

**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: MURGOR, LAIBUTA & NGENYE, JJ.A.)**

**CIVIL APPLICATION NO. E027 OF 2025**

**BETWEEN**

**MAHMOOD ABDALLA MOHAMED.....1<sup>ST</sup> APPLICANT**  
**YATHRIBA KHAMIS RASHID SHIKELY.....2<sup>ND</sup> APPLICANT**  
**NASREEN ABDALLA MOHAMED.....3<sup>RD</sup> APPLICANT**  
**NOOR ABDALLA.....4<sup>TH</sup> APPLICANT**  
**MAJID ABDALLA.....5<sup>TH</sup> APPLICANT**  
**MOHSIN ABDALLA.....6<sup>TH</sup> APPLICANT**  
**FATMA ABDALLA.....7<sup>TH</sup> APPLICANT**  
**NAIMA ABDALLA.....8<sup>TH</sup> APPLICANT**  
**MOHAMED ABDALLA.....9<sup>TH</sup> APPLICANT**

**AND**

**GABRIEL KATANA KAJOJI.....1<sup>ST</sup>**  
**RESPONDENT**

**NEW CENTURY MARINE TRADING EAST**

**AFRICA COMPANY.....2<sup>ND</sup>**  
**RESPONDENT**

**CHI FUNG LAM.....3<sup>RD</sup>**  
**RESPONDENT**

**PATRICOAN KAVINYA MULWA.....4<sup>TH</sup>**  
**RESPONDENT**

**KALAMA RIMBA GONA.....5<sup>TH</sup>**  
**RESPONDENT**

**KAJOJI RIMBA GONA.....6<sup>TH</sup>**  
**RESPONDENT**

**CHARO RIMBA GONA.....7<sup>TH</sup>  
RESPONDENT**

**KEA RIMBA GONA.....8<sup>TH</sup>  
RESPONDENT**

**FLORENCE NINGALA CHIMEGA.....9<sup>TH</sup>  
RESPONDENT**

**(Being an application for stay of execution, stay of further proceedings and injunction pending the hearing and final determination of an intended appeal against the Ruling and order of the Environment and Land Court at Malindi (Njoroge, J.) delivered on 26<sup>th</sup> March, 2025 in Malindi, ELC Case No. 99 of 2019 As Consolidated with Malindi ELC Case No.139 of 2015 And Malindi ELC Case No.28 of 2020 (Formerly Mombasa ELC Case No.93 of 2014))**

\*\*\*\*\*

## **RULING OF THE COURT**

By a Notice of Motion dated 4<sup>th</sup> April 2025 brought pursuant to **Rules 5**

**(2) (b), 47 and 49** of the **Court of Appeal Rules, Sections 3, 3A, 3B** of the **Appellate Jurisdiction Act**, the Applicants seek a stay of execution of the Ruling and Order delivered on 26<sup>th</sup> March 2025, stay of further proceedings in *Malindi ELC Case No. 99 of 2019 (As Consolidated with Malindi ELC Case No.139 of 2015 and Malindi ELC Case No.28 of 2020 (Formerly Mombasa ELC Case No.93 of 2014))*, pending hearing and determination of the intended Appeal, and that the Respondents be restrained,

whether by themselves, their agents, servants, employees as well as any and all other persons claiming any interest or right in the parcel of land known as plot L.R. No. MN/11/783 (*the suit property*) through them, or from entering onto or occupying or using or trespassing onto the suit property or any

part thereof, or from damaging, wasting, developing, selling, leasing, alienating, transferring, charging, mortgaging or in any way from dealing howsoever with the suit property pending hearing and determination of the intended Appeal, and that the costs of this Application be provided for.

