



REPUBLIC OF KENYA



**Buku v National Environmental Authority & 3 others (Civil Appeal  
(Application) E174 of 2022) [2023] KECA 994 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 994 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E174 OF 2022  
HM OKWENGU, HA OMONDI & JM MATIVO, JJA  
JULY 28, 2023**

**BETWEEN**

**MERCY WANGARI BUKU ..... APPLICANT**

**AND**

**NATIONAL ENVIRONMENTAL AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR, URBAN PLANNING NAIROBI COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**SHELTER AFRIQUE LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**DIRECTOR GENERAL, NAIROBI METROPOLITAN SERVICES .... 4<sup>TH</sup>  
RESPONDENT**

*(Being an Application for stay of execution of the Ruling and Order of the Environment  
and Land Court (Mboya, J) delivered on 14th October 2021 in ELC Case No. E289 of 2021)*

**RULING**

1. Mercy Wangari Buku, the applicant herein has moved this Court seeking orders against the 3<sup>rd</sup> respondent Shelter Afrique Limited. The notice of motion is brought under sections 3A & 3B of the [Appellate Jurisdiction Act](#), and rules 5(2)(b), 41, 42, and 47 of the [Court of Appeal Rules 2010](#).
2. The main prayer in the application is prayer number (iii), which is as follows:
  - “(iii) That the honourable court be pleased to issue orders of stay of execution restraining the 3<sup>rd</sup> respondent, its servants, agents or any person claiming under it from executing the ruling and order delivered on October 14, 2021 by Mboya, J. in ELCC No E289 of 2021 by constructing and/or continuing with the construction of the proposed development on the property known



as LR No 3734/357 Othaya Road pending the *inter-partes* hearing and determination of the applicant's intended appeal.”

3. The background to the application is that the applicant is the occupier of a property known as LR 3734/374 situated in Kaputei Gardens, off Othaya Road within Nairobi County (hereinafter "the suit property"). The 3<sup>rd</sup> respondent is the registered proprietor of a parcel of land known as LR No 3734/357 which is adjacent to and shares a perimeter wall with the suit property.
4. The applicant filed a suit in the Environment and Land Court (ELC) against the 3<sup>rd</sup> respondent, the National Environmental Authority (1<sup>st</sup> respondent), the Director - Urban Planning Nairobi County (2<sup>nd</sup> respondent), and the Director General- Nairobi Metropolitan Services (4<sup>th</sup> respondent). In the suit, the applicant sought various declarations and orders regarding violation of constitutional and environmental rights, as well as an order quashing the decision of the 2<sup>nd</sup> respondent granting the 3<sup>rd</sup> respondent approval of change of user and approval of its proposed development dated April 12, 2021. The applicant also sought a conservatory order/permanent injunction prohibiting the 1<sup>st</sup> respondent and 2<sup>nd</sup> respondent from granting the 3<sup>rd</sup> respondent any licence, permission, or authority, to construct the proposed development until a fresh environmental social impact assessment study is undertaken, and the 3<sup>rd</sup> respondent submits revised architectural plans.
5. Contemporaneously with the filing of the suit, the applicant filed a notice of motion in which she sought orders of temporary injunction against the 3<sup>rd</sup> respondent restraining it from carrying out the approved developments until the suit is heard and determined.
6. The 3<sup>rd</sup> respondent entered appearance to the suit and filed a replying affidavit opposing the motion. In addition, the 3<sup>rd</sup> respondent filed a notice of preliminary objection contending that by virtue of section 129 (l) (a) of the [Environmental Management & Coordination Act 1999](#), as read together with regulation 46 (l) (f) of the Environmental (Impact Assessment and Audit) Regulations, 2003 the ELC had no jurisdiction to hear the suit and the motion.
7. On October 14, 2021, the ELC (Mboya, J.) having heard arguments in regard to the preliminary objection delivered a ruling in which it upheld the objection, finding that the jurisdiction for addressing disputes under section 129 of the [Environment Management Coordination Act](#) (EMCA), is vested on the National Environment Management Authority (NEMA), while jurisdiction for disputes relating to change of user and approval of the proposed project are matters that fall within the statutory remit of the county liaison committee under section 78 of the [Physical and Land Use Act](#), 2019. In addition, the learned judge held that the applicant had not exhausted the statutory avenue provided for redress of disputes under the relevant statutes. He, therefore, struck out the applicant's suit.
8. The applicant being aggrieved by the judgment, has filed a notice of appeal and has also requested for copies of typed proceedings for purposes of filing the record of appeal. In the meantime, the applicant is apprehensive that the 3<sup>rd</sup> respondent has deployed on his property, heavy machinery including earth movers, hydraulic diggers, drilling machines, excavators, and other heavy machinery, and has begun digging the foundation of the proposed development, causing great inconvenience to the applicant and her family.
9. The applicant contends that if the 3<sup>rd</sup> respondent is not stopped by way of a temporary injunction pending the hearing and determination of the applicant's motion, and the hearing of the intended appeal, the construction will permanently impact the applicant's constitutional right to a clean healthy environment, and quiet possession of her property. The development will also affect the applicant's access to light and also expose her and her family to permanent loss of privacy, as well as security and nuisance risks on account of the building's height and occupancy by several tenants.



