

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC APPEAL NO. E013 OF 2025

EVERLINE OJIJO:.....APPELLANT

VERSUS

YUSUF KARANJA ISMAIL:.....1ST RESPONDENT

CHRIS MUNGA BICHAGE:.....2ND RESPONDENT

ARCHDIOCESE OF NAIROBI KENYA

REGISTERED TRUSTEES (IN TRUST FOR ST.

JOSEPH FREINADMETZ CATHOLIC

CHURCH- RUAI PARISH):.....3RD RESPONDENT

RULING

The Application is dated 7th March 2025 and is brought under Sections 1, 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Cap 21, Laws of Kenya, Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders;

1. THAT this application be certified urgent and service thereof be dispensed with and be heard ex parte in the first instance.
2. THAT pending the interpartes hearing of this application an injunction do issue restraining the 1st and 3rd Respondents by themselves, their agents, employees, servants or any person whatsoever from transferring or otherwise dealing with that property known as Title Number Nairobi/Block 136/5957.

3. THAT in the alternative and without prejudice to prayer 2 above the *status quo* relating to Title Number Nairobi/Block 136/5957 be maintained pending the hearing and or the determination of this application *inter partes* and thereafter pending the hearing and or the determination the Appeal herein.
4. THAT pending the hearing and determination of the appeal an injunction do issue restraining the 1st and 3rd Respondents by themselves, their agents, employees, servants or any person whatsoever from transferring or otherwise dealing with that property known as Title Number Nairobi/Block 136/5957.
5. THAT the costs of this application be provided for.

It is made on the following grounds that the Appellant/Applicant is the owner of that parcel of land known as Title No. Nairobi/Block 316/5957. That the 1st Respondent has attached and sold the Appellant's said parcel of land to the 3rd Respondent in purported execution of the decree issued by the Subordinate Court on 28th February, 2023. That the 1st Respondent has further obtained an Order from the Subordinate Court dated 11th June, 2024 *inter alia* confirming the sale of the Appellant's property known as Title No. Nairobi/Block 316/5957 to the 3rd Respondent in execution and/or purported execution of the decree of the Subordinate Court dated 28th February 2023 and compelling the 2nd Respondent to transfer the property to the said 3rd Respondent. That upon being aware that the 1st Respondent had sold the

Applicant's property known as Title Number Nairobi/Block 136/5957 to the 3rd Respondent herein the Applicant filed an application dated 27th August, 2024 in the Chief Magistrate's Court at Mavoko but the said Court has declined to hear the said application. The 1st Respondent is illegally, irregularly and fraudulently transferring the Applicant's property known as known Title Number Nairobi/Block 136/5957 (hereinafter "the property") notwithstanding the fact that the Interested Party's application dated 27th August, 2024 in the Subordinate Court has not been heard and with a view to rendering the application and this Appeal an academic exercise/nugatory/stillborn and defeating the execution of any orders which may be issued by this Honourable Court upon the determination of this Appeal. The Appellant/Applicant is apprehensive that if the orders sought herein are not granted the 1st Respondent will in all probability finalize the transfer the said property to the Purchaser herein at any time from now in furtherance of his illegal and fraudulent scheme to deprive the Appellant/Applicant of her property in total contravention of the law and without due process of law. That if the orders sought herein are not granted the Appellant/Applicant shall be condemned unheard contrary to the provisions of Article 50 of the Constitution and the rules of natural justice. The appeal herein is not frivolous but has a high probability of success. If an injunction is not granted the Appeal by the Applicant will if successful, be rendered nugatory. The Respondents will not suffer greater hardship if an injunction pending

appeal is granted. On a balance of convenience, it is fair and just to preserve the *status quo* pending the determination of the Appeal.

This court has considered the application and the submissions therein. The principles for granting stay of execution are provided for under Order 42 rule 6 (1) of the Civil Procedure Rules as follows;

“No appeal or a second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order, but the Court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred, shall be at liberty, on an application being made, to consider such application and to make such orders thereon as may to it seem just, any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have the orders set aside.”

Order 42, rule 6 states:

“No order for stay of execution shall be made under sub-rule (1) unless:-

a. The Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:

1. Substantial loss may result to the applicant unless the order is made.
2. The application has been made without unreasonable delay, and
3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

The principles governing the exercise of the court’s jurisdiction are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicant must show that they have an arguable appeal and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. These principles were well stated in the case of Reliance Bank Ltd (In Liquidation) vs Norlake Investments Ltd – Civil Appl. No. Nai. 93/02 (UR), thus;

“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

1. *That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,*
2. *That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”*

The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in *Chris Munga N. Bichange vs Richard Nyagaka Tongi & 2 Others* eKLR where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus;

“..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”

In the case of *Mohamed Salim T/A Choice Butchery vs Nasserpuria Memon Jamat* (2013) eKLR, the court stated that;

“That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right”

We are further guided by the court’s decision in Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997, at Page 4 as follows:

“ . . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”

The 1st Respondent stated that the Applicant has not established a prima facie case. That the injunctive orders sought were not part of the original suit. That they have failed to establish that substantial loss will be suffered.

I find that the applicant is guilty of laches as judgement was delivered on 8th January 2025 and this application is dated 7th March 2025. The Appellant/Applicant submitted that she is the owner of the suit land known as Title No. Nairobi/Block 316/5957 by virtue of a sale agreement dated 3rd March 2023 between the Appellant and the 2nd Respondent. That the Appellant is in

possession of the suit land. The court dismissed the Appellants application stating that there is an appeal in the matter in ELC No. 33 of 2024 and cannot interfere. I find that the draft memorandum attached to the application on the grounds of appeal does not raise an arguable appeal and I do not find that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. I find that the applicant has failed to fulfil the above grounds mentioned to enable me grant the stay. I find that the application is not merited and is dismissed with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 18TH DAY
OF DECEMBER 2025.**

N.A. MATHEKA

JUDGE