The motion is brought pursuant to the grounds on its face, and on affidavits in support thereof sworn by Abdalla Said Abdalla for the Applicants on 4<sup>th</sup> April, 2025 in which he contended that they are the lawful and registered proprietors of the suit property situated at Kikambala, Maweni in Kilifi County, having purchased and taken lawful possession of the property in 2013, and that the 8<sup>th</sup> Respondent, now deceased, was only a caretaker and was never the registered owner; that the trial court, in its ruling of 26<sup>th</sup> March 2025, granted orders allowing the Respondents, including individuals unknown to the Applicants, access to and occupation of portions of the suit property and, in particular, for family or clan of Kea Rimba Gona, the 8<sup>th</sup> Defendant, to freely enter and use the land pending determination of the consolidated suits.

He stated that they intend to challenge the trial court's decision to permit the filing of a defence and counterclaim on

behalf of the deceased 8<sup>th</sup> Respondent, arguing that such an order is irregular, unlawful, and contrary to established legal principles governing substitution after death, and that, as a result of such substitution, by a letter dated 28<sup>th</sup> March 2025, persons claiming

to act for the family have already issued a demand for 2.4 acres of the suit property as their alleged portion.

He maintained that this claim is unfounded and directly contradicts an earlier consent order of 28<sup>th</sup> April 2022 made between the Applicants and the 9<sup>th</sup> Respondent that required the property to remain undisturbed pending hearing and determination of the main suit; that, unless a stay of execution and injunctive orders are granted, the Respondents and their agents may enter, occupy, interfere with, or even enter the remains of deceased persons on the land; that such actions, he stated, would permanently alter the character and value of the property in a manner that cannot be compensated in damages, and render their intended appeal nugatory due to commission of irreversible acts on the ground.

It was further contended that the intended appeal raises weighty and arguable issues with a real chance of success and, unless stay is granted, they stand to suffer substantial loss, and that their proprietary rights risk being extinguished or irreparably compromised before the appeal is heard.

He therefore prayed for orders of stay of the court's ruling,

further proceedings, and to restrain the Respondents and all persons claiming under them from entering, occupying, developing, selling, burying, or otherwise

dealing with the suit property pending hearing and determination of the intended appeal.

Annexed to the application is the Notice of Appeal dated 28<sup>th</sup> March 2025 and a draft memorandum of appeal, which demonstrated that the learned Judge failed to appreciate and properly evaluate the factual evidence that, for all intents and purposes, the Applicants are the lawful owners of the suit property. They submitted that the decision reached by the court is contrary to and unsupported by the weight of the evidence presented.

The Applicants further argue that the learned Judge disregarded his earlier Ruling delivered on 23<sup>rd</sup> September 2024, which has been neither set aside nor varied, and which ought to have guided the determination of the issues before him; that the learned Judge failed to appreciate that the evidence on record and the defects in the application ought to have led to a dismissal of the 8<sup>th</sup> Respondent's application dated 8<sup>th</sup> November 2024; that the Judge disregarded critical documentary evidence in support of the Applicant's case, and failed to undertake a proper and exhaustive evaluation of all the evidence on record; and that the

Judge misapprehended the material facts and applicable legal principles, with the result that the conclusions reached were not supported by the evidence nor grounded on any proper documentation. They further argue that the learned Judge was in error in failing to find that the 8<sup>th</sup> Respondent's application was

defective as a matter of law and fact, and that it did not meet the threshold for contempt of court proceedings against the Applicants.

In response, the Respondents filed a replying Affidavit sworn on 5<sup>th</sup> April 2025 by one Lucky Kalama Rimba, a resident of Kilifi County, in which he deposed that he is the 8<sup>th</sup> Respondent and the legal representative of the late Kea Rimba Gona, having been substituted pursuant to a Court's order of 19<sup>th</sup> December 2024; and that the Applicants counsel did not object to his joinder of the suit in place of the late Kea Rimba Gona. That his application dated 8<sup>th</sup> November 2024 was duly heard, and the Court delivered its ruling on 26<sup>th</sup> March 2024; that his Advocates wrote to the Applicants' and advised them to comply with the court order, but that relying on an order dated 9<sup>th</sup> December 2019 and using police officers and County Administrators, Abdalla Said Abdalla, the deponent of the Applicants' supporting affidavit, denied the family of the late Kea Rimba Gona access to the concerned portion of the suit property contrary to the court's orders of 23<sup>rd</sup> March 2021 and 9<sup>th</sup> December 2021.

