESPONDENT**

**KENYA POWER & LIGHTING COMPANY ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for stay of execution pending the lodging, hearing and determination  
of an intended appeal from the judgment of the Environment and Land Court of  
Kenya at Chuka (C. K. Yano, J.) dated 8th June, 2022 in E.L.C. Case No. E001 of 2021)*

**RULING**

**Background**

1. Before us is a notice of motion dated July 19, 2022 expressed to be brought under Sections 1A, 1B and 3A of Rule 5(2)(b) of the [Court of Appeal Rules](#), 2010 in which The Hon Attorney General (the applicant) seeks orders in the main :
  - a. that this Court be pleased to grant an order of stay of execution and proceedings of the Environment and Land Court (CK Yano, J) (ELC) at Chuka in ELC Case No E001 of 2021 pending the filing, hearing and determination of the intended appeal; and
  - b. that costs of this application be in the cause.

Joshua Rutere Mucheke, Hypertec Contractors & Equipment and Kenya Power and Lighting Company are the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> respondents respectively.



2. The grounds upon which the notice of motion is based are, inter alia, that there is an imminent danger of the occurrence of an injustice and execution against Kenya Urban Roads Authority (KURA) since the trial court delivered a judgment in Environment and Land Court (ELC) Case No E001 of 2021 on June 8, 2022 to the effect that KURA pays to the 1<sup>st</sup> respondent Kenya Shillings Eleven Million Five Hundred Thousand (Kshs 11,500.000) being special and general damages together with costs and interests thereof; that there is imminent danger that the 1<sup>st</sup> respondent will proceed to execute against KURA based on an erroneous judgment which will lead to loss of public funds and affect construction of a road against public interest, thus occasioning the applicant and members of the public damage that cannot be compensated monetarily; that the applicants are aggrieved with the court's judgment and decree of June 6, 2022 and have filed a notice of appeal against it and have further sought leave to appeal out of time; that the trial judge ignored and did not consider the written statements and the testimony of the only defence witness, Ms Dorcas Kanana Gitonga (Ms Gitonga) which established that the applicant did not demolish the building belonging to the 1<sup>st</sup> respondent and therefore the court arrived at an erroneous finding on quantum and liability; that unless the Court grants the orders sought, the intended appeal will be rendered nugatory and the orders sought rendered academic as the applicant and the public may lose funds which cannot be recovered against the 1<sup>st</sup> respondent; that this being a public interest litigation matter concerning construction of a road, the project is likely to be adversely affected; that the respondents are unlikely to suffer any prejudice which cannot be compensated by costs and interests if the orders sought are granted; and that the Court should facilitate the applicant to pursue justice as the same will not occasion irreparable prejudice upon the respondents.
3. A brief background to this application is that the 1<sup>st</sup> respondent (the plaintiff in the ELC) is the Secretary General of Baptist Convention of Kenya sued the applicant for damages amounting to Kshs 8,500,000 being the value of a commercial building that was allegedly demolished by the applicant's agents. The 1<sup>st</sup> respondent averred in the plaint that Karingani/Ndagani/594 (the suit property) at all material times was registered in the name of Baptist Convention of Kenya and the suit property is freehold and absolute and that on or around February 7, 2020 the applicant's agents marked buildings in Chuka township for demolition to pave way for tarmacking of the "Moi Girls" road and that the commercial building belonging to Baptist Convention of Kenya and standing on the suit property was marked for demolition. He further stated that on April 4, 2020, the applicant's officers illegally demolished the commercial building. The case was heard and determined before the ELC at Chuka and by a judgment delivered on June 6, 2022 the 1<sup>st</sup> respondent was awarded compensatory damages, general damages for distress, pain and suffering and costs of the suit plus interest.
4. Aggrieved by that judgment, the applicant lodged an appeal and the instant application supported by an affidavit sworn by Ms Gitonga a senior surveyor at KURA in which it was averred *inter alia*: that the applicant has an arguable appeal as the learned Judge failed to consider evidence tendered by the applicant's representative in respect to the fact that the applicant did not demolish the commercial building belonging to the 1<sup>st</sup> respondent; that it is indicated that the demolition of the building was not carried out by KURA; that the intended appeal raises pertinent questions that require further judicial consideration; that the trial Judge ignored and did not consider the written statements and the testimony of Ms Gitonga; that the trial Judge ignored and did not consider the issue of who demolished the commercial building; and that unless this Court grants the orders sought, the intended appeal will be rendered nugatory and the orders sought academic as the applicant will suffer substantial loss which the applicant may never recover from and the road construction project is likely to be adversely affected.



## Submissions by Counsel

5. The respondents have not filed any reply or written submissions and did not attend Court despite service.
6. The applicant relied on its written submissions with oral highlights. At the hearing, learned counsel, Ms Elizabeth Kendi appeared for the applicant. Ms Kendi submitted that the applicant has an arguable appeal and rehashed the grounds on the face of the application.
7. On the nugatory aspect it was submitted that failure to issue the orders sought will give the respondents liberty to execute for the sum of Kshs 11,500,000; that the respondents will proceed to construct on a public road thereby interrupting road construction; and that the applicant cannot be compensated by costs and interest if the orders sought are denied and the intended appeal succeeds.

## Determination

8. We have considered the application, the grounds in support thereof, the submissions, the authorities cited and the law. The jurisdiction under Rule 5(2)(b) of the *Court's Rules* is discretionary and guided by the interests of justice. In the exercise of this discretion, the Court must be satisfied on the twin principles which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory.
9. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2)(b) of this *Court's Rules* are well settled. This Court in the case of *Trust Bank Limited and Another v Investech Bank Limited & 3 Others* [2000] eKLR delineated its jurisdiction in such an application as follows:

“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...”
10. In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this Court, both limbs must be demonstrated to the Court's satisfaction. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicant deserving ventilation before this Court. See *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR where 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.”
11. We have carefully considered the grounds set out in the motion and the memorandum of appeal. In our view, it is arguable, *inter alia*, whether the applicant's agents (KURA) demolished the respondents' commercial building. 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, we are satisfied that the intended appeal is arguable.

12. On the nugatory aspect, 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”.

13. 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. We find that there is eminent threat of execution and the 1<sup>st</sup> respondent may execute for the colossal amount of Kshs 11,500,000. The 1<sup>st</sup> respondent has not demonstrated that he can refund the colossal amount.

14. From the circumstances of the instant application before us, we are persuaded that the applicant has demonstrated an arguable appeal which will be rendered nugatory if the orders sought are not granted. We are therefore satisfied that the applicants have met the twin principles for the grant of a stay of execution pending the hearing and determination of the intended appeal.

15. The upshot is that the application dated July 19, 2022 is allowed.

Costs shall abide the outcome of the intended appeal.

**DATED AND DELIVERED AT NYERI THIS 26<sup>TH</sup> DAY OF MAY, 2023**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

.....

**JUDGE OF APPEAL**

**L. KIMARU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

