



**Manyonje v Leap Investment Limited & another (Environment and Land Miscellaneous Application 1 of 2021) [2025] KEELC 832 (KLR) (26 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 832 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 1 OF 2021  
NA MATHEKA, J  
FEBRUARY 26, 2025**

**BETWEEN**

**GREGORY MULIRU MANYONJE ..... APPLICANT**

**AND**

**LEAP INVESTMENT LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**ELKANA MUGODO MWESELI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application is dated 12<sup>th</sup> July 2024 and is brought under Order 40 (1),(2),(3) and order 51 of the Civil Procedure Rules Section 11A, 1B,3,3A,63(e) of the [Civil Procedure Act](#) seeking the following orders;
  1. That this Application be certified urgent to be heard ex-parte and service be dispensed with in the first instance.
  2. That the Respondents, their agents, servants and/or any other persons acting on their behalf be and are hereby temporarily restrained from proceeding with execution as per the Auctioneers Proclamation Notice dated 8<sup>th</sup> July, 2024 pending the hearing of this Application inter-partes.
  3. That the Respondents, their agents, servants and/or any other persons acting on their behalf be and are hereby restrained from proceeding with execution as per the Auctioneers Proclamation Notice dated 8<sup>th</sup> July, 2024 pending the hearing and determination of this Application.
  4. That the Respondents, their agents, servants and/or any other persons acting on their behalf be and are hereby restrained from carrying out execution against the Applicant pending the hearing and determination of the Applicant's appeal.
  5. That cost of this Application be provided for.



2 It is based on the grounds herein, annexed Supporting Affidavit of Gregory Muliru Manyonje and the following grounds that the Applicant's Notice of Motion Application dated 5<sup>th</sup> February, 2021 was dismissed and the Applicant has filed Notice of Appeal dated 13<sup>th</sup> October, 2022 and is yet to be supplied with certified Ruling and proceedings to file Record of Appeal in the Court of Appeal. That the Applicant has a good Appeal with overwhelming chances of success. That the Applicant is likely to suffer irreparable loss and damage if this Honourable Court does not restrain the Respondents from proceeding with execution. That the Applicant's intended Appeal is likely to be rendered nugatory if the Respondents are to proceed with execution. That the 2<sup>nd</sup> Respondent is also facing Criminal Charges in Criminal Case No. E475 of 2024 at Chief Magistrate's Court at Mavoko Law Courts on a charge of forgery of documents which were used to obtain an arbitral award and which came up in Court for hearing on 9<sup>th</sup> July, 2024 and that is the gist of this litigation.

3. I have read and considered the application, supporting affidavit, replying affidavit and submissions therein. The issue for discussion is whether this court can grant a temporary injunction. The appropriate provision for stay pending appeal can be found in order 42 (6) (1) of the civil procedure rules which states as follows:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

4. Sub rule 2 says as follows:

“No order for stay of execution shall be made under subrule (1) unless—

- a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

5. The principles governing the exercise of the court's jurisdiction are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicant must show that they have an arguable appeal and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. These principles were well stated in the case of *Reliance Bank Ltd (In Liquidation) vs Norlake Investments Ltd – Civil Appl. No. Nai. 93/02 (UR)*, thus;

“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,



2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”
6. Substantial loss was described in *Jason Ngumba Kagu & 2 Others vs Intra Africa Assurance Co. Limited* (2014) eKLR where it was held that:

“The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High court is not that of “the appeal will be rendered nugatory”, the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process.”
7. In *Samvir Trustee Limited vs Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997* the court observed that;

“...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...”
8. In the case of *Mohamed Salim T/A Choice Butchery vs Nasserpuria Memon Jamat* (2013) eKLR, the court stated that;

“That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right .....
9. We are further guided by this court’s decision in *Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others* Civil Appeal No. 291 of 1997, at Page 4 as follows:

“... the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. ...the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”
10. In the instant case, the Applicant’s Notice of Motion Application dated 5<sup>th</sup> February, 2021 was dismissed and the Applicant has filed Notice of Appeal dated 13<sup>th</sup> October, 2022 and is yet to be supplied with certified Ruling and proceedings to file Record of Appeal in the Court of Appeal. That the Respondents obtained an arbitral award fraudulently and his Appeal has very high chances of



success in overturning the said award in the Court of Appeal and the Respondents are out to frustrate his efforts towards the same.

11. The respondents opposed the application and stated that the application is res judicata. That a similar application was made dated 5<sup>th</sup> February 2021 and the grounds are the same. That the applicant has been indolent as this application comes one year after the ruling dated 19<sup>th</sup> September 2022 dismissing the application for stay and/or setting aside the arbitral award dated 5<sup>th</sup> February 2021.
12. I find the ruling to be appealed against was delivered on the 19<sup>th</sup> September 2022. and this application was filed on the 12<sup>th</sup> July 2024 after the applicant's goods were proclaimed, I find the delay is inordinate. The Applicants insist that if the said orders are not granted, the appeal will be rendered nugatory as they will be evicted and the intended Appellants will suffer a substantial injury. The applicant insists that the respondents used forged documents to get the arbitral award and that there is a pending case with the DCIO at Athi River. I also note that these are the same grounds adduced in the application dated 5<sup>th</sup> February 2021 before Justice Ochieng when she dismissed a similar application. I find this application is res judicata.
13. Be that as it may, this court is not persuaded that the appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, I am not persuaded that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. I find that the applicant has not fulfilled any of the grounds to enable me grant the stay. I find this application dated July 12, 2024 is unmerited and I dismiss the same with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 26<sup>TH</sup> DAY OF FEBRUARY 2025.**

**N.A. MATHEKA**

**JUDGE**

