



**Bandari v Ethics and Anti Corruption Commission (Civil Appeal  
(Application) E056 of 2023) [2023] KECA 515 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 515 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E056 OF 2023  
DK MUSINGA, HA OMONDI & KI LAIBUTA, JJA  
MAY 12, 2023**

**BETWEEN**

**SHITAL BANDARI ..... APPLICANT**

**AND**

**ETHICS AND ANTI CORRUPTION COMMISSION ..... RESPONDENT**

*(Being an application for stay of proceedings pending the hearing and determination of an intended appeal from the ruling and order of the Environment and Land Court at Nairobi (Oguttu, J.) dated 15th November 2022 in ELC NO. E203 OF 2021)*

**RULING**

1. The Notice of Motion dated January 31, 2023, and supported by the affidavit of Shital Bhandari sworn on even date, is brought pursuant to rule 5(2) (b) of the *Court of Appeal Rules*, and prays that the proceedings in Nairobi ELC No. 203 of 2021 be stayed pending the hearing and determination of the appeal.
2. The genesis of this Motion is the order made by the Environment and Land Court (the ELC) on November 15, 2022 dismissing the applicant's request for joinder and amendment of the defence and counterclaim in Nairobi ELC No. E203 of 2022, where the applicant has been sued as the 4<sup>th</sup> defendant. The amendment sought to include parties against whom the applicant had sought certain reliefs, and yet they were not party to the suit in the ELC. Hence the application for joinder. The amendment also sought to include special damages that were inadvertently left out in the counterclaim.
3. The application was opposed, the respondent accusing the applicant of simply taking everyone in a perpetual circle, explaining that it filed a recovery suit against the applicant and other persons to recover six portions of land which were illegally hived off from public land, namely, Nairobi/Block 90/229 originally alienated in 1978 for development of Nairobi City Council water rectification works; that in the year 2015, the applicant filed Constitutional Petition No. 36 of 2018 seeking damages for alleged



violation of his rights, and in which the same parties named therein had been sued; that similar issues and claims as those contained at the foot of the proposed counterclaim were raised; that to allow the applicant leave to amend and introduce a counterclaim would be tantamount to allowing filing a parallel suit similar to the one which is pending before this very court; and that such a scenario would be contrary to, and in contravention of, the rule of Subjudice. In addition, the trial court had already issued an order for stay of proceedings in ELC Petition No.36 of 2018 pending the hearing and determination of the current suit; so, to grant the prayers sought would be tantamount to reviewing the said orders of stay, albeit through the backdoor.

4. The trial court dismissed the prayers sought on grounds that they were the same as the ones sought in Nairobi ELC Petition No.36 of 2018 *Shital Bhandari vs. The National Land Commission, Ethics and Anti-Corruption Commission and Others*, which had been stayed. The learned Judge observed that the applicant had filed ELC Petition No.36 of 2018 that was still pending hearing and determination albeit having been stayed pending hearing and determination, of Nairobi ELC No. E203 of 2022, and in which the respondents at the foot of the said Petition, had "...essentially included inter-alia, Attorney General and the National Land Commission. Suffice to point out that the respondents in the subsisting Petition; are indeed the ones that the 4<sup>th</sup> defendant/applicant (who is the petitioner in the other suit), is seeking to join and implead at the foot of the intended counterclaim..., it is also important to recall that the reliefs at the foot of the pending Petition, replicates, and are synonymous with, the reliefs articulated at the foot ... what would then arise is that the 4<sup>th</sup> defendant/applicant would be having two parallel suits touching on the subject matter/cause of action, running before the same court at the same time.... allowing the subject application would be tantamount to affording the defendant/applicant a latitude to violate and breach the clear provisions of section 6 of the [Civil Procedure Act](#), chapter 21 Laws of Kenya”.
5. It is the applicant’s contention that the prayers sought in his statement of defence and Counterclaim; are not a mirror image of the prayers sought in the said petition. This has led to the appeal against the decision dated November 15, 2022.
6. In urging us to allow the application herein, the applicant submits that he has an arguable appeal with high chances of success as reflected in the memorandum of appeal; that courts should not fetter the right of a litigant to plead their whole case for determination before the court by disallowing amendments to pleadings; and that amendment to pleadings should be freely allowed at any stage of a suit for the ends of justice to be met, and enable the applicant to litigate fairly before the court of first instance with the participation of the necessary parties.
7. The applicant thus laments that his Constitutional right to a fair hearing and access to justice under articles 50 and 48 of the [Constitution](#) have been violated, and that the decision effectively prevents him from presenting his whole case.
8. On the nugatory aspect, the applicant explains that, at the ELC pretrial, directions were already fixed for March 1, 2023, and that the suit would most likely be set down for hearing soon thereafter. The apprehension is that, in the event that the suit before the ELC proceeds without joinder of the said parties and the proposed amendments, the applicant will be greatly prejudiced as he will be denied a chance to prosecute his case against the parties he seeks specific reliefs from. The result will be to render the appeal nugatory if stay of proceedings is not granted as the suit will be heard and determined without the involvement of the parties against whom the applicant seeks specific results against; and the applicant will be unable to pursue the further special damages sought to be introduced in the amended defence and counterclaim.