10. Furthermore, the applicant is apprehensive that the sinking of the foundation for an 18-storey building on the proposed development will gravely impact and weaken the foundations of the suit property and other properties adjacent to the proposed development, due to the anticipated vibrations from the drills, earth movers and other construction equipment. In addition, resources such as the water supply to the suit property and that of the adjacent properties on Othaya Road will be affected by the 3<sup>rd</sup> respondent's development.
11. The applicant maintains that the balance of convenience in this matter tilts heavily towards restraining the 3<sup>rd</sup> respondent from continuing with construction on the proposed development, until the instant application and the applicant's intended appeal are heard and finally determined. He urges that unless the court intervenes and restrains the 3<sup>rd</sup> respondent from executing the order of October 14, 2021, she will suffer substantial loss and damage, and her intended appeal will also be rendered nugatory.
12. The 1<sup>st</sup> respondent opposed the notice of motion dated May 23, 2022 through an affidavit sworn by Joseph K Makau (Makau), an environmental officer employed by NEMA. Makau stated that the decision made by the 1<sup>st</sup> respondent that was being challenged by the applicant is one that should first be challenged in the National Environmental Tribunal (NET), and that the ELC having rightly dismissed the applicant's suit, the applicant's motion for injunctive relief had nothing to stand on as the intended appeal had no likelihood of success.
13. Makau deposed that the previous orders of interim injunction were effectively quashed by the ruling of October 14, 2021 striking out the suit; and that the order declaring that the court had no jurisdiction to hear the matter was a negative order that is incapable of being stayed as sought by the applicant.
14. The 1<sup>st</sup> respondent also filed written submissions in which it identified two issues for determination. First is whether there is an order capable of being stayed as per the provision of rule 5(2)(b) of the [Court of Appeal Rules 2010](#); and second, is whether the court has jurisdiction to grant the prayers sought in the applicant's motion.
15. The 1<sup>st</sup> respondent submitted that there was no positive order capable of being stayed by the court as the ELC did not order parties to do or not to do anything. In this regard, the 1<sup>st</sup> respondent relied on several decisions including this court's decision in [Western College of Arts and Applied Sciences v Oranga & others](#) [1976] KLR 63. It urged that there was no order capable of being stayed under rule 5(2)(b) of the [Court of Appeal Rules 2010](#). The 1<sup>st</sup> respondent submitted that this court was not properly moved, and was merely being invited to abuse its powers, as the application does not meet the conditions for grant of the prayers sought.
16. The 3<sup>rd</sup> respondent opposed the motion through a replying affidavit sworn by Kunmi Odujuye (Odujuye), its Regional Operation Officer, Eastern and Southern Africa. Odujuye deposed that the orders sought by the applicant in the notice of motion were nebulous, imprecise, vague, and entirely incapable of execution. That in upholding the preliminary objection and striking out the applicant's suit, the decision of the ELC was a negative order, and the reliefs sought are misplaced as there is nothing capable of being stayed.
17. In addition, the 3<sup>rd</sup> respondent contends that it will be inimical to the public interest if the reliefs sought are granted because the development of the serviced apartments on its property, is geared towards furthering the government's agenda of providing affordable housing and addressing the shortage of housing facilities in Nairobi County. It faulted the applicant for failing to mitigate her losses by approaching the relevant statutory bodies in compliance with the doctrine of exhaustion as espoused by the trial court, and failing to demonstrate what loss, if any that she is likely to suffer if the reliefs sought are declined.



