

**IN THE COURT OF  
APPEAL AT NYERI**

**(CORAM: KANTAI, LESIIT & ALI-ARONI, JJ.A.)**

**CIVIL APPEAL (APPLICATION) NO. E190 OF**

**2024 BETWEEN**

**FRANCISCA NJERI GAKUMO ..... 1<sup>ST</sup>  
APPELLANT/APPLICANT**

**VERONICA WANJIKU KUNGU *Alias*  
WANJIKU GAKUMO ..... 2<sup>ND</sup>**

**APPELLANT/APPLICANT AND**

**CHARITY WAMBUI KAMAU  
(Being sued as the legal representative  
of the estate of KARIUKI KAMAU - DECEASED) RESPONDENT**

*(Being an application for stay of execution against the Judgment of  
the Environment and Land Court at Murang'a (Gacheru, J.) delivered  
on 11<sup>th</sup> April 2024*

*in*

***ELC No. E025 of 2021)***

**\*\*\*\*\***

**RULING OF THE COURT**

1. Before the Court is an application by way of a notice of motion dated 26<sup>th</sup> February 2025, made under rule 5(2)(b) of the Court of Appeal Rules 2022, seeking a stay of execution pending hearing and determination of the appeal.
2. The application is predicated on the grounds on the face of the application, and a joint affidavit of the applicants,

Francisca Njeri Gakumo and Veronica Wanjiku Kungu *alias*  
Wanjiku Gakumo,

sworn on 26<sup>th</sup> February 2025, stating that the appeal is arguable, with a high chance of success, and if the orders sought are not granted the appeal will be rendered nugatory; the trial court ordered the applicants to vacate the suit premises within 120 days from the date of the judgment, failing which they would be evicted; the respondent, Charity Wambui Kamau, is seeking to evict the applicants from the property and has issued a notice to show cause why eviction orders should not be granted; the applicants fear that they will be evicted while their appeal is pending.

3. In response, the respondent, Charity Wambui Kamau, filed a replying affidavit sworn on 24<sup>th</sup> April 2025, where she deponed that the appeal is not arguable, as the memorandum does not raise any triable issues; eviction is reversible, therefore the appeal would not be rendered nugatory in the event the appeal succeeds; further she urges that the application does not meet the necessary threshold for granting stay orders; in case of a successful appeal she is capable of compensating the applicants; the application is inordinately and unjustifiably late as judgment was delivered on 11<sup>th</sup> April 2024, and the application was not filed until 26<sup>th</sup> February 2025, nearly a year later; the trial court gave the applicants 120 days to vacate the property; the applicants are guilty of laches and indolence, making them undeserving of the equitable relief they seek; the application is merely an afterthought and a delaying tactic aimed at preventing the respondent from enjoying the benefits of the judgment; the applicants have not

demonstrated any ability or willingness to

provide security for costs; and it would be in the interest of justice for the application to be dismissed, to allow the respondent to enjoy the fruits of the judgment.

4. At the hearing of the application, the Court had only received submissions and a list of authorities, both dated 24<sup>th</sup> April 2024, from the respondent's learned counsel. The applicants had not filed theirs. In his submissions, counsel for the respondent outlined two key issues for determination: whether the applicants' appeal is arguable and whether failing to grant the appeal would render it nugatory.
5. On whether the applicants' appeal is arguable, learned counsel references the principles set by this Court for granting a stay pending appeal, as restated in the case of ***Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR*** and acknowledged the fact that parties should not argue the merits of the appeal at this stage. However, he asserted that the applicants primarily criticise the learned Judge for finding that their claim for adverse possession could not be sustained, as they did not know the party they claimed they were dispossessing. Yet, the applicants admitted in their pleadings that they were unaware of the registered owner of the suit property until 2016, and by the time the applicants filed their suit in 2021, the 12 years required for a successful claim of adverse possession had not elapsed.
6. Further, he contended that the respondent's husband, Kariuki Kamau (deceased), held a valid and indefeasible title to the

suit

property, which the court ought to protect. He further submitted that the applicants challenged how the respondent's husband acquired the title to the suit property while simultaneously claiming adverse possession, which he argued are inconsistent claims.

