

**IN THE COURT OF APPEAL
AT NAKURU**

(CORAM: WARSAME, MATIVO & GACHOKA,

JJ.A.) CIVIL APPLICATION NO. NAK E107 OF

2025 BETWEEN

JOYCE NJOKI GIKORE AND ERICK KITHINJI GIKORE

(Applying as the administrators of the estate of

*PATRICK GIKORE MWITARI (DECEASED).....***APPLICANTS**

AND

JAMES MWANGI WANJOHI.....RESPONDENT

*(Being an application for stay of execution from the judgment
and decree of the Environment & Land Court at Nyahururu*

(L. N.

Mbugua, J.) dated 1st October 2025

in

***ELC O.S. No. E005 of
2023).***

RULING OF THE COURT

1. Joyce Njoki Gikore and Erick Kithinji Gikore the administrators of the estate of Patrick Gikore Mwitari (deceased) have approached this Court by way of notice of motion dated 22nd October 2025 seeking an order that: (a) pending the hearing and determination of the intended appeal in the Court of Appeal at Nakuru, an order be issued staying execution of the judgement dated and delivered on

1st October 2025 in Nyahururu ELC O.S. No. E005 of 2023
and the

consequential decree. Alternatively, the applicants pray for an order that pending hearing and determination of the intended appeal in the Court of Appeal at Nakuru or until further orders of the Court, an order be issued, maintaining and preserving the *status quo*, presently/currently obtaining on the ground and in the register, in respect of L.R. No. Marmanet /North Rumuruti Block 2/9 (Ndurumo).

2. The application is premised on Section 3A, & 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, Rule 5 (2) (b), of this Court's Rules, 2022. It is supported by grounds listed on the face of the application and the applicant's supporting affidavit sworn on 22nd October 2025.
3. A brief factual background is necessary in order to properly contextualize the application. James Mwangi Wanjohi (the respondent) moved the Environment & Land Court on 31st October 2023 vide an originating summons claiming entitlement to 5 acres of land out of land parcel L.R. No. Marmanet North Rumuruti Block 2/9 (Ndurumo) by way of adverse possession having entered into a sale agreement with the deceased. Subsequently, a consent from the Land Control Board to sub-divide the suit land was obtained, a

surveyor

sub-divided the suit land to clearly demarcate the 5 acres out of the suit land and the respondent took possession of the 5 acres and has been in exclusive possession of the 5 acres without any interruption. However, the deceased refused to transfer the 5 acres to the respondent claiming that the consent was obtained fraudulently and he purported to rescind the sale agreement.

4. To protect his interest, the respondent filed a suit in Nakuru HCC No. 243 of 1998 and obtained an injunction against the deceased. Unfortunately, the suit abated because of the deceased's demise. However, in 2021, the respondent learnt that the family of the deceased had filed succession proceedings and misled the Court on the actual acreage that was entitled to culminating to the deceased's widow being charged and convicted for the offence of perjury in Nyahururu Criminal Case No. E217 OF 2022.
5. The respondent's suit was opposed vide replying affidavit sworn on 27th November 2023 where all the respondent's claims were denied and the applicants maintained that the sale to the respondent was rescinded resulting to a suit in Nakuru HCC No. 243 of 1998 and that the conviction

on

perjury has since been appealed against in Nyahururu Criminal Appeal Case No. 26 of 2023.

6. After considering the parties respective *viva voce* evidence and submissions, the learned judge identified a sole issue for determination, i.e. whether the plaintiff has proved a claim of adverse possession on the suit land to the tune of 5 acres. Vide Judgment delivered on 1st October 2025, the learned judge (*Hon. Lucy Gitari, J*) held that the respondent had proved his claim on a balance of probabilities and went on to hold that the respondent dispossessed the applicants of 5 acres of the suit land as far back as 1998 and there is no evidence that the applicants ever re-took possession of the suit land to date. Therefore, the respondent had met the criteria of an adverse possessor. Aggrieved, the applicants have filed a notice of appeal 8th October 2025 against the ruling delivered on 1st October 2024 and are now before this Court under Rule 5 (2)

(b) of this Court's Rules.

