

**IN THE COURT OF
APPEAL AT NAIROBI**

**CORAM: M'INOTI, MUMBI NGUGI & ACHODE,
JJ.A) CIVIL APPLICATION NO. E179 OF 2025**

BETWEEN

**SARAH NYIVA HILLMAN.....1ST APPLICANT
PAULINE KAMBUA MAINGEY.....2ND
APPLICANT**

WILLIAM DAHER.....3RD APPLICANT

AND

THOMAS MUMO MAINGEY (*suing on his own behalf and on behalf of The Franciscans of Our Lady of Good Counsel Sisters Registered Trustees, David Masika, Evergreen Crops Limited, Waridi Limited, Daniel Mutisya Ndonge and Vallley Brook Capital Limited*) **1ST RESPONDENT**

**DIRECTOR OF SURVEYS.....2ND RESPONDENT
HON. ATTORNEY GENERAL.....3RD
RESPONDENT**

(Being an application for stay of execution pending appeal from the judgment of the Environment & Land Court at Machakos (A. Nyukuri J.) dated 19th February 2025

in

ELC No. 113 of 2015)

**RULING OF THE
COURT**

1. By a Notice of Motion dated 20th March 2025 brought under rule 5(2)(b) of this Court's Rules, the applicants, **Sarah Nyiva Hillman, Pauline Kambua Maingey** and **William Daher** seek an order of stay of execution of the judgment and decree of the Environment and Land Court (ELC) at Machakos (A. Nyukuri J.) dated 19th February 2025 in ELC Case No. 113 of 2015.

2. The facts before the trial court are fairly straightforward. In his plaint before the ELC, the 1st respondent, for himself and

the others named in this application as **'the 1st respondent'** (by which appellation we shall refer to them), had sought various declarations, among them that he and all the other proprietors of the properties adjacent to those of the applicants are entitled to a right of way across the properties known as L.R Nos. 1338/91, 1338/92 and 1338/93 using the road commonly known as **39 Quarry Road**. He averred that the said road was shown on the sub-division plan of L.R No. 1338/ 4/R with a broken line running across the said properties.

3. On their part, the applicants filed a defence denying the 1st respondent's claim. They also filed a counterclaim against the 1st respondent, alleging that they had been wrongfully entering and accessing their property by use of the applicants' private road referred to as **39 Quarry Road**; and that the Kenya Urban Roads Authority had been grading and expanding the said road without any right, and were encouraging the 1st respondent in their misconceived claim that the road is a public road. They sought, among others, damages and mesne profits against the 1st respondent.
4. In its decision, the trial court found in favour of the 1st

respondent and issued a declaration that they were entitled

to use of the said road. It also issued, among other orders, an injunction restraining the applicants, their servants or agents from placing or allowing to be placed on the road commonly known as 39 Quarry Road anything restricting, preventing or otherwise interfering with the reasonable enjoyment of the road by the 1st respondent and all other proprietors of the adjacent properties. The court dismissed the applicants' counterclaim.

5. Aggrieved, the applicants filed a notice of appeal and the present application. The application is supported by the affidavit of the 1st applicant, **Sarah Nyiva Hillman**, sworn on 20th March 2025, a Further Affidavit sworn on 24th April 2025, and a Further Supplementary Affidavit sworn on 23rd May 2025, all sworn by Ms. Hillman. The applicants assert that their intended appeal is arguable and raises serious points of law and fact, and that unless a stay of execution is granted, the appeal will be rendered nugatory. They further aver that there is imminent danger of delineation of the road from their properties, L.R. Nos.1338/91, 1338/92 and 1338/93 as the trial court allowed the delineation of the road and amendment of the deed plan so as to indicate the road which is already on the said three properties.

6. Ms. Hillman avers that the effect of the order is that the applicants stand to lose their indefeasible title and interests to part of their property unprocedurally and without compensation; that their right to property will be infringed if the orders sought are not granted; and their appeal will be rendered nugatory. It is her contention that the 1st respondent will not suffer prejudice if the prayers sought are granted. The applicants have annexed to their application a draft Memorandum of Appeal containing some 12 grounds which they aver they intend to raise on appeal. These include their challenge to the trial court's application of the doctrine of prescriptive easement, and its finding that the applicants' parcels were burdened by a prescriptive easement, without adequate evidentiary support; further, that the trial court addressed unpleaded issues such as the issue of prescriptive rights; and that the orders it issued were tantamount to compulsory acquisition without compensation.
7. With regard to the nugatory aspect, the applicants contend that if stay of execution is not granted, the judgment by the trial court delineates their land as part of the road and requires the Director of Surveys to amend the deed plan to

provide for a road through their land; and that if this order
is

implemented, it would result in permanent loss of portions of their land, thereby fundamentally altering the subject matter of the appeal.

8. The 1st respondent, through **Thomas Mumo Maingey**, opposes the application by an affidavit sworn on 9th April 2025. Mr. Maingey avers that the 1st and 2nd applicants are his sisters, while the 3rd respondent is his brother-in-law, and that they all inherited the suit property from their late father, Paul Maingey. He states that the said Paul Maingey had acquired Wattle Blossom Farm, comprising two properties known as L.R Nos. 1337 and 1338, from one James Alexander Sands in 1970; that a road traversing across the property, known as **39 Quarry Road**, was used openly by the neighbouring farms, including Munyeti Ranch, BAT Scheme, ADC Farm, Quarries and KMC Ranch.
9. He asserts that their neighbours openly, peacefully, and as of right enjoyed use of the said road when the deceased purchased the farm and continued to do so without hindrance until recently, when the applicants attempted to restrict its use. It is his averment that 39 Quarry Road is not just a lifeline to the neighbours and the public in general but is also a crucial part of the community's

infrastructure, and its

closure would significantly disrupt the daily lives and economic activities of the community.

