



Omar (Sued as the legal representative of the Estate of the Late Warsame Omar Farah) v Abdi & 3 others (Civil Application E479 of 2024) [2026] KECA 140 (KLR) (30 January 2026) (Ruling)

Neutral citation: [2026] KECA 140 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E479 OF 2024
SG KAIRU, M NGUGI & P NYAMWEYA, JJA
JANUARY 30, 2026**

BETWEEN

MOHAMED WARSAME OMAR (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE WARSAME OMAR FARAH) APPLICANT

AND

**HATHAR HAJI ABDI 1ST RESPONDENT
NORTH EASTERN IMPEXICO AGENCIES LIMITED 2ND RESPONDENT
NAIROBI CITY COUNTY 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT**

(Being an application for stay of execution and injunction pending appeal from the judgment and decree of the Environment and Land Court at Nairobi (Oguttu-Mboya, J.) dated 6th May 2024 in ELC Case No. E218 of 2020)

RULING

1. In the application dated 20th September 2024, the applicant seeks the following substantive orders:
 - a. That pending hearing and determination of Civil Appeal No. E697 of 2024, an order be and is hereby issued staying execution of the judgment and decree of the Environment and Land Court in Milimani ELC Case No. E213 of 2020;
 - b. that in the alternative, this Court be pleased to issue a status quo order in respect of the use, occupation of and title to LR. No. 37/714 pending hearing and determination of Civil Appeal No. E697 of 2024 between the parties herein;



- c. in the alternative, that this Court be pleased to issue an injunction restraining the 1st and 2nd respondents from evicting or interfering with the occupation and use of L.R. No. 37/714 pending hearing and determination of Civil Appeal No. E697 of 2024.
1. The application is brought under rule 5(2)(b) of the Court of Appeal Rules and is based on the grounds on its face and as elaborated in the affidavit in support sworn by the applicant on the same date.
 2. The background to the application is that the applicant filed suit seeking, as against the 1st and 2nd respondents, a declaration that the agreement for sale of part of L.R. No.37/714 between the applicant and the 1st respondent was valid and enforceable; an order of specific performance to compel the 1st respondent and or the 2nd respondent to immediately transfer the agreed 1-acre portion of L.R No. 37/714 to the applicant, failing which the Registrar of Titles do process and register the applicant as the owner of the said portion; an order of mandatory injunction to compel the 3rd and 4th respondents to immediately cancel the proposed subdivision of L.R No. 37/714 into two parcels and, in the alternative, the defendants be ordered to immediately refund the purchase price of the 1-acre portion of L.R No. 37/714 at the market value obtaining at the time of judgment, plus interest at commercial rates from 2004 until payment in full.
4. The applicant's case is that he has been and still is in occupation and use of the suit property. He contended that his late father, Warsame Omar Farah, started occupying the property in 1983 as a tenant; that from 2004, he was occupying the property as owner pursuant to a sale agreement between himself and the 1st respondent, who had offered the property for sale to the applicant's father, at the purchase price of Kshs. 15,000,000. He contended that it was not until 20th May 2011 that the applicant's father and the 1st respondent entered into a sale agreement with the 1st respondent, a director, with his son, of the 2nd respondent, who undertook to transfer the property to the applicant's father, but failed to do so.
 5. The 2nd respondent filed a counterclaim in which it sought, inter alia, Kshs 41,968,059.00 with interest thereon from the date of filing the counterclaim until payment in full; a declaration that the agreement dated 20th May 2011 was illegal and unenforceable against the 2nd respondent; and an order of eviction of the applicant from the subject property, being the 1 acre that he occupies on the suit property, L.R. No. 37/714.
 6. Upon hearing the suit, the trial court dismissed most of the prayers sought by the applicant but entered judgment in his favour for refund of Kshs. 15,000,000, being the purchase price paid to the 1st respondent by the applicant's father; and interest thereon at court rates with effect from 20th May 2011 until payment in full, the said amount and interest thereon to be recovered from the 1st respondent.
 7. The trial court further entered judgment for the 2nd respondent on certain aspects of its counterclaim. It issued a declaration that the agreement dated 20th May 2011 is illegal and unenforceable against the 2nd respondent; directed the applicant to vacate and hand over vacant possession of the portion of the suit property under his occupation within 180 days from the date of the judgment; and that in default, the 2nd respondent be at liberty to levy eviction against him.
 8. The applicant is aggrieved by the judgment and has filed the present application seeking the orders aforesaid. He avers that the 2nd respondent has taken over rent collection from the suit premises since November 2024, and that there is a real risk of alienation or disposal of the suit property. He avers that



