



**Mwangi v Nyali Golf & Country Club (Civil Application  
E080 of 2021) [2022] KECA 455 (KLR) (18 March 2022) (Ruling)**

Neutral citation: [2022] KECA 455 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E080 OF 2021  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
MARCH 18, 2022**

**BETWEEN**

**SIMON MAINA MWANGI ..... APPLICANT**

**AND**

**NYALI GOLF & COUNTRY CLUB ..... RESPONDENT**

*(An appeal from the ruling and order of the High Court of Kenya  
at Mombasa (E. Ogola J.) dated and delivered on the 30th day of  
September, 2021 in Judicial Review Application No E008 of 2020)*

**RULING**

1. The application before this Court is a Notice of Motion dated 1<sup>st</sup> November 2021, in which the Applicant is seeking an order of a temporary injunction pursuant to Rule 5(2)(b) of the [Court of Appeal Rules](#). The Applicant prays that this Court restrains the Respondent from implementing its decision contained in a letter dated 13<sup>th</sup> July 2020, pending the hearing and/ or determination of the intended appeal by the Applicant, and that the costs of the application be provided for.
2. In this regard, the principles applicable in the exercise of the Court's discretion under Rule 5(2) (b) to grant an order of stay are well settled. Firstly, an Applicant has to satisfy that he or she has an arguable appeal. Secondly, an Applicant has to demonstrate 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 vs Tony Ketter & 5 others \[2013\] eKLR](#).
3. The Applicant's case in this respect, as set out in the supporting affidavit sworn on 1<sup>st</sup> November 2021 by the Applicant, is that on 13<sup>th</sup> July 2020 the Respondent club suspended his membership from the club for a period of two years, following a decision taken on 1<sup>st</sup> July 2020 by the Respondent's Management Committee. The Applicant alleges that he was not allowed to participate in disciplinary proceeding contrary to the principles of natural justice and fairness, and that the Management



Committee being the complainant, lacked objectivity and impartiality. He accordingly filed a judicial review application in the High Court, where he sought an order of certiorari to quash the Respondent's decision of 13<sup>th</sup> July 2020, which application was dismissed, and being dissatisfied with the ruling, he instructed his advocates to file an Appeal. The Applicant is apprehensive that the Respondent will implement their letter dated 13<sup>th</sup> July 2020, thus rendering the Appeal nugatory. Further, it was in the interest of justice that the temporary injunction is granted.

4. The Applicant annexed copies of the impugned ruling, a Notice of Appeal dated 4<sup>th</sup> October 2021 and lodged on 6<sup>th</sup> October 2021 and a letter dated 2<sup>nd</sup> October 2021, asking to be supplied with the typed and certified proceedings and rulings. Having lodged the Notice of Appeal within 14 days of the judgment pursuant to Rule 75 of the Court of Appeal Rules, this court is properly seized of the application, as prescribed by Rule 5 (2)(b) and held in *Halai & Another vs Thornton & Turpin (1963) Ltd. (1990) KLR 365.*
5. The Respondent on its part filed Grounds of Opposition to the application on the ground that the judicial review application did not seek any order of prohibition to restrain the implementation of the decision, and the temporary injunction sought was extraneous to a stay of execution and did not relate to what the High Court ordered ought to be done or not to be done. Furthermore, that there was no positive and enforceable order made by the High Court which can be the subject of this application for an injunction, and the draft memorandum was not annexed to enable Court to assess the arguability of the application.
6. When the matter came for hearing on 19<sup>th</sup> January 2022, Ms. Asewe, learned counsel for the Applicant was present, and made reference to her written submissions dated 10<sup>th</sup> November 2021. Mr. Karega, learned counsel for the Respondent, was also in attendance, and relied on written submissions dated 17<sup>th</sup> November 2021. The Court was informed that the main appeal had not been filed since the typed proceedings were being pursued.
7. On the first limb of arguability, Ms. Asewe submitted that the Notice of Appeal had been filed, and under Rule 5 (2) (b) of this Court's Rules there was no requirement that before making an application the memorandum of Appeal needed to be filed. Reference was made to the principles for the exercise of Court's unfettered discretion in granting an injunction under Rule 5 (2) (b) as stated in the cases of *Trust Bank Limited and Another vs Investech Bank Limited and 3 others [2000] eKLR* and *NIC Bank Limited & 2 others vs Mombasa Water Products limited [2021] eKLR*, and it was submitted that the Applicant would in the fullness of time demonstrate that the learned judge erred in law by failing to find that the Respondent's conduct of the disciplinary hearing and/or decision contained in the letter of 13<sup>th</sup> July 2020 was in breach of the Applicant's right to fair hearing and fair administrative action.
8. Reliance was also placed on the case of *Meso Multipurpose Society Limited vs Luore Nyoiro Company limited and 2 others [2020] eKLR*, the case of *Equity Bank Limited vs West link Mbo Limited [2013] eKLR* and of *Board Trustees of NSSF vs Caroline Wanjiru Karori [2020] eKLR* for the proposition that an arguable appeal is not one which must necessarily succeed but one which if fully argued before the Court, will not be frivolous.
9. Mr. Karega, on the other hand submitted that the Applicant had failed to demonstrate arguability of the appeal, as the proposed weighty issues had not been pleaded or placed before Court, and the Memorandum of Appeal that would have been of assistance in discerning whether the intended appeal was arguable was not annexed. In addition, that the merits of the intended appeal are not discernible from the Applicant's affidavit. The counsel further placed reliance on the decision of this Court in the case of *Cortec Mining Kenya Limited vs Cabinet Secretary, Attorney General & 8 others [2015]*