10. The 1st respondent avers that it was the 1st applicant who started restricting the use of the road; that the orders of the ELC sought to be stayed restrain the applicants from closing, blocking, restricting, obstructing, hindering, or otherwise interfering with the use of the said road; that they do not require any positive action on the part of the applicants that is capable of being stayed; that it is untrue that the applicants' property is being alienated; and that the said road has been in use before 1970 and no additional land is demanded of the applicants.
11. The 1st respondent avers that no loss is likely to be suffered by the applicant if the existing road is marked with beacons by the surveyors from the 2nd respondent; and that such marking is urgent and necessary to prevent encroachment and remove uncertainty in building the road by the relevant authorities.
12. The 1st respondent further avers that amending the deed plans will not occasion any permanent loss or damage to the applicants as it can be reversed should this Court overturn the decision of the ELC; that placing beacons to

mark the

existing road does not amount to alienation and will not cause a loss worthy of protection by an order of stay of execution or an injunction from this Court; and that marking the road on the deed plans will not amount to alienation or cause irreversible damage.

13. Mr. Maingey avers that he and those he represents use the said road to access their respective properties; that both internet and water connections terminate in the property of the 1st applicant, who has refused to allow the service providers to lay pipes beyond her property; that if the judgment is stayed, then there is not just imminent danger that the applicant will close the road to the 1st respondent's detriment but also to the detriment of the greater public; and that if the orders are granted, the applicants will use the orders to bar utilities such as power, water, and internet from being laid across the suit properties, to his disadvantage and that of the other neighbours.

14. At the hearing of the application, learned counsel, Dr. Owino, was present, holding brief for Mr. Ojiambo for the 1st respondent. Learned counsel, Ms. Jematia, was present, holding brief for Mr. Ndalila who was said to be acting for Waridi Holdings Limited, a party named as represented by

the

1st respondent; while learned counsel, Mr. Eredi, Chief State Counsel, was present, holding brief for Mr. Odongo, Principal State Counsel, for the 2nd respondent. There was no appearance for the applicants and the 3rd respondent, though the applicants had filed submissions dated 25th April 2025. The 1st respondent filed submissions dated 8th May 2025, which Dr. Owino briefly highlighted. No submissions had been filed for the 2nd and 3rd respondents.

15. We have read and considered the impugned judgment of the trial court, the submissions on record, as well as the respective averments by the parties. The application before us requires exercise of this Court's discretion under rule 5(2)(b). It is settled law that for an applicant to succeed under the said rule, she must satisfy the court on two principles. First, that the appeal or intended appeal is arguable, that is, that it is not frivolous; and, second, that absent stay of execution, the appeal, if successful, will be rendered nugatory- see ***Stanley Kangethe Kinyanjui v. Tony Ketter & 5 others*** [2013] KECA 378 (KLR). An arguable appeal is not one that will necessarily succeed, but one that raises at least a *bona fide* point deserving consideration by the Court. It is also settled

that even a single bona fide ground of appeal is sufficient to satisfy the arguability test.

16. In addition to these considerations, in appropriate cases, the public interest consideration may come into play, requiring the Court to consider where the public interest lies when deciding whether or not to grant orders under rule 5(2)(b)-see **Munya v Kithinji & 2 others 2014] KESC 30 (KLR).**
17. The facts before us indicate that the land parcels in contention between the applicants and their brother, Thomas Mumo Maingey, were all part of a larger property that belonged to their deceased father. The averments by the 1st respondent that the road in contention, 39 Quarry Road, has run through the property since 1970, and that it was in use by the 1st respondent and members of the public until subdivision of the land parcel between the Maingey siblings, has not been disputed in the three affidavits sworn by Ms. Hillman.
18. What appears to be the applicants' case is that the road became a private road upon subdivision, disentitling the 1st respondent and other members of the public from using it as they appear to have done prior to the subdivision. From

the applicants' submissions and their draft memorandum
of

appeal, they are particularly aggrieved that the trial court dealt with the issue of prescriptive rights, reposing in the 1st respondent the right to use 39 Quarry Road. This, we agree with the applicants, is an arguable point that merits consideration.

19. The question, however, is whether their appeal will be rendered nugatory if the orders of the trial court are not stayed, and where the public interest lies. The trial court issued an injunction restraining the applicants, their servants or agents from placing or allowing to be placed on the road commonly known as 39 Quarry Road anything restricting, preventing or otherwise interfering with the reasonable enjoyment of the road by the 1st respondent and other proprietors of adjacent properties; and requiring amendment of the decree to excise the road.
20. Having considered the issue and the interests of the public, which the applicants tacitly acknowledge, we are not satisfied that the applicants have met the second consideration under rule 5(2)(b). There is no indication that leaving the disputed road open for public use and amending the deed plan to delineate it will render the appeal nugatory, as such delineation can be reversed

should the appeal succeed.

21. Accordingly, we find that the applicants have not satisfied the second principle under rule 5(2)(b), that their intended appeal, if successful, will be rendered nugatory. We therefore decline to issue the orders sought in the application dated 20th March 2025, and it is hereby dismissed with costs to the 1st respondent.

Dated and delivered at Nairobi this 30th day of January 2026.

K. M'INOTI

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**JUDGE OF
APPEAL MUMBI
NGUGI**

.....

**JUDGE OF APPEAL
L. ACHODE**

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.