



**Ndungu v Ndichu & 2 others (Civil Application E566 of 2024)
[2025] KECA 1482 (KLR) (12 September 2025) (Ruling)**

Neutral citation: [2025] KECA 1482 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E566 OF 2024
J MOHAMMED, FA OCHIENG & AO MUCHELULE, JJA
SEPTEMBER 12, 2025**

BETWEEN

SUSAN NDUNGU APPLICANT

AND

JOSEPH NDICHU 1ST RESPONDENT

**ANN WAIRIMU NDUNGU & STANLEY NDUNGU MURIGI T/A ANNE ROSE
NURSERY & PRIMARY SCHOOL 2ND RESPONDENT**

EMBAKASI RANCHING COMPANY LIMITED 3RD RESPONDENT

(Being an application for an order of stay of execution against the ruling and order of the Environment and Land Court at Nairobi (Mbugua, J.) dated 30th October 2024 in ELC Case No. 179 of 2009)

RULING

1. This is an application brought under Rule 5(2)(b) of the Court of Appeal Rules, 2022. It seeks that -

“pending the hearing and determination of this Appeal, this honourable court be pleased to order stay of execution of the ruling of Mbugua, J. delivered on 30th October 2024 and that of the judgment and decree of the ELC Court at Nairobi in Milimani ELC Cause No. 179 of 2009 Joseph Ndichu Kiiniu -vs- Ann Wairimu Ndung’u & Stanley Murigi T/A Ann Rose Nursery and Primary School & Embakasi Ranching Co. Ltd.”
2. The principles applicable in the application for stay are now settled. The applicant has to 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 intended appeal, if successful, would be rendered nugatory if the execution of the decree or order is not stayed. See Stanley Kang’ethe Kinyanjui -vs- Tony Ketter &



5 Others [2013] KECA 378 (KLR). An arguable appeal is one that raises at least one bona fide issue that should be argued fully before the Court. 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. If it is irreversible or if damages cannot reasonably compensate then stay may be granted, if an arguable appeal has been demonstrated.

3. The background of this application is that, before the Environment and Land Court (ELC) in Nairobi, Joseph Ndichu (the 1st respondent) sued Ann Wairimu Ndungu t/a Annrose Nursery and Primary School (2nd respondent) and Embakasi Ranching Co. Ltd (3rd respondent) claiming that in January 1976 he bought shares from the 3rd respondent and was issued with a share certificate No. 2874 dated 1st August 1978. The 3rd respondent was the registered proprietor of LR No. 10904/2. It allotted to the 1st respondent two plots of land, being A69 and A70 which are currently demarcated as Nairobi Block 105 (Embakasi Ranching) 1927 and Nairobi Block 105 (Embakasi Ranching) 1928. He was shown the plots' beacons and took possession. On 7th February 2008 he visited the plots and found that the 2nd respondent was constructing a school thereon. He sought a declaration that he was the rightful owner of the two plots, a permanent injunction to restrain the 2nd respondent and those acting under her, an order of eviction, mesne profits and an order of revocation of any title documents that the 2nd respondent may be having over the plots.
4. The 2nd respondent denied the 1st respondent's claim over the properties, and asserted that these were her properties that she had lawfully bought from Stanley Ndichu Murigi; that the plots had been assigned Nos. V4510 and V4511 now Nairobi Block 105 (Embakasi Ranching) 1916 and 1917. She has subsequently developed them.
5. The 3rd respondent was served but did not enter appearance or file a defence.
6. On 23rd June 2022 the learned L. N. Mbugua, J. rendered a judgment in which she found for the 1st respondent and declared him to be the owner of the suit properties and cancelled the titles that had been issued to Stanley Ndungu Murigi over the same. It was found that the 2nd respondent was a trespasser and an order of eviction and permanent injunction were issued against her. She was ordered to pay Kshs.7,000,000/= being mesne profits, and then costs of the suit.
7. On the basis that the judgment aggrieved her, Susan Ndungu (the applicant) filed a motion dated 19th July 2024 before the ELC seeking to stay its execution and all proceedings; to have the judgment set aside; and to join her in the proceedings; and to allow her to file a defence to the same. The 2nd respondent applied to be left in possession as she pursued stay and appeal. The 1st respondent applied to have the 2nd respondent and the applicant cited for contempt of the orders that had been issued. In a ruling delivered on 20th January 2024, the applicant's application for stay, joinder and setting aside was dismissed with costs. A notice was issued against the 2nd respondent and the applicant, both of whom had been found to be in contempt, to show cause why they should not be punished. The 1st respondent was allowed to remove all the structures that the 2nd respondent had erected on the properties, and for herself to be removed therefrom with the assistance of the police. The applicant was ordered to pay mesne profits and the costs of the suit.
8. The present application by the applicant is directed at these orders of 30th October 2024.
9. When the application came before us for hearing, learned counsel Mr. Outa was for the applicant, learned counsel Mr. Ng'ang'a was for the 1st respondent, while learned counsel Mr. Gakuo was for the 2nd respondent. Counsel for the applicant argued that the main grievance revolved around the existence