He further deposed that the late Kea Rimba Gona and his

family members had been occupying a portion of the suit property which the Applicants had undertaken to excise and give them, having provided assurances that they would not interfere with the 2.4 acres of the suit property.

The 8<sup>th</sup> Respondent further deposed that it is not in dispute that the Applicants are the registered proprietors of the suit property, but that it was not true that the late Kea Rimba Gona was a caretaker of the premises, nor did the Applicants at any time employ or pay him; that the family members of the late Kea Rimba Gona have their houses and homesteads constructed on a portion of the suit property, and that the issue before the court was whether the Applicants were in contempt of the court's orders. That the Applicants should not be permitted to defy court orders, and should first purge the contempt before approaching this Court for relief.

He also deposed that the ruling of 23<sup>rd</sup> September 2024 did not prohibit the family members of the late Kea Rimba Gona from accessing their houses or homesteads on the relevant portion of the suit property; that other family members have been buried on the same portion, and that bringing the remains of the late Kea Rimba Gona to be buried on that same land cannot amount to abuse of the court process; and that the Applicants had since constructed a wall around the suit property and had not excluded the 2.4 acres as ordered by the court.

On her part, the 9<sup>th</sup> Respondent opposed the application and deposed that, although the suit was filed in 2013, the main suit has never been heard on its merits; that the continued filing of multiple interlocutory applications has

delayed and frustrated the hearing of the suit; that, vide a ruling delivered on 26<sup>th</sup> March 2025, the trial court directed all parties to file and serve their consolidated trial bundle so that a hearing date for the main suit could be fixed; that, instead of complying with those directions, the Applicants filed the present application seeking to set aside the ruling so as to delay and frustrate the hearing and determination of the main suit; that the current application seeking a stay of proceedings pending the hearing and determination of an intended appeal amounts to an abuse of the court process. That the Respondents were at all material times in physical occupation of the suit property, having constructed permanent residential homes, but were unlawfully and forcefully evicted by the Applicants; and that to date they have not regained possession of the property and remain dispossessed despite the existence of a court order granting them access.

By a Supplementary Affidavit sworn by Abdalla Said Abdalla, the Applicants further deposed that when determining the Notice of Motion dated 8<sup>th</sup> November 2024, the trial court delivered a ruling on 26<sup>th</sup> March 2025 in *Malindi ELC Case No. 99 of 2019*

*(consolidated with Malindi ELC Case No. 139 of 2015 and Malindi ELC Case No. 28 of 2020)*, granting Lucky Kalama Rimba leave: i) to be included in place of the 8<sup>th</sup> Respondent, who had died on 19<sup>th</sup> July 2024, and to file a defence and counterclaim within 14 days of the ruling; ii) to purge

contempt of the orders of 23<sup>rd</sup> March 2021 and 9<sup>th</sup> December 2021 by giving the family of Kea Rimba Gona access to their homestead situated on a portion of the suit property; and iii) that the order of access be complied with pending the hearing and determination of the suit; that in an affidavit sworn on 7<sup>th</sup> January 2020 by Kea Rimba Gona before his demise, the deceased expressly deposed that he had been in the employment of Abdulla Mohamed Abdulla as caretaker, and that he had no interest whatsoever in the suit property, and had only signed documents without knowledge; and that he swore the affidavit to make it known that he had no claim over the property. The deponent further contended that, on 23<sup>rd</sup> July 2017, the 1<sup>st</sup> Respondent, Gabriel Katana Kajoji, purported to sell part of the suit property to one Benedict Kahindi Munga to the Applicants' detriment while the suit was still pending. He again denied that the Applicants have disobeyed any court order.