9. Drawing from the principles set out for grant of an order for stay of proceedings in *Trust Bank and another v Investech Bank Ltd and 3 others* [2000] eKLR, which addresses the aspect of arguability of an appeal, and what considerations to look out for when considering the nugatory aspect as discussed in *Stanley Kangethe Kinyanjui v Tony Keter* [2013] eKLR, and *Gitarau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR for the proposition that public interest may be a reason for grant of stay, the respondent submits that the applicant has not met the three principles set out in these cases.
10. The respondent submits that the grounds raised in the memorandum of appeal are frivolous, simply invoking constitutional provision on the right to fair administrative action is not applicable as ELC No. E203 of 2018 is still pending; that amendment of pleadings is at the discretion of the court, and not a free fall (see *Central Bank of Kenya Trust Bank Ltd and 5 others* [2000] eKLR); and that an application for leave to amend is not a free fall, but is at the discretion of the court.
11. Further, the respondent contends that allowing the amendment will offend the provisions of section 6 of the *Civil Procedure Act* as the Petition is still alive; that the application does not pass the irreversibility test with regard to whether the appeal would be rendered nugatory because, in the event that the appeal succeeds, damages would be adequate compensation; and that, in any event, the parties who sold the property to the applicant are parties before the ELC; and that, at worst the hearing could be conducted de novo; and that it will not be in the public interest to stay proceedings which are pursuing recovery of illegally acquired public property affecting the much needed expansion of the Loresho Water Reservoir due to water shortage in Nairobi and its environs.
12. Urging us to disallow the application, the respondent cited the case of *Trust Bank Ltd and another v Investech Ltd and 3 others* (*supra*) to the effect that, although the guiding principles when dealing with an application under rule 5(2) (b) of the *Court of Appeal Rules* are well delineated, these must be considered against the facts and circumstances of each case. Further, that a prayer for stay of proceedings must not be confused with a prayer for stay of execution, as the former seriously interferes with a litigant’s right to conduct his litigation, and also impinges on the right to access to justice (see *Kenya Wildlife v James Mutembei* [2019] eKLR).
13. 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 of Appeal Rules*, the applicant has to establish that:
  - i. the appeal is arguable; and
  - ii. the appeal (or intended appeal) is likely to be rendered nugatory if the stay is not granted, and appeal succeeds.
14. In relation to whether or not the appeal is arguable, we are required to consider whether there is at least a single bona fide arguable ground that has been raised by the applicant in order to warrant ventilation before this court. In *Stanley Kang’ethe Kinyanjui v Tony Keter & 5 others* (*supra*) eKLR, this court described an arguable appeal thus:
  - “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.”



15. At this stage, we are not required to delve into the merits of the intended appeal as that is the duty of the court which will hear the appeal. We are also alive to the fact that an arguable appeal is not necessarily one that will succeed. We have evaluated the grounds cited in support of the intended appeal. Our perusal of the trial court's ruling and the memorandum of appeal reveals that, not only is the ELC matter still pending in court, but there is also a petition that has been stayed pending the outcome in ELC No. E203 of 2021. We are unable to detect any arguable point, and concur with the respondent that the prayers in the counterclaim being similar to what the applicant seeks in his petition, the appeal cannot be rendered nugatory as should the suit in the ELC not favor the applicant, then he has his petition to still fall back on.
16. Having found that the applicant has no arguable appeal, we need to pronounce ourselves on the second limb of the principles for grant of orders pursuant to rule 5(2) (b) of the
17. Rules of this court as doing so would be merely academic. Accordingly, we find that the applicant has failed to satisfy the requirements under rules 5(2)(b) for grant of the orders sought, the Motion dated January 31, 2023 lacks merit and is hereby dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF MAY, 2023.**

**D. K. MUSINGA, (P)**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

