

**IN THE COURT OF
APPEAL AT
NAKURU**

**(CORAM WARSAME, MATIVO, & GACHOKA,
JJ.A.) CIVIL APPLICATION NO. E094 OF
2025**

BETWEEN

**JAMES SAMUEL KINYANJUI (Sued as the legal representative of the estate of MUIKAMBA NGETHE (deceased).... MUSA
.....1ST APPLICANT JOHN B
KARUGA KINYANJUI.....2ND APPLICANT**

AND

MARY WAMBUI GICHURU.....RESPONDENT

(An application for injunction and stay of execution from the judgment and decree of the Environment and Land Court at Nakuru (O. Ombwayo, J.) delivered on 22nd September 2023

in

ELC No. 148 of 2016)

REASONS FOR THE

RULING

1. The applicants' Notice of Motion dated 22nd September 2025 came up for hearing on 2nd December 2025. The applicants were represented by Mr Gaita, advocate, while the respondent was represented by Mr. Ochieng Gai, advocate.
2. Upon considering the application and the submissions that were briefly orally highlighted by counsel, this Court dismissed

the Notice of Motion under rule 34 of the Court of Appeal Rules 2022 and reserved the reasons for that decision to be given within 14 days. These are the reasons for the dismissal of the application.

3. By Notice of Motion dated 22nd September 2025, the applicants sought an injunction restraining the respondent, the Land Registrar Naivasha and the District Surveyor Naivasha by themselves, their servants or agents from transferring, alienating, subdividing or interfering in any manner whatsoever land parcel No. NAIVASHA MARAIGUSHU BLOCK 11/148 and the resultant subdivision being NAIVASHA MARAIGUSHU BLOCK 11/7388- 7401. They also sought for stay of execution of the judgment and decree dated 22nd September 2023.
4. The gist of the Motion is that the respondent sued the applicants in Nakuru **ELC No. 148 of 2016**. The applicants filed their statement of defence in response, together with a counterclaim, where the applicants sought eviction orders against the respondent. They stated that on 18th March 2019, the respondent withdrew the suit. However, the counterclaim proceeded to a full trial but was dismissed on 23rd September 2023.
5. Aggrieved by those findings, the applicants filed their notice of appeal dated 4th October 2023 and draft memorandum of appeal, which were annexed to their application. The

application was supported by the 1st applicant's supporting affidavit, sworn on

22nd September 2025 as well as his supplementary affidavit, sworn on 21st October 2025.

6. The applicants submitted that the application was merited and necessitated by the respondent's action of subdividing the land, yet no such orders were issued by the trial court. They were apprehensive that the respondent was intent on transferring the property to third parties following subdivision of the property. They urged us to find that the appeal was arguable and would be rendered nugatory if stay was not granted.
7. Upon questioning by the Court to explain the delay of more than two years, the applicants maintained that their application was filed timeously, as it was done upon the discovery of the applicants subdividing the property, an unforeseen action not sanctioned by the trial court. They explained the delay in filing the appeal on the ground that though they paid for typed proceedings on 6th October 2023, the typed proceedings are not yet ready. They argued that they were therefore interested in pursuing the appeal. They prayed that the application be allowed.
8. The respondent opposed the application. He filed his

replying

affidavit, sworn on 7th October 2025. He observed that the application was inordinately lodged two years after the impugned

judgment was delivered. The applicants were therefore undeserving of the orders sought since no reasons were advanced to explain the delay. Further, though a notice of appeal was filed, no further affirmative steps were taken to prepare the record of appeal and have it heard.

9. He urged this Court to find that the application had not met the threshold set out in law. He further summarized the dispute at trial to demonstrate the sanctity of title in his name. He argued that he was entitled to the fruits of the judgment and therefore he could dispose of the property as he wished. He urged this Court to dismiss the application with costs.
10. This is an application governed by the provisions of rule 5 (2) (b) of this Court's Rules. In it, an applicant must satisfy the following twin conjunctive principles in order to succeed: that the appeal is arguable and that the appeal would be rendered nugatory if stay is not granted.
- 11.** On the arguability of the appeal, it is trite that an arguable appeal does not necessarily mean one that will succeed. The applicant only needs to demonstrate that at least one ground is arguable. [See **Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet**

[2018] KECA 701 (KLR)]. The applicants annexed a draft

memorandum of appeal that raised eight grounds disputing the findings of the learned judge. We have examined the grounds and we are satisfied that the applicants have demonstrated that the appeal is arguable. However, as to whether the grounds are merited, we leave that to the bench that will hear and determine the appeal.

12. On the nugatory aspect, this Court in **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others** [2013] KECA 378 (KLR)

established that 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.

13. Whether an appeal will be rendered nugatory depends on the facts and circumstances of each application. We are satisfied that the applicants failed to demonstrate that the appeal will be rendered nugatory for the following reasons: firstly, the property in dispute has already been subdivided by the respondent and there would therefore be nothing to stay. It is trite that a court cannot issue an order in vain. Secondly, the

applicants slept on their rights when they elected not to file this application much earlier, shortly after judgment was delivered. The application was filed a

whopping two years after the judgment. The reasons given did not persuade us that the applicants were genuine in their quest for the orders sought. It is noteworthy that even after all these years, the applicants have still not filed their appeal.

14. We were therefore not persuaded by the reasons advanced by the applicants. Accordingly, these are the reasons why the application was dismissed with costs under rule 34 of this Court's rules.

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

M. WARSAME
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JUDGE OF APPEAL

J. MATIVO
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JUDGE OF APPEAL

M. GACHOKA C. Arb, FCI Arb.
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JUDGE OF APPEAL

*I certify that this is a
True copy of the original
Signed*

DEPUTY REGISTRAR