Concerning the 8<sup>th</sup> Respondent's application for contempt, he deposed that it did not satisfy the principles applicable to contempt proceedings, and that no proof was provided to show that the Applicants had disobeyed the court's orders; that the late

Kea Rimba Gona and his family members were not and have never been in occupation of any portion of the suit property; and that no family members were ever buried on the concerned portion of the suit property.

It was contended that the Applicants have demonstrated that their intended appeal is arguable and that, unless stay is granted, the appeal will be rendered nugatory; that the Applicants' appeal raises valid points of law and fact with overwhelming chances of success, and that it is fair and in the interest of justice that stay of execution be granted; and that unless stay is granted, strangers and land-grabbers will invade and alter the structure of their property, and adversely affect the title, particularly as the 8<sup>th</sup> Respondent does not have a plausible claim against the Applicants.

When the application came up for hearing on the Court's virtual platform, learned counsel **Ms. Kimura** and **Mr. Lakicha** appeared for the Applicants while learned counsel **Mr. Odhiambo** appeared for the 8<sup>th</sup> Respondent. Learned counsel **Mr. Gikandi** appeared for the 9<sup>th</sup> Respondent. There was no appearance for the 1<sup>st</sup> to 7<sup>th</sup> Respondents whom Mr. Odhiambo informed us were since deceased. On this account, Ms. Kimura sought to withdraw the application against the 1<sup>st</sup> to 7<sup>th</sup> Respondents. There being no objection, the application against the 1<sup>st</sup> to 7<sup>th</sup> Respondents was marked as withdrawn.

The parties filed written submissions which counsel briefly highlighted. Submitting on the issue as to whether the appeal was arguable, counsel for the Applicants relied on the issues as raised in the draft memorandum of appeal. It was submitted that a consent was entered into between the Applicants and the

9<sup>th</sup> Respondent setting aside 2.4 acres pending conclusion of the suit; that amidst the proceedings, the trial court granted access to the family of the 8<sup>th</sup> Respondent without specifying who should be granted access and to which homestead. It was argued that the order was general, and “sweeping” and may lead to strangers and land grabbers invading the suit property and change its structure and tenure, and adversely affect the title, thereby defeating the appeal altogether; that there is need to issue the injunction to preserve from the 8<sup>th</sup> Respondent’s acts, and to allow an opportunity for the intended appeal to be heard and determined; and that granting the application will preserve both the property and the beneficial interest of the Applicants.

On their part, counsel for the 8<sup>th</sup> Respondent submitted that, in the ruling of 26<sup>th</sup> March 2025 , the court allowed the prayers sought and ordered inclusion of Lucky Kalama Rimba in substitution of the 8<sup>th</sup> Respondent, who had died on 19<sup>th</sup> July 2024, and further ordered that he filed a defence and counterclaim within 14 days of the ruling; that, the Applicants to purge the contempt of the orders of 23<sup>rd</sup> March 2021 and 9<sup>th</sup> December 2021 by giving the family of Kea Rimba Gona access to their

homestead situated on a portion of the suit property, and that the order of access be complied with pending the hearing and determination of the suit; that the Applicants have conveniently failed to attach that application in their present Motion; that the trial Court expressly found that

the Applicants were in disobedience of the court's orders, and were subsequently found to be in contempt of the court orders of 23<sup>rd</sup> March 2021 and 9<sup>th</sup> March 2021; that the Applicants have no chance of succeeding in their intended appeal; and that the Applicant's continue to inconvenience the 8<sup>th</sup> Respondent, who has been denied access to the homestead and houses on the portion of the suit property.

Counsel for the 9<sup>th</sup> Respondent opposed the application and reiterated the contents of the affidavit in reply. It was submitted that the dispute relates to 2.4 acres of the suit property in respect of which the court issued orders allowing access by the Respondents; and that the 9<sup>th</sup> Respondent has remained locked out of the 2.4 acres contrary to the court orders, as a result of which the Applicants were found to be in contempt, hence this application.