18. The 3<sup>rd</sup> respondent objected to the issues raised in the applicant's supporting affidavit maintaining that the applicant seeks to fashion an entirely new case, and this was only intended to convolute the issues in contention and murky the waters in the appeal. That this should not be allowed as the trial court having upheld the preliminary objection, declined jurisdiction and did not determine any issues. Finally, the 3<sup>rd</sup> respondent argued that the applicant is barred by the doctrine of ripeness from pursuing the new issues on appeal, as the matters can only come before this court after they have been canvassed before the right forum as provided by statute.
19. During the hearing of the motion, Mr B. Odhiambo held brief for Mr Nderitu who is the advocate for the applicant. Mr N. Maina was present for the 1<sup>st</sup> respondent, Mr Allan Kamau was present for the 2<sup>nd</sup> and 4<sup>th</sup> respondents, while Mr Munyu was present for the 3<sup>rd</sup> respondent. Counsel highlighted their written submissions, reiterating the position that they had taken.
20. From the prayers in the applicant's notice of motion, it is apparent that although section 3A and 3B of the appellate jurisdiction are cited, the application is basically anchored on rule 5(2)(b) of the *Court of Appeal Rules*. The purport of the applicant's suit in the ELC was to have the 3<sup>rd</sup> respondent stopped from undertaking the developments on his property that had been approved by the 1<sup>st</sup> and 2<sup>nd</sup> respondent. Although the prayers in the motion have been worded as if the applicant is seeking restraining orders akin to an injunction, the applicant is simply seeking an order of stay of execution of the ruling and order delivered on October 14, 2021. If granted the order sought will effectively stay the order dismissing his suit by restraining the 3<sup>rd</sup> respondent from constructing and/or continuing to construct on LR No 3734/357.
21. Rule 5(2)(b) of the *Court of Appeal Rules* 2022 states as follows:

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- (2) Subject to sub-rule (1) an appeal shall not operate to suspend any sentence or to stay execution but the court may –
  - a. ...
  - b. In any civil proceedings where a notice of appeal has been lodged in accordance with rule 77 order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just.”

22. In *Charter House Bank Limited v Central Bank of Kenya & 2 others* [2007] eKLR, this court referring to rule 5(2)(b) of the *Court of Appeal Rules* stated as follows:

“The principles upon which this court exercises its unfettered discretion to grant a stay of execution, stay of proceedings or an order of injunction are settled. The applicant should satisfy the court that the appeal or the intended appeal is not frivolous, that is to say, that, the appeal or intended appeal is arguable and, secondly, that unless the application is granted the results of the appeal, if successful would be rendered nugatory. The purpose of granting an injunction pending appeal is to preserve the status quo and to prevent the appeal, if successful, from being rendered nugatory. (See *Madhupaper International Limited v Kerr* (1985) KLR 840; *J. K. Industries v Kenya Commercial Bank Ltd & Anor* [1987] KLR 506; *Githunguri v Jimba Credit Corporation Ltd (No 2)* [1988] KLR 938.”



23. In *George Ole Sangui & 12 others v Kedong Ranch Limited* [2015] eKLR, (George Ole Sangui decision) where the court had to consider an application for stay of an order of dismissal, the court approached the issues for consideration as follows:

“Has the applicant shown that

- (1) the appeal is arguable;
- (2) that the appeal, if it succeeds, will be rendered nugatory if stay is not granted;
- (3) that an order for the dismissal of the suit can be stayed.

In considering these issues, we propose to deal with the last issue because the success or otherwise of the application reposes on it. Can an order dismissing a suit be stayed under rule 5(2) (b)“ If the answer is in the negative, that will dispose of the application. If it is in the affirmative, a consideration shall ensue of the twin principles regarding the arguability of the appeal and the nugatory effect of the appeal if it succeeds and stay is not granted.”

