



**Kimaiyo & 3 others v Kimilot (Civil Application E042 of 2025)
[2025] KECA 2173 (KLR) (10 December 2025) (Reasons)**

Neutral citation: [2025] KECA 2173 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E042 OF 2025
MA WARSAME, JM MATIVO & PM GACHOKA, JJA
DECEMBER 10, 2025**

BETWEEN

**RAEL KIMAIYO 1ST APPLICANT
ALFRED KIMAIYO 2ND APPLICANT
BONFACE KIMAIYO 3RD APPLICANT
MICHAEL KIMAIYO 4TH APPLICANT**

AND

DAVID CHERUIYHOT KIMILOT RESPONDENT

(Being an application for temporary injunction orders from the judgment and decree of the Environment and Land Court of Kenya at Eldoret (C. YANO, J.) dated 15th May, 2025). in ELC O.S No. 321 of 2016)

REASONS

1. On 25th November, 2025 we dismissed the applicant’s application dated 3rd June 2025 and pursuant to Rule 34 (7) of the Court of Appeal Rules, 2022 reserved the reasons for the decision to be rendered within 14 days.
2. The applicant’s application sought for an order of temporary injunction and/or orders of status quo against the respondents, their servants and or agents restraining them from encroaching upon, evicting, transferring, selling, cultivating, trespassing or developing on or in any other way utilizing L.R Uasi Ngishu/Kaptagat/150 pending the hearing and determination of the appeal.
3. The application is brought under Sections 1A, 1B & 3A of the *Civil Procedure Act*, Rule 5 (2) (b) and 44 (1) of the Court of Appeal Rules, 2022. It is premised on the grounds that their appeal is arguable and in the absent of stay, the respondent will evict the applicants from the suit property. The application



is supported by the supporting affidavit sworn on 3rd June 2025 by Michael Kimaiyo who is the 4th applicant.

4. A brief history is necessary in order to properly contextualize the application and the reasons for our decision. Vide originating summons dated and filed on 4th November 2024, the applicants approached the Environment and Land Court seeking to be declared the proprietors of six acres of the L.R Uasi Ngishu/Kaptagat/150 (suit property) invoking the doctrine of adverse possession. They claimed that they were born, bred and had been in peaceful, exclusive, uninterrupted possession of six acres of the suit property for a period of over 30 years without the owner's consent and there had been no attempt to evict them save for a suit belatedly filed in 2007 being Eldoret ELC No. 834 of 2012 after the respondent's title had been extinguished in the year 2004 by virtue of the Limitation of Actions Act.
5. In response, the respondent in his replying affidavit sworn on 18th November 2016 deponed that the applicants' late father and his own late father were biological brothers and that his late father only gave the applicants' late father 1 acre of the suit property to cultivate and feed his family. However, on his father's demise, the applicants' father started claiming a share of the land. However, after lengthy deliberations with a panel of elders, he agreed to give his uncle 2 acres of land in the presence of the 6th applicant who took the minutes. However, upon his uncle's demise, his family disregarded the decision and filed a reference being Land Disputes Tribunal No. 9 of 2002 Tamining Kimaiyo vs. David Cheruiyot where she was awarded 6 acres of the suit property. The respondent challenged the tribunal's decision vide JR No. 175 of 2002 (not finalized) and he subsequently filed ELC No. 834 of 2012 seeking an eviction order against the applicants maintaining that adverse possession could not lie where the applicants entered the land by permission of the owner and that the applicants never enjoyed peaceful possession of the suit property.
6. The applicants' suit was heard on 12th February 2025 through viva voce evidence, and the learned judge identified the following issues for determination: (a) whether the applicants have acquired the suit property by way of adverse possession; (b) what is the extent of the applicants' entitlement over the suit property in light of the decision of the Burnt Forest Lands Dispute Tribunal adopted as CMCC Award No. 52 of 2002; (d) Who should bear costs of the suit?
7. Vide judgment delivered on 15th May, 2025, Yano, J. found that the applicants' claim for adverse possession was not proved since the applicants failed to demonstrate that they had been in possession of the suit property for the requisite number of years required under the Limitations of Actions Act. The learned judge also found that Burnt Forest Lands Dispute Tribunal award adopted as CMCC Award No. 52 of 2002 had lapsed by operation of law having not being implemented. Aggrieved by the said judgment, the applicants lodged a notice of appeal dated 15th May 2025 and instituted this appeal against the said judgement.
8. The applicants' case is that their appeal is arguable since the learned judge erred in law in holding that they did not meet all the elements of adverse possession. The applicants also maintained that unless an injunction is issued against the respondent restraining him from evicting them from the suit property, they would suffer substantial loss and their appeal would be rendered an academic exercise.
9. The respondent filed a replying affidavit sworn on 22nd July 2025, a further affidavit sworn on 22nd August 2025 and grounds of opposition dated 22nd July 2025 opposing the application and terming it incompetent and fatally defective. He averred that the applicants never served a notice of appeal upon him contrary to Rule 77 (2) of the Court of Appeal Rules, 2022 which required the same to be served within 7 days and that the applicants have not sought the leave of this Court to serve the notice of appeal out of time.