As a brief background to the motion before us, the Applicants instituted the suit in the Environment and Land Court against the Respondents seeking an order of temporary injunction be issued restraining the Respondents whether by themselves, their agents, servants, or employees from interfering in any

manner whether by way of wrongfully entering, trespassing or continuing to wrongfully enter, demolish or construct houses on the suit property.

Filed contemporaneously with the suit was a Notice of Motion application dated 22<sup>nd</sup> November 2019 seeking temporary orders of injunction

to restrain the Respondents from interfering with the property, as well as an order directing them to demolish the structures on the suit property. As a prayer in the alternative, they sought to be allowed to demolish the structures and for the Respondents to be compelled to reimburse them for the costs thereof.

When that Motion came up for hearing *inter-partes* on 9<sup>th</sup> December 2019, none of the Respondents, though served, had filed any response thereto. In the absence of any objection to the application, the trial court allowed the orders as prayed. On 10<sup>th</sup> December 2019, the 4<sup>th</sup> to 9<sup>th</sup> Respondents filed an application seeking a stay of the orders issued on 9<sup>th</sup> December 2019 on grounds, *inter alia*, that their houses would be demolished pursuant to the orders granted. Upon considering the motion *ex-parte*, the Court stayed execution of the orders. When the application came up for hearing *inter-partes* on 19<sup>th</sup> December 2019, the Respondents withdrew the motion with the result that the orders barring the demolition of the houses were vacated.

Thereafter, the 5<sup>th</sup> to 9<sup>th</sup> Respondents filed an application dated 2<sup>nd</sup> September, 2020 seeking orders that, pending the hearing and determination of the suit, an order of temporary

injunction be issued restraining the Applicants whether by themselves, their agents, servants, or employees from interfering in any manner whether by way of wrongfully entering or trespassing or continuing to wrongfully enter and demolish or construct houses on the suit property.

By a ruling dated 23<sup>rd</sup> March 2021, the trial court allowed the application and ordered maintenance of the *status quo ante* prevailing as at the date of the orders of 9<sup>th</sup> December 2019 to be restored pending the hearing and determination of the consolidated suits.

The Applicants nevertheless erected a wall around the suit property and, aggrieved, the 4<sup>th</sup> to 9<sup>th</sup> Respondents filed an application dated 8<sup>th</sup> November 2024 seeking substitution of Lucky Kalama Rimba as the 8<sup>th</sup> Defendant in the suit, and for orders that the Applicants do purge the contempt of court orders of 23<sup>rd</sup> March 2021 and 9<sup>th</sup> December 2021 by giving the family of Kea Rimba Gona access to and from their homestead situated on a portion of the suit property, and to comply with the court orders of 23<sup>rd</sup> March, 2021 and 9<sup>th</sup> December 2021 respectively pending hearing and determination of the suit, and that the 8<sup>th</sup> Respondent be granted leave to file a defence and counter-claim in the suit. The trial judge upon considering the motion granted the orders sought. The Applicants were aggrieved and intend to file an appeal, hence the application now before us seeking a stay of the orders of the trial court.

Under **Rule 5(2)(b)** of this Courts' rules. For an applicant to succeed, it must satisfy two essential components before the Court can grant the reliefs sought. First, it must be shown that the appeal, or intended appeal, raises an

arguable issue; and second, the applicant must demonstrate that, if stay is not granted, the appeal will be rendered nugatory.

