



**Njowabu Kenya Limited v Mjengo Limited (Civil Appeal  
E287 of 2022) [2022] KECA 1356 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1356 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL E287 OF 2022  
K M'INOTI, KI LAIBUTA & PM GACHOKA, JJA  
DECEMBER 2, 2022**

**BETWEEN**

**NJOWABU KENYA LIMITED ..... APPELLANT**

**AND**

**MJENGO LIMITED ..... RESPONDENT**

*(Being an application for stay of execution pending appeal from the Judgment  
and Decree of the Environment and Land Court of Kenya at Nairobi  
(Mogeni, J.) delivered on 7th June 2022 in ELC Suit No. 1055 of 2015)*

**RULING**

1. By a plaint dated October 23, 2015, the respondent, Mjengo Limited, filed suit against the applicant, Njowabu Limited, in the Environment and Land Court (ELC) at Nairobi in ELC No 1055 of 2015 seeking, inter alia: a permanent injunction restraining the applicants from alienating, selling, or in any other manner disposing of the proprietary interest in LR No 4953/4349 (the suit property) otherwise than in accordance with the sale agreement made between the applicant and the respondent on February 20, 2013; an order for specific performance against the applicant for compliance with the terms of the sale agreement aforesaid, specifically, accepting the balance of the purchase price of Kshs 30,005,000, and conveying the suit property to the respondent; an order directed at the applicant to issue to the respondent all completion documents in accordance with the sale agreement within 14 days; and, in default, the registrar of the court be authorised to execute a transfer of the suit property in favour of the respondent; costs of the suit and interest thereon at court rates.
2. In its defence and counterclaim dated August 18, 2020, the applicant denied the respondent's claim and contended that the sale agreement in issue had become frustrated for reasons that: the suit property had become subject to political interference; that the applicant was unable to fulfil its obligations under the agreement on account of revocation by the council of the consent previously granted to build a



perimeter wall; and that there were subsequent notices to rescind the agreement, which the respondent chose to ignore.

The applicant counterclaimed for judgment against the respondent for: a declaration that the agreement stood rescinded and thus unenforceable; a mandatory injunction compelling the release of the original grant to the suit property by the respondent's advocates; mesne profits plus interest; and costs of the suit.

3. In its judgment dated June 7, 2022, the ELC at Nairobi (Mogeni, J) dismissed the applicant's counterclaim with costs to the respondent, and allowed the respondent's claim as prayed.
4. Aggrieved by the decision of the ELC, the applicant moved to this court on appeal on 12 grounds set out in its memorandum of appeal dated July 1, 2022, which we need not replicate here. In summary, the applicant faults the learned judge for, inter alia: failing to find that the respondent was in fundamental breach of the contract of sale; failing to appreciate that time was of the essence of the said contract; failing to find that delay in construction of the perimeter wall constituted breach of the contract of sale; holding that no termination notice was served upon the respondent; failing to appreciate the contents of correspondence in proof of the applicant's intention to rescind the contract; holding that the remedy of rescission was not available to the applicant; allowing the claim for specific performance on wrong principles despite the contract having been frustrated or rescinded; dismissing the applicant's counterclaim for, among others, mesne profits despite evidence of loss of income for a long period of time when the respondent continued in possession of the suit property; and for failing to appreciate the applicant's submissions, the cited precedents and provisions of law therein cited.
5. Presently before us is the applicant's notice of motion dated August 5, 2022 made under rules 5(2) (b) and 42 of the *Court of Appeal Rules*, and article 159(2) (d) of the *Constitution*. The applicant prays, inter alia, for stay of execution of the judgment of the ELC pending hearing and determination of its intended appeal; and that costs of the motion do abide the outcome of the intended appeal.
6. The applicant's motion is anchored on 26 grounds, whose recital here would serve no useful purpose. It is also supported by the annexed affidavit of John Mburu, the applicant's managing director, sworn on August 5, 2022. In summary, the applicant contends that it has an arguable appeal; that execution of the trial court's judgment and decree is underway; and that, unless the orders sought are granted, its intended appeal, if successful, would be rendered nugatory.
7. The respondent opposes the applicant's motion vide the replying affidavit of Raj Malde, the respondent's managing director, sworn on October 11, 2022, and the contents of which are mainly argumentative of its case and right of action that are beyond the scope of the application before us. suffice it to observe that, according to the respondent, it is intent on executing the judgment and decree of the trial court short of which the applicant was not ready and willing to specifically perform its part in the contract of sale.
8. In support of the applicant's motion, learned counsel, M/s John N Mugambi and Associates, filed written submissions dated October 19, 2022 citing the case of *Chris Munga N Bichage vs Richard Nyagaka Tongi and 2 others [2013] eKLR* and *Stanley Kang'ethe Kinyanjui vs. Tony Ketter and 5 others [2013] eKLR*, which set out the twin principles that must be satisfied for one to merit the grant of orders sought pursuant to rule 5(2) (b) of this court's rules.
9. On their part, learned counsel for the respondent, M/s Ochieng, Onyango, Kibet and Ohaga, filed their written submissions dated October 21, 2022. They cited *Trust Bank Limited and another vs Investech Bank Limited and 3 others [2000] eKLR*, which likewise underscores the twin principles which an applicant must satisfy to merit grant of orders under rule 5(2) (b) of the court's rules.