7. Counsel also relied on the case of ***Mparo & 5 Others vs. Kanji (Being sued as administrator of the Estate of Kanji Naran Pate) [2024] KECA 12 (KLR)***, where this Court declined to grant a stay of execution against judgment where eviction orders had been issued against the applicants who were seeking adverse possession. The Court held that there had been an inordinate delay in bringing the application, the respondent had a certificate of title that required protection, and that damages were an adequate remedy, as the dispute involved ownership of land whose value was quantifiable.
8. To succeed in an application under rule 5(2)(b) of the Court of Appeal Rules, an applicant has to satisfy the twin principles that are enumerated in many decisions of this Court, namely:
  - (i) ***An applicant must demonstrate that they have an arguable appeal; and***
  - (ii) ***That the intended appeal (or appeal if already filed) will be rendered nugatory if the execution of the decree order or proceedings is not stayed.***
9. On the first limb of this twin principle, this Court held in ***David***

**Morton Silversein vs. Atsango Chesoni [2002] eKLR,**  
that for

an order of stay to issue, the applicant must first demonstrate that the appeal or intended appeal is arguable, that is, it is not frivolous and that the appeal or intended appeal, would in the absence of stay, be rendered nugatory.

- 10.** In the draft memorandum of appeal, the applicants stated inter alia that the learned Judge erred in law and fact in calculating the time the applicants had been in open, continuous and exclusive possession of the suit property, and by finding the appellants had been issued with a notice dated 18<sup>th</sup> July, 2010, without any evidence. We find that the above issues are arguable on appeal. In **Yellow Horse Inns Ltd vs. A. A. Kawir Transporters & 4 Others [2014] eKLR**, this Court observed that an applicant need not present a multiplicity of arguable points, as a single arguable point would suffice. Neither is the applicant required to show that the arguable point would succeed, as this Court held in **Kenya Commercial Bank Limited vs. Nicholas Ombija [2009] eKLR**.
11. Regarding the second principle on whether the appeal will be rendered nugatory if the order for stay is not granted and the appeal succeeds, we are guided by the decision in **Stanley Kangethe Kinyanjui vs. Tonny Keter & Others [2013] eKLR**, where the court summarised what should guide the court as follows:

***“xii. The term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means***

***trifling.***

***xiii. Whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed, if allowed to happen, will be reversible, or if it is not reversible, whether damages will reasonably compensate the party aggrieved.***

***ix. Where the applicant alleges that the appeal will be rendered nugatory on account of the respondent's impecuniosity, the onus shifts to the latter to rebut by evidence the claim."***

12. The applicants claimed to have been in quiet, open and continuous possession of the suit property since 1982, 43 years of occupation; the respondent, on the other hand, did not deny this. Her case is that the applicants entered the suit premises with her late husband's permission and have not had quiet possession for over 12 years, as claimed. A 43-year occupation is a considerable period of time, especially if the party has exploited the property. The bench, which will eventually hear the appeal, will determine the question of who is the rightful owner. This requires that the substratum of the appeal be safeguarded. In our considered view, it is not sufficient for a party to claim they are financially capable of compensation (without providing proof), as the respondent stated. Further, there is more to a property that has been occupied for 43 years, and we are inclined, therefore, to find that monetary compensation in the circumstances of this case may not necessarily be adequate, should the appeal succeed.

13. The applicants having satisfied the twin principles, we allow the application and order the costs thereof to abide by the outcome of the appeal.

**Dated and delivered at Nyeri this 28<sup>th</sup> day of November, 2025.**

**S. ole KANTAI**

.....  
**JUDGE OF APPEAL**  
**J. LESIIT**

.....  
**JUDGE OF APPEAL**  
**ALI-ARONI**

.....  
**JUDGE OF APPEAL**

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

*Signed*  
**DEPUTY REGISTRAR**