This position was reiterated in the case of **Chris Munga N. Bichage vs**

**Richard Nyagaka Tongi & 2 others [2013] KECA 141 (KLR)** where the Court 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.”***

On whether the appeal is arguable, does not mean an appeal that is bound to succeed, but rather, one that presents at least one genuine point of law or fact deserving the Court’s consideration. See **Kenya Tea Growers Association & Another vs Kenya Planters Agricultural Workers Union, Civil Application No. Nai. 72 of 2011 (UR)**. Further, the law does not require numerous grounds; and even a single arguable

issue is sufficient, provided that the second limb is met. See

**Damji Pragji Mandavia vs Sara Lee Household & Body Care**

**(K) Ltd, Civil Application No. Nai. 345 of 2005 (UR); Kenya**

**Airways Corporation vs Ederman**

**Properties Ltd (2012) KECA 82 (KLR) and Ahmed Musa  
Ismael v Kumba Ole**

**Ntamorua & 4 others [2014] KECA 689 (KLR).**

Based on the draft memorandum of appeal annexed to the application, the Applicants contended that the learned Judge committed errors of both law and fact by failing to give effect to his earlier ruling of 23<sup>rd</sup> September 2024, which had neither been set aside nor varied, and which, in their view, ought to have informed the determination of the subsequent application; that the Judge overlooked clear and uncontroverted evidence on record that justified dismissing the 8<sup>th</sup> Respondent's application of 8<sup>th</sup> November 2024, yet he nonetheless proceeded to allow it notwithstanding its procedural defects and the substantive evidence placed before him; that the learned Judge disregarded crucial documentary evidence supporting their case and failed to undertake a proper, comprehensive and balanced evaluation of the entire evidentiary record; and that the Judge afforded undue weight to the Respondents' submissions while overlooking or failing to adequately address the Applicants' written submissions, thereby occasioning prejudice. Upon consideration of the matters to be canvassed in the intended appeal, we find them to be arguable and worthy of ventilation before this Court.

On the nugatory limb, the Applicants submit that, unless the

orders sought are granted, the intended appeal will be rendered nugatory because the effect of the impugned ruling will be to fundamentally alter the substratum of the dispute, namely the suit property. They contend that the court's order permitting the

family of the late Kea Rimba Gona to access and occupy a portion of the land creates a real and imminent risk that the suit property may be subjected to irreversible acts, including occupation, interference with the perimeter wall, demolition, construction of structures, and entry by persons claiming rights to 2.4 acres.

The 8<sup>th</sup> Respondent states, on the other hand, that the intended appeal will not be rendered nugatory, and that the Applicants will suffer no irreparable loss because the only portion of the land to which the 8<sup>th</sup> Respondent seeks to access is the 2.4 acres which the Applicants themselves have expressly excluded and of which they have averred they would not interfere with as they continued to use and develop the remainder of the suit property.

The impugned ruling ordered the Applicants to purge the contempt of court orders of 23<sup>rd</sup> March and 9<sup>th</sup> December 2021 by giving the family of the 8<sup>th</sup> Respondent access to and from their homestead and houses on the 2.4-acre portion of the suit property. The ruling also granted leave to the 8<sup>th</sup> Respondent to file and serve a defence and counterclaim to the Applicants' suit

within 14 days of the order. In our view, compliance with this order neither dispossesses the Applicants of the suit property, nor does it authorize any irreversible acts of alienation, development, or demolition or even the alleged interment. Without doubt, the substratum of the appeal being the suit property will remain intact,

even were the 8<sup>th</sup> Respondent's family allowed to access the 2.4 acres. Invariably, we are not able to fathom how granting access to, and from, their homesteads on the suit property will render the appeal nugatory. For this reason, we find that the Applicants have not established that the intended appeal will be rendered nugatory.

In sum, the Applicants have failed to meet the established threshold for the grant of orders of stay of the rulings of the Environment and Land Court of 23<sup>rd</sup> March 2021 and 9<sup>th</sup> December 2021, stay of proceedings and an injunction, with the result that the Notice of Motion dated 4<sup>th</sup> April 2025 lacks merit and is hereby dismissed with costs in the appeal.

***It is so ordered.***

***Dated and delivered at Mombasa this 19<sup>th</sup> day of December, 2025.***

**A. K. MURGOR**

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

**DR. K. I. LAIBUTA CARb, FCIArb.**

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

*I certify that this is the true copy of the original  
**Signed***

**G. W. NGENYE-  
MACHARIA**

**...  
DEPUTY REGISTRAR**

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