10. The respondent also deponed that the applicants had neither demonstrated that they had an arguable appeal nor any substantial loss they stood to suffer, whereas the decree holder continues to be denied the rights to enjoy the fruits of the judgment. Furthermore, it is the respondent's case that negative orders are ordinarily incapable of being stayed and to that extent the instant application ought to be dismissed.
11. When the matter came up for hearing, learned counsel, Ms. Jeruto was present for the applicants, while Mr. Mutai appeared in person.
12. Ms. Jeruto submitted that the principles for grant of temporary injunction pending appeal are settled in the case of Patricia Njeri & 3 Others vs. National Museum of Kenya [3004] eKLR, and in this case, the applicants have demonstrated that they have an arguable appeal and that greater hardship would be eviction of the applicants only for the appeal to succeed and their destroyed property cannot be recovered.
13. The respondent on the other hand reiterated the contents of its affidavits in opposing the appeal.
14. We have carefully considered the application and the grounds urged by both parties in support of their respective positions. The application before us is brought under Rule 5 (2) (b) of the Court of Appeal Rules, 2022. This Court in Trust Bank Limited & Ano. vs. Investech Bank Limited & 3 Others [2000] eKLR described the jurisdiction of this Court under Rule 5 (2) (b) as original and discretionary. This discretion is wide and unfettered. In Kenya National Union of Teachers and 3 Others, Civil Application No. 16 of 2015, the Supreme Court considering the nature and scope of this Court's jurisdiction under Rule 5 (2) (b) of the Court of Appeal Rules stated:

“(23) It is clear to us that Rule 5 (2) (b) is essentially a tool of preservation. It safeguards the substratum of an appeal, if invoked by an intending appellant, in consonance with principles developed by that Court over the years.... jurisdiction.”
15. In order to succeed in an application under Rule 5 (2) (b), an applicant must first demonstrate that the intended appeal is arguable and not frivolous, and that the intended appeal if it eventually succeeds, will be rendered nugatory if the stay orders are not granted. In Chris Munga N. Bichage vs. Richard Nyagaka Tongi, Independent Electoral & Boundaries Commission & Robert K. Ngeny [2013] KECA 141 (KLR) it was held that:

“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.”
16. In satisfaction of the first prerequisite, we note that based on the grounds set out in the draft memorandum of appeal and bearing in mind that an arguable appeal is not one that will necessarily succeed, we are not prepared to say that it is frivolous.
17. Turning to the second prerequisite, which is the nugatory aspect; that is, whether the appeal, if successful, would be rendered nugatory in the event we decline to grant the orders sought and the



intended appeal succeeds, we are guided by the sentiments of this court in Stanley Kang’ethe Kinyanjui Vs. Tony Ketter & 5 Others [2013] eKLR this Court stated that:

- “ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling
- x). 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.”

18. The applicants seek to stay the execution of an eviction order. The respondent has indeed admitted to filing an application before the Superior Court on 15th July 2025 seeking to enforce the impugned judgment. The respondent also averred that he offered the applicants two acres within the suit property but they declined and maintained that they wanted to have the six acres they are currently claiming citing adverse possession. In our view, we do not think that all factors considered, the pending appeal will be rendered nugatory if the order of injunction is not issued. The applicants, if evicted and in the event the appeal succeeds, can be compensated by way of damages for the period they will have been out of the suit property. Furthermore, there is no indication that the respondent intends to dispose of the suit property and even if he was to do so, the property can still be valued and the applicant compensated by way of damages. We are cognizant of the fact that in exercising our discretionary jurisdiction the bigger picture we should focus on is to preserve the ends of justice which includes letting a deservedly winning party enjoy the fruits of their judgment.
19. The upshot of the foregoing is that the applicants have not established to our satisfaction that the appeal, if successful, will be rendered nugatory. Accordingly, the application fails to meet the threshold for grant of injunction orders. Consequently, the motion dated 3rd June 2025 is without merit and it is hereby dismissed. As for the costs, there being a pending appeal, the costs shall abide the outcome of that appeal.

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, FCIArb.

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JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR.

