

**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: MURGOR, J. MOHAMMED, NGENYE, JJ.A.)**

**CIVIL APPLICATION NO. E017 OF 2025**

**BETWEEN**

**JULIANA MENDEMBO.....1<sup>ST</sup> APPELLANT/APPLICANT**

**ELVIS M. SHUTU.....2<sup>ND</sup> APPELLANT/APPLICANT**

**AND**

**ELIZABETH SARINGI MARANYA.....RESPONDENT**

***(Being an application for stay of execution of the judgement and decree of the Environment and Land Court at Malindi (E. Makori, J.)***

***delivered on 29<sup>th</sup> January, 2025 in***

***Malindi ELC No. E 074 of 2022)***

**\*\*\*\*\***

**RULING OF THE COURT**

By Notice of Motion dated 14<sup>th</sup> April 2025 brought pursuant to **Rule 22 (1)** and **Order 42 Rule 6** of the **Civil Procedure Rules 2010** and **Sections 14, 34 & 63(e)** of the **Civil Procedure Act, the Applicants, Juliana Mendembo** and **Elvis Shutu** seek orders of stay of execution of the Judgment delivered

on 29<sup>th</sup> January, 2025 and

any other subsequent orders emanating therefrom pending the hearing and final determination of the appeal and for provision to be made for costs.

The Notice of Motion is brought pursuant to grounds supported by the affidavit of the 2<sup>nd</sup> Applicant, in which he contended that the Applicants and the Respondent were parties in Malindi ELC Case No. E074 of 2022. He deponed that in the Judgment delivered on 29<sup>th</sup> January 2025, the Applicants were ordered to be evicted from Plot No. 1111 (CR. 80759) (*the suit property*) located in Watamu within ninety days from the date of the Judgment, as their occupation was found to be illegal.

It was further averred that, being dissatisfied with the Judgment, the Applicants have sought a stay of execution from this Court so as to pursue an appeal, and that they had filed a Notice of Appeal signifying their intention to appeal the decision of the ELC. The deponent contended that the trial Judge's decision was based on adverse possession, yet adverse possession was not pleaded by any of the parties; that the Applicants had been in occupation of the suit property for over thirty years, and that

during that time, they were awaiting Government intervention for clearance of the squatters in Watamu; that the demolition exercise contemplated in the Judgment would eventually render

them and their families homeless and destitute; and that, therefore the intended appeal would be rendered nugatory.

It was also deponed that the applicants have prepared the Record of Appeal, and the grounds of appeal raised therein demonstrate that the appeal has reasonable chances of success. Annexed to the application is a Notice of Appeal dated 4<sup>th</sup> February 2025 and a Memorandum of Appeal in which the Applicants contend that the trial Judge was in error in concluding that the Letter of Allotment was allegedly open and not specific, and could therefore be accepted at any time, thereby exempting the Respondent from adhering to the strict time frame required for fulfilling the conditions of allotment; and that the learned Judge was in error in adjudicating extensively on the issue of adverse possession, an issue that had not been raised by the Applicants.

The record does not show that the Respondent filed any reply to the Motion.

When the Motion came up for hearing on a virtual platform,

learned counsel **Ms. Minyazi** appeared for the Applicants while learned counsel **Ms. Muisyo** appeared for the Respondent. Despite having informed the Court that they had filed written submissions, a review of the proceedings does not disclose that either party filed any written submissions.

Be that as it may, as a brief background, the dispute revolves around ownership and occupation of the suit property, where the Respondent filed suit seeking a declaration that the Applicants were in unlawful occupation of her property.

The Respondent stated that she is the lawful lessee of the parcel, having been allocated the land by the National Government through a letter of allotment dated 15<sup>th</sup> September 1992, which she accepted and paid for. Although the survey and issuance process took time, she was eventually issued with a registered lease in 2022, formally converting the land from Government land to private property registered in her name.

Upon attempting to assert her rights over the land, the Respondent discovered that the Applicants were in occupation and had refused to vacate the suit property. She therefore sought declarations of trespass, an eviction order, for police assistance for enforcement, a permanent injunction and general damages.

