

**IN THE COURT OF  
APPEAL AT NYERI**

**(CORAM: KANTAI, LESIIT & ALI-ARONI**

**JJ.A.) CIVIL APPLICATION NO.E028 OF 2025**

**BETWEEN**

**ROBERT NJERU KAREGA AND 17 OTHERS.....APPLICANTS**

**AND**

**VIRGINIA NGUNYI MUTOKAA  
& JAMES NJUE MUTOKAA**

*(Legal representatives of the estate of*

**MUTOKAA NTHAUTHO).....RESPONDENTS**

*(Being an application for injunction against the Ruling of the  
Environment and Land Court at Embu (Bor, J.) delivered on 25<sup>th</sup>  
February, 2025*

*in*

***ELC Case No.104 of 2014.)***

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**RULING OF THE COURT**

The application in issue is dated 4<sup>th</sup> March, 2025 and is brought under **rule 5 (2)(b)** of the **Court of Appeal Rules, 2022**.

This Court in **Ibau & 73 Others vs. Langata Development Company Limited & Another** (Civil Appeal (Application) E453 of 2023) [2024] KECA 240 (KLR) (8 March 2024) (Ruling) stated:

***“The jurisdiction under rule 5(2)(b) of this Court’s Rules is discretionary and guided by the interests of justice. In the exercise of this***

***discretion, the Court must be satisfied on the twin principles, which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory.”***

A brief history of the record indicates that this matter relates to a land parcel known as LR No. Mbeti/Gachuriri/249, which was registered to the late Mutokaa Nthautho, who had been sued as a defendant in the Environment and Land Court (hereinafter “ELC”) case number 104 of 2014. The applicants herein were the plaintiffs in the ELC suit, and their case was that the suit property was registered to the deceased Mutokaa Nthautho on behalf of the Mbadi Clan, of which he was the Clan Chairman. The respondents were accused of perpetrating a fraud and attempting to administer the property amongst themselves as his beneficiaries.

The impugned ruling of 25<sup>th</sup> February, 2025 was in regard to an application dated 7<sup>th</sup> November, 2022 where the applicants sought leave to apply for substitution of the deceased out of time. The defendant at the ELC, Mutokaa Nthautho, had passed away in the year 2018 during the pendency of the suit, and the suit had abated. The application dated 7<sup>th</sup> November, 2022 sought to have the defendant substituted with his legal representatives and to revive the abated suit. They attributed their delay in filing the application to the advice from their counsel to await the determination of another ELC Petition number 2 of 2018 and the fact that the grant issued in Siakago Succession Cause No. 47 of 2019 in favour of the respondents on 16<sup>th</sup> August, 2019 had been stayed.

The respondents opposed the application and termed it as

res judicata in light of a similar application which was dismissed  
on 6<sup>th</sup>

October, 2022. They termed the late filing of the application as inordinate.

In rebuttal, the applicants stated that their earlier application was dismissed because it lacked a prayer for extension of time to substitute the deceased, a technicality which they had since rectified.

The court in its ruling dated 25<sup>th</sup> February, 2025 stated that the applicants had made a similar application dated 15<sup>th</sup> February, 2021 to revive the suit, substitute the deceased, amend the plaint and adopt a consent. The court noted that the earlier application was dismissed on 6<sup>th</sup> October, 2022 because of the delay in filing and for failing to seek an extension of time for consideration of the prayers sought. The court in that ruling also stated that ELC Petition No. 2 of 2018 sought different reliefs than ELC 104 of 2014, and therefore, the argument of waiting for the outcome of the former did not persuade the court. Regarding the application before it, the court stated that the applicants were attempting to re-litigate the same issues that had been ruled upon. The court also agreed that the deceased died on 3<sup>rd</sup> August, 2018 and the suit abated on 3<sup>rd</sup> August, 2019 and there was no reason for the delay in substituting the deceased. The application was dismissed with each party being directed to bear its own costs.