of plots Nos. A69 and A70 as contained in LR No. 10904/2. He submitted that the Judge had erred in finding that the plots were the same as Plots Nos. 1927 and 1928, and that they belonged to the 1st respondent; that, whether or not the two sets of plots were referred to the same plots, and whether they belonged to the 1st respondent and not to the 2nd respondent, were arguable points that should be determined by this Court when it finally sits to hear and determine the intended appeal. Learned counsel further submitted that, whether or not the learned Judge was right not to join the applicant into the suit was another arguable point. Lastly, there was the question whether the learned Judge was right in convicting her for being in contempt.

10. On the nugatory aspect, the learned counsel argued that if the eviction orders are enforced and the Kshs.7,000,000/= recovered, the applicant would suffer irreparably, now that her case was that the 1st respondent would not be in a position to compensate her for the loss. Reference was made on the decision of this Court in ABN Amro Bank N. K. -vs- Le Monoe Foods, Civil Application No. 15 of 2002 at Nairobi in which it was held that, once an applicant expresses apprehension on the respondent's ability to refund the decretal sums, the evidentiary burden shifts to the respondent to rebut the apprehension by showing the assets he owns or bank statements to show his ability to refund the decretal sum. The second aspect of the nugatory limb was that, the applicant had been adjudged to be in contempt and ran the risk of being sentenced to jail. This loss of liberty would render the intended appeal an academic exercise, it was submitted.
11. The trial court had found that the applicant had become the registered proprietor on 12th June 2019, ten years after the dispute over the same between the 1st respondent and the 2nd respondent had been filed in court and when, during the suit, on 4th February 2011 the 2nd respondent and the 3rd respondent had been restrained by the court from any dealings in the property. According to learned counsel Mr. Ng'ang'a, the applicant's claim to the property was not tenable in law; she had unclean hands and that, as the daughter of the 2nd respondent, her quest to be joined in the suit was only intended to circumvent the judgment in favour of the 1st respondent. According to learned counsel, the intended appeal was based on frivolous grounds. It was also pointed out to us that, following the impugned judgment, the 2nd respondent had sought stay of its execution in Civil Application No. E348 of 2022 but had, however, failed to file a substantive appeal; that, although the present notice of motion sought to stay the judgment and the ruling subsequent to it, there was no notice of appeal in respect of the judgment.
12. Learned counsel Mr. Gakuo supported the application.
13. We have considered the application, the response and the rival positions taken by learned counsel. Looking at the grounds of appeal raised against the impugned ruling, and noting the threshold as regards whether or not the intended appeal is arguable, we find that the grounds are not frivolous.
14. On the nugatory aspect, we hold the view that the hearing of the application for notice to show cause may result in the applicant being committed to civil jail, and such loss of liberty will render the intended appeal, if it were to succeed, nugatory.
15. The consequence is that, the applicant has satisfied the two limbs under Rule 5(2)(b) of the Court of Appeal Rules, 2022. That being the case, we allow the application but on condition that the applicant files and serves the appeal within 30 days from today. The stay will lapse automatically if the appeal is not filed and served as directed.
16. We direct that costs do abide the appeal.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF SEPTEMBER, 2025.

JAMILA MOHAMMED



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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

