

**IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: GATEMBU, MUMBI NGUGI & NYAMWEYA, JJ.A.)

CIVIL APPLICATION NO. E476 OF 2025

BETWEEN

**JOB OKUNA OYUGI.....1ST
APPLICANT DOUGLAS ODHIAMBO OYUGI.....
.....2ND APPLICANT JOSHUA
ONYANGO.....3RD APPLICANT**

*(Suing as the administrators of the estate of
HEZEKIAH NELSON OYUGI-
DECEASED)*

AND

**TIMDAR SAID SHERMAN.....1ST
RESPONDENT
THE COMMISSIONER OF LANDS..... 2ND
RESPONDENT**

*(Being an application for an injunction pending the hearing and
determination of an intended appeal from the judgment of the
Environment and Land Court of Kenya at Nairobi (O.A. Angote, J.)
dated 10th July 2025*

in
**ELC Cause No. 1517 of
1998)**

RULING OF THE COURT

1. The applicants are the administrators of the estate of the late Hezekiah Nelson Oyugi (deceased), who was the registered proprietor of the suit property, L.R. No. 209/4491, Lavington. They have filed the application dated 31st July 2025 seeking an injunction to restrain the 1st respondent from selling, leasing, charging, transferring or

otherwise interfering with the suit property pending the hearing and determination of their intended appeal from the judgment of the Environment

and Land Court (ELC) at Nairobi (**O.A. Angote, J.**) dated 10th July 2025, and a stay of proceedings in **Nairobi ELC Case No. 1517 of 1998**. The application is brought under rule 5(2)(b) of this Court's Rules, 2022 and is supported by an affidavit sworn by the 2nd applicant, Douglas Odhiambo Oyugi, on 31st July 2025.

2. The applicants, who were the plaintiffs before the ELC, had filed suit seeking orders, in the Further Amended Plaint dated 6th June 2022, that the transfer of L.R. No. 209/4491 in favour of the 1st respondent, the 1st defendant before the ELC, be declared null and void; that the Registrar of Lands be ordered to amend the Land Register and reverse entries numbers 15 and 16 on Grant Number I. R. 11591; and that the 1st respondent be ordered to provide accounts for the rent collected from the suit property to the appellants. They further sought an order that the 1st respondent be restrained by a permanent injunction from selling, disposing or dealing with the property and/or receiving rent from the suit property; and that the 1st respondent be ordered to give vacant possession of the suit property to the applicants within 30 days of the court's judgment, failing which an eviction order

do issue.

3. In its judgment dated 10th July 2025, the ELC dismissed the applicants' suit. It found that a constructive trust arose in favour of the 1st respondent to prevent the applicants from resiling from an agreement for sale of the property to the 1st respondent dated 13th January 1998; and acting in a manner that would occasion unjust enrichment to themselves and the estate of the deceased.
4. It further found that the 1st respondent's equitable and legal interest in the suit property, arising from her payment of the full purchase price and long-standing possession, and thereafter registration of the title to the suit property in her favour, is binding upon the applicants and shall subsist against the estate of the deceased.
5. Aggrieved by the decision, the applicants filed a notice of appeal dated 16th July 2025 and the application now before us.
6. In the affidavit in support of the application sworn by Douglas Odhiambo Oyugi on 31st July 2025, it is averred for the applicants that they have an arguable appeal as demonstrated by the grounds of appeal in their draft memorandum of appeal, among others, that the trial court erred in determining

the suit on the issue of constructive trust that was not pleaded

by the 1st respondent, thus ambushing them and condemning them unheard; in assuming jurisdiction on the issue of constructive trust yet it was not pleaded by the 1st respondent as a defence or counterclaim; in determining that the applicants executed the transfer of the suit property to the 1st respondent; and in determining that the transfer of the suit property to the 1st respondent was lawful and binding on the estate of Hezekiah Nelson Oyugi notwithstanding the clear finding that it was effected before confirmation of grant; and that the court order used to effect the transfer was forged.