eKLR for the proposition that the Applicant neither sought an order of prohibition nor an order of injunction before the trial Court, and that the application should be dismissed in limine.

10. A number of issues have been raised by the Respondent that we need to address at a preliminary stage. The first is this Court's jurisdiction to grant orders not sought in the trial Court in exercise of its discretion under Rule 5(2)(b), particularly where there is no positive order made by the trial Court. We adopt the position taken by this Court in the case of Clerk, Nairobi County Assembly vs Speaker, Nairobi City County Assembly & another [2021] eKLR (Nambuye, Karanja & Warsame JJ.A) as follows:

8.... We do not agree with the respondent's argument that the trial court's orders dismissing the applicant's petition is a negative order incapable of being stayed. We associate ourselves with this court's positions in *Equity Bank Limited vs. West Link MBO Limited*, Civil Application No. Nai 78 of 2011 and *Daniel Lomagul Kandeji & 2 Others vs. Kamanga Holdings Limited & 40 Others* (2017) eKLR that in dealing with Rule 5(2)(5) applications this Court is exercising its discretion as a court of first instance and that such discretion when exercised must consider the import of the decision of the superior court, the nature of the orders sought in the intended appeal and the particular acts before the court for preservation of the subject matter of the appeal in order to ensure the just and effective determination of the appeal. We think that injunctive orders can be granted even where the judgment appealed against simply dismissed the applicant's claim."

11. The Applicant's application is therefore properly before us, and we will proceed to apply the principles set out in *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others* [supra] in our determination of its merits.
12. The second preliminary issue is the failure by the Applicant to annex a draft memorandum of appeal. This issue has been addressed by this Court in the cases of *Somak Travels Ltd vs Gladys Aganyo* [2016] eKLR and in *Abercombie & Kent Limited vs John Wanjau Maina* [2020] eKLR wherein it was noted that while it is desirable for an applicant to annex a draft proposed memorandum of appeal to its application, the omission to do so is not fatal, and is curable in so far as the applicant has sufficiently set out its grievances on the face of the application. We agree that this is the appropriate course of action to take in the interests of substantive justice.
13. The Applicant has in this respect averred in his application and affidavit that the Respondent's action was in breach of his right to a fair hearing and right to fair administrative action. He however has not averred as to the errors made by the High Court in its findings in this regard, and only pleaded that his appeal will be rendered nugatory of the injunction sought is not granted. In the circumstances the Applicant has not demonstrated any arguable ground, and has therefore not satisfied the first limb of arguability.
14. Even though an applicant is required to satisfy both limbs for an order to be granted under Rule 5(2)(b), we will still consider the second limb of the intended appeal being rendered nugatory for purposes of record. The Applicant's counsel submitted in this respect that the Applicant's suspension was for two years and it was unlikely that the Appeal would be determined in one year, which meant that the Applicant would have served the term of the suspension by the time the Appeal was heard and determined. The Respondent's counsel on his part submitted that any member aggrieved by the decision of the Respondent committee was at liberty to appeal to the general membership by way of a special resolution, and the Applicant had not demonstrated that he had attempted to put into motion the available remedies provided by the Articles of Association. In addition, that the Applicant was only suspended and not expelled from the Respondent club.



15. It was stated by this Court in *Reliance Bank Limited vs Norlake Investments Ltd* [2002] 1 E.A. 227, that “the term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.” See also *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others* [*supra*] wherein it was held, inter alia, that whether or not an appeal will be rendered nugatory depends on whether the status of the subject matter sought to be stayed is reversible; or if not reversible whether damages will be an adequate remedy for the party aggrieved. In the present application it is speculative to argue that the Applicant’s appeal will not be heard and determined in two years, and in any event, it is our view that if his intended appeal succeeds, this is a case where he can be adequately compensated in damages.
16. The Applicant’s application therefore fails as he has not been able to demonstrated any arguability of his intended appeal, nor that the appeal will be rendered nugatory if the orders of injunction are not granted. The Notice of Motion dated 1<sup>st</sup> November 2021 is accordingly dismissed with costs to the Respondent.
17. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 18<sup>TH</sup> DAY OF MARCH 2022.**

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

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