- he has developed the land substantially and asserts that execution of the decree would occasion grave prejudice to him and render his appeal, which he has already filed and which is arguable, nugatory.
9. The application is opposed by an affidavit sworn on 4th October 2024 by Abdirahim hathar Haji. Mr. Haji avers that he is one of the directors of the 2nd respondent, which is the registered owner of the suit property; that the property is located in an industrial area and thus can only be used for commercial purposes; that the trial court had made a finding that the 1st respondent, (hathar Haji Abdi) had no authority to sell the suit property; that the trial court allowed the applicant to occupy the suit property for a period of six months, but there was no clarity from the judgment on whether the applicant was supposed to pay rent for the said period; that on 27th May 2024, the 2nd respondent requested the applicant to pay agreed monthly rent of Kshs. 400,000.00; that he had received information that the applicant was no longer in occupation of the suit property but had leased it to third parties to run businesses thereon; and that he had therefore instructed his advocates to prepare eviction notices directed at the three illegal occupants of the suit property. The 1st respondent avers that the applicant has not denied the presence of third parties on the suit property but has alleged that the eviction notice was directed to him. The 1st respondent asserts that the applicant was allowed to occupy the suit property for 180 days from the date of the judgment; that he is not on the suit property and that it is third parties who are sought to be evicted therefrom.
 10. It is averred further that the judgment of the court was delivered on 6th May 2024 and this application has therefore been brought after an unreasonable delay. He asserts that the applicant has not demonstrated that the appeal has reasonable chances of succeeding, and he prays that the application be dismissed with costs to the 2nd respondent.
 11. The 1st respondent did not file a response, nor did the 3rd and 4th respondents, though duly served.
 12. At the hearing of the application, learned counsel, Dr. O’Kubasu, appeared for the applicant, learned counsel, Mr. Muchoki, appeared for the 1st respondent, while learned counsel, Mr. Kamwaro, appeared for the 2nd respondent. There was no appearance for the 3rd and 4th respondents.
 13. In highlighting the applicant’s submissions, Dr. O’Kubasu submitted that in his memorandum of appeal, the applicant had raised very serious issues for consideration by the Court. First, that the 1st respondent is one of the directors and was the controlling director of the 2nd respondent at the time it entered into the agreement for sale of the suit property. He submitted that the trial court treated the question of privity of contracts as if it is a general rule, with no exceptions; and that where there’s an agency relationship, the doctrine of privity of contracts may be applied with that particular exception. Further, that while the trial court found that the agreement the subject of the proceedings was not enforceable on account of lack of privity of contract, in dealing with the question whether the applicant was entitled to the property by virtue of adverse possession, the trial court held that the applicant had entered the property by virtue of an agreement, and therefore adverse possession did not apply. Dr. O’Kubasu submitted that the trial court was assessing the agreement to be valid for purposes of disallowing a claim for specific performance, but assessing the same agreement as valid for purposes of assessing a claim against adverse possession. The applicant’s submission, therefore, was that on these two grounds, the applicant’s appeal was arguable.
 14. As to whether the appeal would be rendered nugatory should the orders sought not be granted, the applicant submitted that the trial court ordered the applicant to give vacant possession within 180 days of the judgment; that the applicant had been occupying the property since 1983, first as a tenant and, since 2004, by virtue of a sale agreement. It was submitted that after the suit was filed, the 2nd respondent had charged the suit property, which was one of the reasons why the trial court stated that it could not grant orders of specific performance.