24. The application before us poses similar issues as the George Ole Sangui decision, and it is appropriate that we adopt a similar approach. Therefore, we shall first address the ruling and order that was made by the ELC on October 14, 2021 in ELC Case No E289 of 2021, and determine whether it is capable of execution or to put it in another way whether it is an order capable of being stayed.

25. The final disposition as set out in the ruling of the ELC was as follows:

“63. In a nutshell, I have come to the inescapable conclusion that the preliminary objection raised by the 3<sup>rd</sup> defendant herein is meritorious.

64. In any event, the legal terrain pertaining to the extent and applicable of the doctrine of exhaustion, and the twin sister, the one of avoidance are now well beaten. Decision in this regard are now legion and hence any reasonable litigant including their advocates exercising some degree of diligence and research would have established as much.

65. In some, the preliminary objection (sic) September 23, 2021 be and is hereby allowed. Consequently, the plaint dated the August 3, 2021 is hereby struck out. As concerns the costs, it is important to note that the preliminary objection was only filed by the 3<sup>rd</sup> defendant and the rest of the defendants merely escorted the 3<sup>rd</sup> defendant. In this regard, costs are hereby awarded to the 3<sup>rd</sup> defendant only and same shall be borne by the plaintiff.”

26. The ELC was presented with a preliminary objection challenging its jurisdiction. That was the objection which the court allowed and consequently struck out the applicant’s suit for want of jurisdiction. One wonders what would be capable of execution in the final orders that were issued by the court reproduced above.

27. In *Western College of Arts and Applied Sciences v Oranga and others* [1976] KLR 63, the former Court of Appeal for East Africa grappled with the same question, and this is how the court rendered itself:

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a fund to



make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this court, in an application for stay, to enforce or to restrain by injunction.

It appears to me therefore that what this court is now being asked to do is to order the issue of a temporary injunction in respect of a matter which is not directly connected with a stay of execution of the judgment – the subject of the intended appeal. I am not satisfied that this court has jurisdiction to do so, and I would dismiss this application, with costs.”

28. In *Kanwal Sarjit Singh Dhiman v Kesbavji Jivraj Shah* [2008] eKLR, this court dealing with an application under rule 5(2)(b) stated:

“The 2<sup>nd</sup> prayer in the application is for stay (of execution) of the order of the superior court made on December 18, 2006. The order of December 18, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see *Western College of Arts & Applied Sciences v Oranga & others* [1976] KLR 63 at page 66 paragraph C).

.....

The main orders given in the execution proceedings were the attachment of the applicant’s property, the permission to the respondent to bid at the auction and the vesting of the property in the name of the respondent. The eviction order was merely a consequential order which terminated the execution process. Moreover, the eviction order is not specifically the subject matter of the appeal and no notice of appeal has been given in respect of the eviction order. In the circumstances, we are of the view that the court has no basis for staying the execution of the eviction order under rule 5 (2) (b).”

29. In the *George Ole Sangui decision* (supra), in addressing the same issue this court stated thus:

“In the instant case, the High Court dismissed the suit in which the applicants were seeking a declaration and an order to be registered as the proprietors of the suit land on the basis of the doctrine of adverse possession. The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent. That was not a positive order that required any party to do or refrain from doing anything. It was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted.”

30. Coming back to the issue at hand, as evident from the extract of the ruling cited above, the ruling and order of the learned judge subject of the intended appeal, was one striking out the applicant’s suit. It did not require the parties to do anything or to refrain from doing anything. There is therefore nothing capable of execution other than the order for costs. As the applicant has not specifically sought an order of injunction, and the court did not issue any orders capable of execution, this court has no powers to grant restraining orders by way of stay of execution. The applicant’s case having been struck out on grounds of jurisdiction, the intended appeal would be limited to the issue of jurisdiction and not



the issues of violation of constitutional rights and environmental rights upon which the applicant's prayers for restraining orders is anchored.

31. As the order sought to be stayed is not capable of execution and cannot be stayed, we do not find it necessary to consider the twin principles of arguability and the nugatory aspect. The upshot of the above is that we find no merit in the notice of motion dated May 23, 2022. Consequently, it is dismissed with costs.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF JULY, 2023.**

**HANNAH OKWENGU**

**JUDGE OF APPEAL**

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**HELLEN OMONDI**

**JUDGE OF APPEAL**

.....

**J. MATIVO**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