7. Regarding whether the applicants' appeal is arguable, the applicants depone that their appeal is arguable as can be gleaned from the memorandum of appeal marked JE 10. To

further elucidate the grounds in the memorandum of appeal,

the applicants stated that the respondent entered into and possessed the subject 5 acres of the suit land with the consent and permission of the deceased following a sale transaction between the two, so an adverse possession claim could not be founded legally and factually in the circumstances.

8. On whether the appeal would be rendered nugatory unless the orders of stay are granted, the applicants averred that the respondent has openly and publicly vowed to execute the impugned Judgment, expedite registration of the subject 5 acres in his name, sell and alienate to undisclosed wealthy and influential third parties occasioning the applicants irredeemable loss and rendering their appeal nugatory.
9. In opposition to the application, the respondent swore a replying affidavit on 26th November, 2025 deponing that the appeal is not arguable since the applicants already acknowledged his notorious possession by including his name in the Succession Cause of Patrick Gichore Mwitari (Deceased) and even obtained a confirmed grant. Therefore, the intended appeal merely challenges findings

of fact made by the trial court which this Court does not lightly interfere with.

10. The respondent also deponed that he had been in possession of the 5 acres for 27 years and therefore refusal to grant stay will not dispossess the applicants of anything because they have never been in possession in the first place. Therefore, the applicants' appeal will not be rendered nugatory. On the other hand, the respondent averred that he stands to suffer prejudice as there will be prolonged uncertainty and interference with his farming activities.

11. When the matter came up for hearing on 3rd December 2025, learned counsel, Mr. Mbaabu was present for the applicants, while Mr. Kibet appeared for the respondent. Mr. Mbaabu reiterated the contents of the supporting affidavit sworn on 22nd October 2025 while Mr. Kibet also reiterated the contents of the replying affidavit sworn on 26th November 2025.

12. We have read all these affidavits. We see no need to rehash them here. We have also considered the grounds in support of the application. This Court exercises original jurisdiction under Rule 5 (2) (b) as held in **Ruben & 9 Others vs. Nderitu & Another [1989] KLR 459** and **Trust Bank**

**Limited and Another vs. Investech Bank Limited & 3
Others [2000] eKLR.**

13. To succeed in an application for stay of execution, an applicant must satisfy the following twin conjunctive principles under Rule 5 (2) (b) of this Court's Rules: the appeal is arguable; and would be rendered nugatory if stay is not granted. (See **Republic vs. Kenya Anti-Corruption Commission & 2 Others [2009] KLR 31; Reliance Bank Ltd vs. Norlake Investments Ltd [2002] I EA 227** and **Githunguri vs. Jimba Credit Corporation No (2) (1988) KLR 838**).

14. In satisfaction of the first prerequisite, we note that based on the 5 grounds set out in the memorandum of appeal, it is contended that the learned judge erred both in law and facts, in allowing the respondent's claim premised on adverse possession, yet, the respondent did not plead the specific time/date of his alleged entry into and possession of the subject 5 Acres of land. Bearing in mind that an arguable appeal is not one that will necessarily succeed, we are not prepared to say that it is frivolous. (See **Kenya Tea Growers Association & Another vs. Kenya Planters Agricultural Workers Union, Civil Application No. Nai. 72 of 2011 UR**).

15. Turning to the second prerequisite, which is the nugatory aspect; other than the requirement that an applicant satisfies

the Court that if stay is declined the appeal will be rendered nugatory, it is also settled law that each case is to be considered on its peculiar facts and circumstances. It is admitted that the respondent has been in occupation for years and is still in occupation. This being the position, we do not think an order of stay is appropriate in this case. The scales of justice tilt against granting a stay order. The result is that the application dated 22nd October 2025 is dismissed. The costs shall abide the outcome of the appeal.

Dated and delivered at Nakuru this 10th day of December, 2025.

M. WARSAME

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

J. MATIVO

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

M. GACHOKA C.Arb, FCIArb.

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

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

Signed.

DEPUTY REGISTRAR.