15. The applicant submitted that the property had been charged in November 2021, after the suit had been filed, and there was a fear that the respondents, especially the 2nd respondent, would dispose of the property or default in payment, so that the property would be unavailable should his appeal before this Court succeed.
16. In highlighting the 2nd respondent's submissions dated 16th October 2024, Mr. Kamwaro argued that the application had been filed more than four months after the judgment; that the applicant was not in possession, a fact confirmed by his counsel; and he could therefore not seek orders in his favour while third parties were in possession.
17. As to whether the appeal would be rendered nugatory, Mr. Kamwaro submitted that the property has been charged to a financial institution, and there is therefore no danger of the property being disposed of; and that there had been no demonstration of any attempts by the 2nd respondent to dispose of it.
18. We have considered the application, the affidavits in support and opposition thereto, and the submissions of the parties. The principles applicable on an application under rule 5(2)(b) are settled. The applicant must demonstrate that the appeal is arguable, and that unless the orders sought are granted, the appeal would be rendered nugatory- see Stanley Kangethe Kinyanjui v Tony Ketter & 5 others [2013] KECA 378 (KLR and Trust Bank Limited & another vs Investech Bank Limited & 3 others (2000) eKLR.
19. Before we consider these principles against the facts of the matter before us, we consider the argument by the 2nd respondent that the present application was filed after inordinate delay. We observe, however, that the applicant filed the present application on 20th September 2024, within the 180 days that the trial court had granted him in the judgment dated 6th May 2024 to vacate the premises. We are not persuaded, therefore, that there was inordinate delay in lodging the application.
20. Turning back to the substance of the application, we consider the 1st principle on the arguability of the appeal. The applicant seeks to appeal on the question, among others, whether the trial court could properly find that the agreement dated 20th May 2011 between the applicant and the 1st respondent was not valid and enforceable for purposes of addressing the applicant's claim for specific performance; yet find that the applicant's claim in adverse possession could not be maintained as he had entered into the suit premises on the strength of the said agreement. We find that on this ground, the appeal is arguable, bearing in mind that, as was held in Kenya Commercial Bank Limited vs Nicholas Ombija (2009) eKLR, "An "arguable" appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court."
21. On whether the appeal will be rendered nugatory, it was submitted for the applicant that there is fear that the applicant will be evicted from the suit property, and that the property, which had been charged by the 2nd respondent after the suit was filed, may be disposed of, thus rendering the appeal nugatory. The 2nd respondent's response is that on the contrary, the fact that the property is charged should offer solace to the applicant.
22. It is not disputed that the applicant has been in possession of the suit premises, whether personally or by persons on the premises with his authority, from at least 2004. We are satisfied that should the orders sought not be granted, the applicant's appeal, Civil Appeal No. E697 of 2024, which has already been filed, as we were informed at the hearing hereof, will be rendered nugatory as the property may be disposed of before the hearing and determination of the appeal. As we make this finding, we also note the acknowledgement of counsel for the 1st and 2nd respondent at the hearing hereof that there was a need to preserve the suit property pending appeal.



23. We are, accordingly, satisfied that the orders sought herein are merited, and we hereby grant the following orders:

- i. That an order be and is hereby issued staying execution of the judgment and decree of the Environment and Land Court (Oguttu-Mboya, J.) in ELC Case No. E218 of 2020 dated 6th May 2024 pending the hearing and determination of Civil Appeal No. E697 of 2024;
- ii. That an injunction be and is hereby issued restraining the 1st and 2nd respondents from evicting the applicant or interfering with the occupation and use of L.R. No. 37/714, including the collection of rent therefrom, and from disposing of or transferring the ownership of the property known as LR. 37/714 pending hearing and determination of Civil Appeal No. E697 of 2024;
- iii. That the costs hereof shall abide the outcome of the said appeal.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JANUARY, 2026.

S. GATEMBU KAIRU, FCIArb, C.Arb

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JUDGE OF APPEAL MUMBI NGUGI

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

