

**IN THE COURT OF
APPEAL AT NYERI**

(CORAM: M'INOTI, KANTAI & ALI - ARONI,

JJ.A.) CIVIL APPLICATION NO. E069 OF 2025

BETWEEN

PETER NGARI NDUATI.....APPLICANT

AND

ANTONY NJAGI NDUATI.....RESPONDENT

(An application for stay of execution against the Judgment and Decree of the Environment and Land Court of Kenya at Embu (A. Kaniaru, J.) delivered on 30th April, 2024

in

E.L.C. Appeal No. 4 of 2023.)

RULING OF THE COURT

The dispute at the Senior Principal Magistrate's Court, Runyenjes, involved ownership of a parcel of land. The original parcel of land known as **Kagaari/Weru/382** was registered in the name of the County Council of Embu which held the same in trust for members of the Marigu Clan. That parcel was subdivided to members of that clan and the respondent, (**Antony Njagi Nduati**) was allocated parcel number 4349 (measuring about 1 acre) while his 2 brothers were allocated other parcels, but the applicant, **Peter Ngari Nduati**, was not allocated any land. He sued his brother (the respondent) claiming part of the said parcel, but his suit was dismissed and he filed an appeal at the Environment and Land Court at Embu, Kaniaru, J. found no merit in the appeal which he dismissed in the judgment delivered on 30th April, 2024.

The applicant has approached us by Motion stated to be “Under Sections 1A, 3 and 3A of the Civil Procedure Act, Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Rule 5(b) of the Court of Appeal Rules” where we are asked in the main that pending the hearing and determination of the application “interparties” we stay execution of the judgment delivered on 30th April, 2024 and provide for costs of the application.

It is stated in the grounds in support of the application and in the applicant’s affidavit that the applicant is apprehensive that he and his family who have been in occupation and using the land to cultivate seasonal and commercial crops “... will suffer substantial loss of their livelihood”; that the land will be exposed to adverse dealings by the respondent including sale, transfer, lease or mortgage to third parties which in turn would affect the substratum of the appeal, thus rendering it nugatory; that the subject matter of the appeal should be preserved to await determination of the appeal; that the appeal is arguable with high chances of success; that the applicant is about to be evicted and that the respondent will not suffer any prejudice if the application is allowed.

Attached to the Motion is a Notice of Appeal and draft Memorandum of Appeal.

The respondent in a replying affidavit wonders why the application is presented about 1 year after delivery of the said judgment; that he was allocated the land by his clan; that the

appellant had registered himself as owner of the land using suspicious means, leading to the suit at Runyenjes where it was

found that the applicant had used fraud to have himself registered as owner of the land; that the applicant is not entitled to any part of the land and orders of stay of execution of the judgment should be denied.

We must say that the application could have been more elegantly drawn; counsel should look up the law to see which provisions to cite in support of an application. The Civil Procedure Act and the Rules made thereunder have no relevance to applications in this Court.

We have seen and considered the applicant's submissions which dwell on the applicant's counsels' understanding of the provisions of Order 42 rule 6 of the Civil Procedure Rules.

For an applicant to succeed in an application for stay of execution of a judgment or order for an injunction under rule 5(2) (b) of the rules of this Court he must, firstly, demonstrate that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that the same is not frivolous. Such an applicant must, in addition, show that the appeal would be rendered nugatory absent stay. See, for a detailed discussion of those principles, the case of ***Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2013] eKLR.***

The position here is that a suit at the Magistrates Court and the resultant appeal to the ELC, Embu, were dismissed.

In **Mbaruk vs. Mwasi & 6 Others** (Civil Application E006 of 2020) [2022] KECA 520 (KLR) (6 May 2022) (Ruling), this Court stated:

"In response to that challenge, we shall rely and adopt this Court's ruling in the case of County Secretary of Kajiado & 47 others v Salaries & Remuneration Commission & another [2021] eKLR where the Court observed:

"In addition, in Daniel Lomagul Kandeï & 2 Others v. Kamanga Holdings Limited & 40 Others (2017) eKLR this Court expressed itself as follows:-

"In the motion before us the applicants sought a stay of the striking out of the O.S.

This was a negative order which, by parity of a long line of decisions of this court as demonstrated above, is incapable of being stayed."

Similarly, in **Mwangi Gikonyo & Another vs. Mukumbu Wambui** (Civil Application E019 of 2022) [2022] KECA 1033 (KLR) (23 September 2022) (Ruling), this Court stated:

"First, the decision appealed against is a dismissal. It is therefore a negative order. This Court has innumerable times pronounced itself on stay of negative orders. In Western College of Arts and Applied Sciences v EP Oranga & 3 Others [1976] eKLR, the learned Judges stated thus:-

"What is there to be executed under the judgment, the subject of the intended appeal" The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In Wilson v Church the High Court had ordered the trustees of a fund to

make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to

pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered.”

The applicant here is faced with a situation where a suit was dismissed and the appeal to the ELC also dismissed. He asks in the Motion before us that we stay execution of the Judgment of ELC “...pending hearing and determination of this application” but he does not pray for any orders after the application has been heard and determined.

The applicant has not met the threshold on which applications of this nature are considered. The application has no merit and we dismiss it with costs to the respondent.

Dated and delivered in Nyeri this 13th day of February, 2026.

K. M’INOTI

.....
JUDGE OF APPEAL

S. ole KANTAI

.....
JUDGE OF APPEAL

ALI - ARONI

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR