



**Hussein v Habib & 3 others (Civil Application E032 of 2023)
[2023] KECA 588 (KLR) (26 May 2023) (Ruling)**

Neutral citation: [2023] KECA 588 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E032 OF 2023
K M'NOTI, HA OMONDI & KI LAIBUTA, JJA
MAY 26, 2023**

BETWEEN

ABDISALAN ADAN HUSSEIN APPLICANT

AND

SADAFF SHOKATALI HABIB 1ST RESPONDENT

SABAHATT SHOKATALI HABIDI 2ND RESPONDENT

PARAGON PROPERTY CONSULTANTS LIMITED 3RD RESPONDENT

**ESTATE OF SHOKATALI GULAM HUSSEIN HABIB ALIAS SHOKATALI
GULAM HUSSEIN HABIB 4TH RESPONDENT**

*(Being an application for stay of execution pending appeal against the Ruling
and Orders of the Environment and Land Court of Kenya at Nairobi (L.
Mbugua, J.) delivered on 26th January 2023 in E.L.C No. E300 of 2022)*

RULING

1. The respondents (Sadaff Shokatali Habib, Sabahatt Shokatali Habib, Paragon Property Consultants Limited and the Estate of Shokatali Gulam Hussein Habib Alias Gulam Hussein Habib) sued the applicant, Abdisalan Adan Hussein, in the Nairobi Environment and Land Court in ELC Case No. E300 of 2022 claiming, *inter alia*: that Shokatali Gulam Hussein Habib Alias Gulam Hussein Habib (the deceased) was the registered proprietor of LR No. 1870/III/417 (Original No. 1870/232/2) I R No 81623/1 (the suit property) having purchased it in 2009; that on 27th May 2013 the deceased transferred the suit property by way of gift to his children, namely the 1st and 2nd respondents (Sadaff Shokatali Habib and Sabahatt Shokatali Habib); that the two appointed the 3rd respondent, Paragon Property Consultants Limited, as managers of the suit property; and that, on 12th September 2022,



- the 1st and 2nd respondents became aware of trespass by the applicant in an attempt to enter into and occupy the suit property.
2. From the scanty record before us, we can only conclude from the impugned ruling that the respondents instituted proceedings seeking, *inter alia*, orders to restrain the applicant from entering into the suit property. It is also noteworthy that the impugned ruling and orders relate to an application for a temporary injunction, “a prohibitory injunction,” and a “mandatory prohibitory order” restraining the applicant from entering into, occupying, possessing and/or accessing the suit property pending hearing and determination of the main suit; an order compelling the Officer Commanding Station (OCS) Spring Valley Police Station to enforce the said court orders and maintain law and order pending hearing and determination of the main suit; and costs of the application.
 3. On his part, the applicant claimed to have purchased the suit property from the deceased in March 2019. According to him, he moved into the suit premises and has been in occupation since then.
 4. We hasten to observe that, in the absence of the pleadings, applications, affidavits in support and in reply thereto, and other evidential documents that would have comprised the record of the trial court, we only have the impugned ruling dated 26th January 2023 to go by.
 5. By its ruling, the ELC (L. M. Mbugua, J.) granted the injunctive relief sought by the respondents as against the applicant. The learned Judge also ordered and directed that, in the event that the applicant had entered into the suit property, he be required to vacate or, in default, he be evicted; that the orders of injunction do remain in force for a period of one (1) year during which the suit property were not to be alienated; and that the costs of the application do abide the outcome of the main suit.
 6. Dissatisfied by the ruling of L. N. Mbugua, J., the applicant moved to this Court on appeal. By a Notice of Motion dated 8th February 2023 made under rule 5(2) (b) of the [Court of Appeal Rules, 2022](#) the applicant seeks stay of execution of the impugned ruling pending the hearing and determination of the intended appeal.
 7. The applicant’s Motion is supported by his annexed affidavit sworn on 8th February 2023 followed by his further affidavit sworn on 20th February 2023 explaining that the instant application was filed subsequent to the filing of the application for review in the trial court. Notably, the Motion is made on 3 main grounds, namely: that the applicant has an arguable appeal; that the intended appeal (if successful) would be rendered nugatory if the orders sought are not granted; and that the applicant is willing to deposit such sufficient security as the Court shall require pending determination of the intended appeal.
 8. The intended appeal is anchored on 11 grounds, which are also deposed to and substantiated in the applicant’s supporting and further affidavits. In essence, the applicant faults the learned Judge, *inter alia*, for: granting eviction orders prematurely on an interlocutory application; granting eviction orders not prayed for in the respondents’ application; summarily dispossessing the applicant of the suit property before interrogation of the question of ownership; failing to consider the affidavit evidence tendered by the applicant; and for failing to consider the gross inconsistencies in the respondents’ pleadings.
 9. Learned counsel for the applicant, M/s. Mbalu & Associates, filed written submissions dated 2nd March 2023 citing the cases of [Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others](#) [2013] eKLR, which sets out the twin principles for grant of stay orders pursuant to rule 5(2) (b) of the [Rules of this Court](#); [Mbogo v Shab](#) [1968] EA 93 submitting that the trial court veered beyond the purview of the prayers sought in the application before it, and had not basis to issue the eviction orders; and [Reliance Bank](#)



Limited v Norlake Investments Limited [2002] 1 EA 227 at p.232 where the court defined the term “nugatory”.