The Applicants for their part, contended that they were the rightful occupants of the suit property by virtue of over 30 years'

uninterrupted, peaceful, and open possession, which they argued entitled them to ownership through adverse possession. They claimed that they were recognized squatters by the

former Municipal Council of Kilifi, had been allowed to pay rates, they had approved development plans and participated in squatter-upgrade processes. They further alleged that the Respondent's acquisition was fraudulent, and that her delay from 1992 to 2022 to obtain a lease showed non-compliance with allotment conditions.

Having fully considered the matter, the Court concluded that the Respondent was the lawful owner of the suit property and that the Applicants' occupation constituted illegal trespass, and therefore ordered the Applicants to vacate the suit property within 90 days of the Judgment.

We begin by observing that the Applicants have brought this application seeking reliefs pursuant to the provisions of the Civil Procedure Act and the rules of the Civil Procedure Code, in total disregard of the rules of this Court which under **Rule 5(2)(b)** of the **Court of Appeal Rules** make provision for the reliefs sought.

However, notwithstanding the grave inadvertence on their part, in terms of the edicts of **Article 159** of the **Constitution**

that we refrain from dwelling on procedural technicalities, we shall proceed and determine the application by applying the principles pertaining to **Rule 5(2)(b)**. The principles governing the

grant of relief under **Rule 5(2)(b)** require an applicant to satisfy two concurrent

requirements: first, that the appeal is arguable; and second, that unless the stay or injunction sought is granted, the appeal will be rendered nugatory—that is, useless, illusory, academic, or devoid of practical effect. An arguable appeal does not mean one that must ultimately succeed; rather, it is an appeal that is not frivolous and raises at least one genuine issue worthy of consideration and requiring a reasoned response from the respondent. These principles were affirmed in the cases of **Stanley Kang’ethe Kinyanjui vs Tony Ketter & 5 Others [2013] eKLR** and **Kieni Plains Co. Ltd & 2 Others vs Ecobank Kenya Ltd [2018] eKLR.**

With respect to whether the intended appeal is arguable, as was held in the cases of **Kenya Tea Growers Association & Another vs Kenya Planters & Agricultural Workers Union, Civil Application No. Nai 72 of 2001** and **Dennis Mogambi Mang’are vs. Attorney General & 3 others [2012] KECA 251 (KLR)**, it is well established that even one *bona fide* ground is enough to satisfy this requirement.

In the Applicants' draft memorandum of appeal, they complained among others that the learned Judge wrongly concluded that the Letter of Allotment was allegedly open and not specific, and could therefore be accepted at any time, thereby exempting the Respondent from adhering to the strict time frame

required to fulfil the conditions of allotment, and further that the learned Judge extensively adjudicated on the question of adverse possession, an issue that had not been raised by the parties. We find that these grounds sufficiently demonstrate that the intended appeal is arguable.

Regarding the nugatory limb, the Applicants explained that together with other occupants, they have erected homes and other structures on the suit property, and that following delivery of the Judgment, they face imminent eviction and the demolition of their homes and will be rendered homeless and destitute; and that if eviction proceeds before the appeal is heard, they will suffer loss that may be impossible to reverse.

In the case of **Kang'ethe & Another vs Muhia Muchiri Ng'ang'a [2017] KECA 30 (KLR)**, this Court held that the nugatory inquiry turns on whether the act sought to be stayed is reversible, and if not, whether an award of damages would offer adequate compensation to the aggrieved party.

Indeed, given the circumstances of the case, were the

Applicants to be evicted before the appeal is heard and determined, there is every likelihood that the appeal will be rendered nugatory.

Accordingly, the Applicants have met the requisite threshold for the grant of the orders of stay of execution under **Rule 5(2)(b)**. The Notice of motion dated 14<sup>th</sup> April 2025 is merited and is allowed. Costs shall be in the intended appeal.

***It is so ordered.***

***Dated and delivered at Mombasa this 30<sup>th</sup> day of January, 2026.***

**A. K. MURGOR**

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

**JAMILA MOHAMMED**

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

**G. W. NGENYE-MACHARIA**

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

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

***Signed  
DEPUTY REGISTRAR***