Being aggrieved by this ruling, the applicant filed a notice of appeal dated 26<sup>th</sup> February, 2025. The application currently in

issue before this Court is dated 4<sup>th</sup> March, 2025 seeking  
an

injunction restraining the respondents from dealing with the suit property in any way pending the determination of the application and the intended appeal. The applicants state that they have an arguable appeal with high chance of success, but the same will be rendered nugatory if the application is not granted. The applicants have filed submissions dated 16<sup>th</sup> April, 2025 in support of the motion.

The respondents filed a replying affidavit sworn on 18<sup>th</sup> March, 2025 but did not file any written submissions. The respondents assert that the intended appeal is not arguable and that the applicants purposely omitted to attach the ruling to mislead the court into giving favourable orders. They state that the applicants are guilty of inordinate delay, and the application was res judicata and an abuse of court process. They accuse the applicants of intentionally frustrating the distribution of the estate of the late Mutokaa Nthautho. They urge this court to dismiss the application.

The Motion was heard on 6<sup>th</sup> May, 2025 on the Court's virtual platform. Learned counsel **Mr. Bulowa** appeared holding brief for **Mr. Khaemba** for the applicants while learned counsel **Mr. Onani** appeared holding brief for **Mr. Karoki** for the respondents.

Counsel for the applicants sought a temporary injunction. He stated that their application was not res judicata as the earlier application was not determined on merit and this is an arguable point on appeal. The applicants argued that there was an

existing

trust for the entire clan, and the respondents have obtained a grant

to the estate of the deceased, thus the property is in danger of distribution, which would render the appeal nugatory. Counsel urged us to preserve the suit property with injunctive orders.

The application is opposed, and the respondents state that the dismissed application was *res judicata* and that it was dismissed for good reasons. The applicants were faulted for never filing an appeal but rather for opting to file a fresh application that was similar to an earlier one. The respondents urged the court to finalize the matter, which has been heard and determined. The applicants were also accused of filing a similar application in the Siakago Succession case, where they are enjoying stay orders, thus the current application is an abuse of court process.

In rejoinder, the applicants' counsel stated that the stay orders in the succession matter became obsolete when the High Court rendered its ruling and were no longer in force.

As earlier stated in this ruling, this Court's discretion is guided by the interest of justice. The interest of justice is, in turn, guided by the two-pronged approach as to whether the applicants have proved an arguable appeal and whether they have successfully demonstrated the nugatory aspect.

This Court in the case of ***Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013]*** stated, *inter alia*:

***“The discretion of this court under Rule 5 (2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.***

***On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.***

***An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.”***

In regard to this particular application, we are of the view that the applicants have demonstrated an arguable appeal. This is because the applicants indicated to the court that they were not involved in the Succession case regarding the Estate of the deceased, and this has not been disputed. Additionally, given the claim by the applicants that the suit property was the Mbadi clan land registered in the name of the Chairman (the deceased), and given the fact that it is not disputed that the deceased was the clan Chairman, the applicants ought to have been given an opportunity to present their case in the interest of justice.

Further, we find that the applicants who had failed to seek an extension of time earlier made an effort to correct their error in their subsequent application, and the court could have considered undertaking substantive justice in the matter. The earlier application was dismissed on a technicality, not on merit, and we find this to be an arguable point on appeal.

On the nugatory aspect, we are persuaded by the averment by the applicants that the land subject of the dispute at the ELC may be transferred to the respondents or even to third parties and that if that happened, the suit land would be beyond the applicants, which would render the appeal nugatory if it succeeded.

The applicants have satisfied both limbs of the principles to consider in an application of this nature. We allow the motion by issuing an injunction to restrain the respondents or any person acting on their behalf from dealing in any way with the suit land pending hearing and determination of the intended appeal.

**Dated and delivered in Nyeri this 11<sup>th</sup> day of December, 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**