7. The applicants aver that the 1st respondent has, pursuant to the judgment, sought to access rent held in a joint account and there is nothing to prevent her from selling, transferring or otherwise alienating the suit property so as to defeat their appeal, unless this Court issues an injunction pending appeal and/or orders a stay of proceedings in the superior court. They contend that they have an arguable appeal which will be rendered nugatory should the orders sought not be granted.
8. The 1st respondent opposes the application by a rather lengthy 67-paragraph affidavit which she swore on 23rd

August 2025. She goes into extensive detail into the history of the matter and the (mis)conduct of the applicants. However,

the gist of her averments that is of relevance to this application is her contention that the applicants do not have an arguable appeal; and that even if they do, it will not be rendered nugatory as the applicants have not demonstrated that even if the property is sold during the pendency of the appeal, they cannot be compensated in damages.

9. When the matter came up for hearing before us on 27th August 2025, the applicants were represented by learned counsel, **Mr. Ochwo**, while the 1st respondent was represented by learned counsel, **Mr. Wachira**. There was no appearance for the 2nd respondent, though served. Learned counsel, Mr. Ochwo and Mr. Wachira highlighted their respective clients' submissions dated 26th August 2025 and 25th August 2025 respectively, which we have read and considered.
- 10.** Under rule 5(2)(b) of this Court's Rules, an applicant is required to satisfy the Court on two principles. First, that it has an arguable appeal and, secondly, that absent the orders sought, the intended appeal, if successful, will be rendered nugatory-see **Stanley Kangethe Kinyanjui v Tony Ketter & 5 others** [2013] KECA 378 (KLR) and

Reliance Bank Ltd (In

Liquidation) v Norlake Investments Ltd [2002] 1 EA
227].

11. With respect to the first principle, we have noted the grounds of appeal in the applicants' draft memorandum of appeal. Two of these grounds, which were highlighted by learned counsel, Mr. Ochwo, are that the trial court erred in determining the appeal on the basis of a constructive trust, an issue that was not pleaded by the 1st respondent. Secondly, that the trial court erred in finding that it was the applicants who must have procured the forged court order used to transfer the suit property to the 1st respondent. We are satisfied that the applicants' intended appeal raises at least two issues that are arguable and merit consideration by this Court.
12. The second principle requires that a party satisfies the court that, should the orders sought not be granted and its appeal succeeds, it will be rendered nugatory. The applicants submit, on the authority of ***Githunguri v Jimba Credit Corporation Ltd*** (No 2) [1988] KECA 141 (KLR), that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed, if allowed to happen, is reversible; and if not reversible, whether damages would be an adequate remedy.
13. The applicants submit that the subject matter of the suit is

land, situate in Westlands, Nairobi, and is valued at Kshs.

350-400 million. On her part, the 1st respondent submits that the suit property was purchased for an ascertainable amount of Kshs. 10 million, while the rental income held in the joint account between counsel for the parties is also ascertainable. It is her submission, therefore, that damages, including a refund of these amounts, are available to the applicants in the event that the appeal succeeds.

14. We have considered the submissions of the parties on this issue. We note the submissions of the applicants with respect to the value of the suit property, while the respondent places it at the purchase value as at 1990. We note that the 1st respondent has not deposed with respect to her ability to compensate the applicants in damages should she dispose of the suit property prior to the determination of the appeal, and the appeal succeeds. We are satisfied that in the circumstances, an order for the preservation of the subject matter of the appeal is merited.
15. Accordingly, we hereby grant an injunction restraining the 1st respondent from transferring or otherwise disposing of the suit property pending hearing and determination of the applicants' appeal.

16. With regard to the application for stay of proceedings before the trial court, we are not satisfied that the continuation of such post-judgment proceedings as may be ongoing before the ELC will render the appeal nugatory, and we decline to issue the order for stay of proceedings.
17. The costs of the application shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 13th day of February, 2026.

S. GATEMBU KAIRU, FCI Arb, C.Arb.

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**JUDGE OF
APPEAL MUMBI**

NGUGI

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.