10. The respondents oppose the applicant’s Motion vide the replying affidavit of Ms. Faith Mutie, a property manager of the 3rd respondent, sworn on 13th February 2023. In addition, Ms. Mutie filed a further reply to the applicant’s further affidavit sworn on 23rd February 2023. In the two affidavits, she depones, among other things: that the applicant has moved on appeal and, at the same time, filed an application for review of the impugned ruling in the ELC; that the respondents did not seek eviction orders in their application; that the applicant has never lived on the suit property; that the proposed eviction will not occasion him irreparable harm that cannot be compensated by an award of damages; that the applicant’s further affidavit is inadmissible in that it seeks to adduce further evidence; and that the applicant’s Motion should be dismissed.
11. In their written submissions, learned counsel for the respondents, M/s. Waruiru, Karuku & Mwangale, filed written submissions dated 6th March 2023 citing 4 judicial authorities, including: [*Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 Others*](#) [2021] eKLR and *Madison Insurance Company Limited v Augustine Kamande Gitau* [2020] eKLR submitting that the intended appeal is not arguable, and that it is intended to delay the hearing of the main suit; and [*Chairman Board of Governors Highway Secondary School v William Mmosi Moi*](#) [2007] eKLR for the proposition that one cannot file an appeal and seek review concurrently or one after the other.
12. In light of the paucity of the record as put to us, we are unable to ascertain whether the application for review was ever determined. If it had, the ruling thereon ought to have been the subject of appeal. In the circumstances, we presume that it was abandoned in preference to the intended appeal, in which case the intended appeal and the Motion at hand are properly before the Court and deserving of our scrutiny. We reach this conclusion conscious of the principle that one cannot pursue an appeal against a ruling in respect of which review has been declined, unless such appeal is from the outcome of the review. See [*Gerald Kitbu Muchanje v Catherine Muthoni Ngare & another*](#) [2020] eKLR; and [*The Chairman Board of Governors Highway Secondary School v William Mmosi Moi*](#) [2007] eKLR where the Court held that review exhausts the right of appeal unless the appeal is on the decision made on review.
13. As this Court pronounced itself time and again, for an applicant to merit stay orders pursuant to rule 5(2) (b) of the [*Court of Appeal Rules*](#) pending appeal, he or she must demonstrate to the satisfaction of the Court that he or she has an arguable appeal; and that the appeal (or intended appeal as the case may be), if successful, would be rendered nugatory absent an order of stay of execution. The two requirements constitute what is commonly referred to as the twin principles that must be satisfied before such orders can avail (see *Anne Wanjiku Kibeh v Clement Kungu Waibara and IEBC* [2020] eKLR; and [*Yellow Horse Inns Limited v A. A. Kawir Transporters & 4 Others*](#) [2014] eKLR).
14. A cursory look at the applicant’s draft memorandum of appeal in the backdrop of the record as put to us reveals a number of substantive issues of law and fact deserving of the Court’s inquiry on appeal. Moreover, and as this Court has often stated, even one bona fide ground of appeal is adequate to satisfy the first limb of the twin principle. [*University of Nairobi v Ricatti Business of East Africa*](#) [2020] eKLR is a case in point.



15. Regarding the second limb of the twin principle, the term “nugatory” was defined in *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA p.227 at p.232 as

“worthless, futile or invalid”. It also means “trifling”. Having concluded that the applicant’s intended appeal is arguable, the remaining question is whether the intended appeal, if successful, would be rendered nugatory if the stay orders sought were not granted.

16. Having carefully examined the impugned ruling, the applicant’s Motion, the grounds on which it is anchored, the affidavits in support and in reply, the rival submissions of learned counsel for the parties, and the cited authorities, we form the view that the intended appeal would be rendered worthless or futile if we declined to grant the orders sought. Indeed, enforcement of the orders sought to be stayed would result in final determination of the suit in the trial court at an interlocutory stage. Such enforcement would lead to the applicant’s eviction and possible demolition of the residential premises occupied by the applicant and his family. It would also result in untold and irreversible loss and damage that cannot be compensated by an award of damages.

17. In view of the foregoing, we reach the inescapable conclusion that the applicant has satisfied the twin principles for the grant of the orders sought pursuant to rule 5(2) (b) of this *Court’s Rules*. Accordingly, the applicant’s Notice of Motion dated 8th February 2023 succeeds. The same is hereby allowed with orders and directions that:

- a. There be stay of execution of the ruling and orders of the ELC (L. N. Mbugua, J.) dated 26th January 2023 pending hearing and determination of the intended appeal;
- b. The applicant do file and serve the record of appeal within forty-five (45) days from the date hereof failing which the stay orders hereby granted shall automatically lapse;
- c. The costs of the Motion do abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY, 2023.

K. M’INOTI

.....

JUDGE OF APPEAL

H. OMONDI

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

