



Nzuki & another v Nanyathya (Suing as the Guardian ad litem of Robert Ndolo Kaveke) ((Suing as the Guardian ad litem of Robert Ndolo Kaveke)) (Land Case Appeal E034 of 2024) [2025] KEELC 3859 (KLR) (13 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3859 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
LAND CASE APPEAL E034 OF 2024**

**AY KOROSS, J
MAY 13, 2025**

BETWEEN

JOHN NZUKI 1ST APPELLANT

RICHARD MUSYOKI MULILI 2ND APPELLANT

AND

**PAUL NYAMA KANYATHYA RESPONDENT
(SUING AS THE GUARDIAN AD LITEM OF ROBERT NDOLO KAVEKE)**

RULING

Appellants' case

1. The notice of motion that is the subject for determination is dated 23/07/2024, and the appellants have sought the following reliefs from this court:
 - a. Spent.
 - b. Spent.
 - c. That the respondent and/or his agents and/or servants and/or anyone else for that matter acting under him be restrained by way of a temporary injunction from evicting and/or in any other manner interfering with the appellants occupation, possession and use of the suit property, Matungulu/Kawethei/19 pending the hearing and determination of this appeal.
 - d. That the costs of this motion be provided for.
2. The motion is predicated on grounds particularised on its face and on the 1st appellant's affidavit that he deposed on the instant date.



3. In a nutshell, it was stated that the appellants were dissatisfied with the lower court's judgment delivered on 24/06/2024 in Kangundo MCELC No. 142 of 2019 that dismissed their suit and have since filed a memorandum of appeal against the whole of the said judgment.
4. Further, they were apprehensive the respondent would evict them from their homesteads, and if that happens, they and their families would lose their homes and suffer irreparable/ substantial loss and damage and the appeal would be rendered nugatory and the object of the appeal which has high chances of success would be defeated.
5. The 1st appellant's position was maintained in his supplementary affidavit sworn on 12/11/2024, which was a rejoinder to the respondent's replying affidavit

Respondent's case

6. By the law firm of M/s. B. M. Kituku & Company Advocates, the respondent, opposed the motion by filing a replying affidavit that he deposed on 15/10/2024.
7. In it, he maintained the impugned judgment was determined on merits, the appellants did not have their homes on the suit property, the appellants were not homeless as the parties were merely holding the neighbouring parcels of land, the appellants were vexatious litigants and the appellants had availed uncertified photographs before this court.
8. Further, that his brother Robert Ndolo Kaveke was the one who utilized the suit land and lastly, that the appeal had no chances of success.

Parties' submissions

9. The court directed the parties to file written submissions, but the appellants did not comply. The respondent's submissions were filed by his counsel on record and were dated 12/02/2025.
10. In these submissions that have been considered by the court, the respondent's counsel reiterated the averments contained in the replying affidavit, argued that the impugned judgment issued a negative order that was incapable of execution and stated the appeal did not have chances of success.

Issues for Determination, Analysis, and Determination

11. Consequently, having carefully considered the motion, affidavits as well as the respondent's submissions and cited precedents, the issue for determination is whether the appellants have met the legal threshold to warrant the grant of the orders sought.
12. Utmost and as can be seen from the face of the motion, this court derives its jurisdiction to grant injunctions pending appeal from the provisions of Order 42 Rule 6 (6) of the Civil Procedure Rules, which provides thus:

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

13. The principles for the grant of injunction pending appeal have been explicated in various court decisions, and in consideration thereof, this court has to exercise judicious discretion based on evidence and law, and if justice so demands and upon confirmation that the appeal is properly before it, grant such relief.



14. In the case of *Cosmas Stephen Nabungolo v African Banking Corporation Ltd* [2018] eKLR, the Court of Appeal summarised the 2 principles of injunctions pending appeal as follows: -
 - “...the applicant must satisfy the Court that the appeal is not only arguable but that should it succeed it would be rendered nugatory if the orders sought are not granted. This principle has been well summarized in *Stanley Kang’ethe Kinyanjui Vs Tony Ketter & 5 Others* [2013] eKLR.”
15. Turning to the motion, the impugned decision the appellant is aggrieved against was rendered on 24/06/2024, and the appeal was filed on 23/07/2024, which is without doubt within the statutory period of 30 days, and it suffices that the appeal is competently before this court.
16. Accordingly, and seeking guidance from *Cosmas Stephen Nabungolo* (Supra), on the principle of whether the appeal is arguable, this court has to bear in mind that an arguable appeal is not one which must ordinarily succeed but one which is not frivolous. Hence, even a sole arguable ground of appeal would suffice to meet the required threshold.
17. Therefore, this court has to interrogate the memorandum of appeal to establish the appeal’s arguability. In the memorandum of appeal dated 4/07/2024, the appellants assert, amongst others, that the trial magistrate erred in not finding they had proved their case to the required standards. Without delving into whether the other grounds have merits, this court is satisfied that this ground is arguable.
18. The other principle is that of the appeal being rendered nugatory, which was expounded by the Court of Appeal decision of *Stanley Kangethe Kinyanjui V Tony Ketter & 5 others* [2013] eKLR as follows: -
 - “ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.
 - x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.
 - xi) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent’s alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403.”
19. The affidavit in support of the motion merely asserts the appeal will be rendered nugatory without any explication of how that is so. Moreover, upon consideration of the impugned decision that did not issue a positive relief, it is the considered view of this court that the appeal will not be rendered nugatory. Additionally, this court was also not told of the respondent’s financial status.
20. For this reason, this court finds that the appellants have not satisfied the nugatory limb of an application of this nature. Consequently, having failed to meet the 2nd limb of the principles, this court declines to grant the order of temporary injunction pending the hearing and determination of the intended appeal. Thus, the motion is dismissed. Costs shall abide by the outcome of the appeal.
21. Ultimately, for the foregoing reasons and finding, this court hereby issues the following disposal orders: -
 - a. That the notice of motion dated 23/07/2024 is hereby dismissed.



- b. That the costs of the motion shall abide by the outcome of the substantive appeal.
- c. That the appeal is hereby admitted.
- d. That the appellants shall file and serve the record of appeal within 30 days from the date hereof.
- e. That calling letter to issue to the lower court.

It is so ordered.

DELIVERED AND DATED AT MACHAKOS THIS 13TH DAY OF MAY, 2025.

HON. A. Y. KOROSS

JUDGE

13.05.2025

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

MR. Muli holding brief for Mr. Nzavi for the applicant

Mr. Kituku for the respondent

Mr. Abdisalam- Court Assistant

