



Nywele Nzuri Limited v Captain Real Estate Limited (Civil Appeal E176 of 2025) [2025] KEHC 11515 (KLR) (Civ) (31 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11515 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E176 OF 2025

AC MRIMA, J

JULY 31, 2025

BETWEEN

NYWELE NZURI LIMITED APPELLANT

AND

CAPTAIN REAL ESTATE LIMITED RESPONDENT

RULING

1. This ruling relates to an application by way of a Notice of Motion dated 19th February 2025 filed by the Appellant/Applicant. The application sought to stay the ruling rendered by the trial Court on 7th February 2025 in Nairobi Milimani MCOMM E920 of 2024 between the parties herein where the trial Court dismissed the Appellant's/Applicant's application for an order of injunction against the Respondent.
2. For clarity, the instant application sought the following orders: -
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 3. That pending the hearing and determination of the appeal, there be a stay of execution of enforcing the ruling delivered on the 7th February 2025 in MCOMM E920 of 2024-Nywele Nzuri Limited versus Captain Real Estate Company Limited.
 4. That costs of this application be provided for.
3. The application was supported by the grounds on the face thereof and the supporting affidavit sworn on 19th February 2025 by one Jasmin Kassim Juma, one of the Appellant's Directors.



4. The application was vehemently opposed by the Respondent through a Replying Affidavit sworn on 7th April 2025. By directions of this Court, the application was heard by way of written submissions where both parties duly complied and referred to several decisions in support of their rival arguments.
5. Being an application for stay of execution, the applicable principles thereto are well settled. Order 42, Rule 6 of the Civil Procedure Rules provides that an Applicant must satisfy the following conjunctive requirements for the grant of stay of execution; that is to say: -
 - i. The application has been made without unreasonable delay;
 - ii. Substantial loss may result to the Applicant unless the order is made; and
 - iii. That the Applicant is willing to furnish such security as the court order for the due performance of such decree.
6. It is not lost to this Court that the purpose of an order for stay of execution pending appeal is as discussed in *RWW vs. EKW* [2019] eKLR thus: -

..... The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs... Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.'
7. Before dealing with the substance of the application, there is an issue which was raised by the Respondent to the effect that the prayers sought in the application cannot issue since the order sought to be stayed was a dismissal one; that is a negative order. Whereas the Respondent referred to a decision in support of the rather preliminary issue, the Applicant did not respond to it. Be that as it may, this Court will, nevertheless, render itself on the matter.
8. There is no doubt that the appeal is against a dismissal order in respect of an injunction application before the trial Court. That order is a negative order. The Court of Appeal in *Western College & Arts and Applied Sciences v Oranga & Others* [1976] KLR 63 dealt with a dispute between the parties about money lying in a bank account contributed by members of the public for construction of a college of technology called WECO. The Appellant filed suit in the High Court in pursuit of the money seeking a declaration that the money belonged to WECO and that WECO was entitled to operate the bank account. The High Court dismissed the suit with costs whereupon WECO gave notice of appeal and applied for temporary injunction to restrain the respondent from operating the bank account and for stay of execution until the appeal was determined. At the time, the Court of Appeal did not have jurisdiction to grant an injunction under the equivalent of rule 5(2)(b) but it had jurisdiction to grant stay. The Court of Appeal, therefore, held that it had no jurisdiction to grant an order for injunction. But with regard to the prayer for stay in respect of which it then had jurisdiction, the Court held that there was nothing in the order of dismissal of the suit (other than the order for costs) that could be



enforced, and accordingly dismissed the application for stay. In a unanimous decision, the Court of Appeal had the following to say: -

... 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. An execution can only be in respect of costs....

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.

9. Later, in *Devani and 4 Others v Joseph Ngindari* (Civil Application No. NAI 136 of 2004 (unreported) in an application for interim stay of execution of a High Court order/decreed which had dismissed judicial review proceedings under Order 53 of the Civil Procedure Rules, the Court of Appeal stated in its decision as follows: -

... By dismissing the judicial review application, the superior court did not thereby grant any positive order in favour of the respondents which is capable of execution. If the order sought is granted, it will have the indirect effect of reviving the dismissed application. This Court cannot undo at this stage what the superior court has done.

It can only do so after hearing the appeal. It seems to us that the application for stay of execution of the dismissal order was not brought in error. It was designed to achieve that result which regrettably is impracticable.

10. In *William W. Wahome and the Registrar of Trade Unions & Others* (Civil Appl. No. NAI 308 of 2005 (unreported) the High Court had set aside *ex parte* leave to institute judicial review proceedings. An application was made to the Court of Appeal under Rule 5(2)(b) for stay of execution of the ruling of the High Court that set aside the grant of leave to apply for judicial review. The Court of Appeal stated: -

... The order of 19.9.2005 did not grant the respondents any relief other than costs which can be enforced through execution. On the contrary, the order in fact denied the applicant a relief in the sense that it struck out the application for leave and for an order of stay and set aside the leave and stay granted earlier. There is no judgment in favour of the respondents which is capable of enforcement by execution save for costs.

11. In *George ole Sangui & 12 others v Kedong Ranch Limited* [2015] eKLR, the Court of Appeal discussed this subject as follows: -

20. 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.

12. On the appropriateness of the prayer to have been sought, Court of Appeal stated as follows: -

21. We observe that the applicants did not seek an order of injunction to be allowed to remain on the land pending the determination of the appeal. The intended grounds of appeal in the draft memorandum of appeal show that the appeal is arguable. But an arguable appeal is not necessarily one that is bound to succeed.

13. The Court of Appeal has, no doubt, clearly stated the legal position in respect to any quest to stay a negative order. Simply, such an order cannot issue. Therefore, the instant application suffers a false start and is for rejection.

14. Consequently, the following final orders hereby issue: -

- (a) The Notice of Motion dated 19th February 2025 is hereby dismissed with costs to the Respondent.
- (b) The sums deposited in Court as security in this matter, if any, be released forthwith to the Respondent.
- (c) The trial Court file be availed for further directions.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF JULY 2025.

A. C. MRIMA

JUDGE

Ruling virtually delivered in the presence of:

Miss Njoroge, Learned Counsel for the Respondent.

Miss Amutabi, Learned Counsel for the Appellant/Applicant.

Amina/Michael – Court Assistants.