10. The twin principles that apply in applications under rule 5(2) (b) of the Court of Appeal Rules for stay of execution, or an injunction pending appeal or intended appeal, have long been settled. To be successful, an applicant must first show that the intended appeal or the appeal (if filed) is arguable, and not merely frivolous. Secondly, the applicant must show that the appeal, or the intended appeal, if successful, would be rendered nugatory if stay was not granted.
11. These principles have been enunciated in various judicial pronouncements of this court, including those cited by the parties. On the first limb of the twin principles, this court held in *Anne Wanjiku Kibeh v Clement Kungu Waibara and IEBC [2020] eKLR* that, for stay orders to issue in similar cases, the applicants must first demonstrate that the appeal or intended appeal is arguable, i.e, not frivolous, and that the appeal or intended appeal would, in the absence of stay, be rendered nugatory (see also Stanley Kang'ethe Kinyanjui vs Tony Ketter and 5 others (ibid) and Trust Bank Limited and another vs Investech Bank Limited and 3 others (ibid).
12. With regard to the sufficiency of the pleaded grounds of appeal to warrant a grant of the stay orders sought, this court in *Yellow Horse Inns Limited vs AA Kawir Transporters & 4 Others [2014] eKLR* observed that an applicant need not show a multiplicity of arguable points, as one arguable point would suffice. Neither is the applicant required to show that the arguable point will succeed (see Stanley Kang'ether Kinyanjui vs Tony Ketter and 5 others (supra).
13. On our reading of the grounds on which the applicant's motion is founded, the affidavit in support thereof and in reply, and from the respective written and oral submissions of the learned counsel for the parties, we draw the conclusion that the applicant's grievance revolves around the legal soundness of the learned judge's order for specific performance of a contract of sale claimed by the applicant to have been frustrated or rescinded. In our considered view, the intended appeal is arguable. It is not frivolous. That satisfies the first limb of the twin principle for grant of the orders sought.
14. That brings us to the second limb of the twin principles – whether the appeal, if successful, would be rendered nugatory in the event that stay is not granted. The term 'nugatory' was defined in *Reliance Bank Ltd Vs Norlake Investments Ltd (2002) 1 EA* p 227 at p 232 thus: 'it does not only mean worthless, futile or invalid. It also means trifling.' The court also expressed the view that what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The case before us involves a contested decree of specific performance for sale and transfer of land of a substantial value in the face of alleged frustration or rescission of the contract of sale.
15. We take to mind this court's decision in *Milka Akinyi Otieno vs Charles Odongo Ngani [2018] eKLR* for the proposition that in a situation where the orders being appealed from are for specific performance and final in nature; and the orders are executed, the process of reversal in the instant the intended appeal succeeds is lengthy and costly. This is sufficient proof to demonstrate that the intended appeal will be rendered nugatory if stay is not granted.
16. As submitted by learned counsel for the applicant, this court in *Okul & another vs. Ondieki & 2 others [2022] eKLR* had this to say on the balance of convenience in considering an application for orders under rule 5(2) (b):

' 12. The appellants have sufficiently demonstrated that the balance of convenience favours them over the respondents. Without the stay orders, the respondents could transfer the suit property and dispose of the same, further complicating the process of reversing further dealings with the property should the appellants' appeal be successful. The application therefore satisfied the second limb of the nugatory aspect.'



17. Having carefully considered the applicant’s motion, the affidavits in support and in reply, the written and oral submissions of learned counsel for the applicant and for the respondent, we are satisfied that the applicant’s notice of motion dated August 5, 2022 succeeds. The same is hereby allowed with costs in the intended appeal.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2022.**

**K M’INOTI**

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**JUDGE OF APPEAL**

**DR KI LAIBUTA**

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**JUDGE OF APPEAL**

**M GACHOKA – CI Arb, FCIARB**

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**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

