

**IN THE COURT OF  
APPEAL AT NYERI**

**(CORAM: KANTAI, LESIIT & ALI-ARONI, JJ.A.)**

**CIVIL APPEAL (APPLICATION) NO. E062 OF**

**2024 BETWEEN**

**PETER NDUNGU LUKA.....APPLICANT**

**AND**

**WILSON MUCHOKI WAIKAYU.....RESPONDENT**

*(Being an application for orders of injunction against the Judgment of the Environment and Land Court at Murang'a (Gacheru, J.) delivered on 8<sup>th</sup> February, 2024*

*in*

***E.L.C. A. No. E020 of 2023.)***

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**RULING OF THE COURT**

1. By Notice of Motion dated 5<sup>th</sup> July, 2024, the applicant, **Peter Ndungu Luka**, invoked **rule 5 (2)(b)** of the **Court of Appeal Rules 2022**, seeking orders of injunction and/or stay execution of the decree pursuant to the judgment delivered on 8<sup>th</sup> February, 2024 in ELCA No. E020 of 2023. In the alternative, he seeks a conservatory order on all the property known as **Loc.6/Gikarangu/773** (hereinafter the suit land) pending the hearing and final determination of the intended appeal. The application is supported by the grounds on its face and in the affidavit of the applicant sworn on even date.
2. In the impugned judgment, Gacheru, J. dismissed the applicant's appeal for want of merit and upheld the trial

court's

judgment dated 8<sup>th</sup> June, 2023. The trial court had entered judgment in favor of the respondent and found that there was a trust in existence over the suit land, finding that the applicant held the land in trust for himself, the respondent, one Simon Njoroge and one Lukas Waikayu.

3. Aggrieved by the decision of the Environment and Land Court dismissing his appeal, the applicant preferred an appeal to this Court and, in the interim, filed this application. The applicant argued that he has an arguable appeal with very high chances of success. He has annexed a memorandum of appeal dated 15<sup>th</sup> April, 2024 in which he faults the first appellate Judge on five (5) grounds. His main contention is that he had been in exclusive possession of the suit land since the year 1979, without interference from the respondent and/or his siblings and that he was the registered owner of the same, hence he did not hold the suit land in trust for himself or his siblings. The applicant further argued that the respondent would not be prejudiced if the orders sought were granted, as he was not in occupation of the suit land. He contended that if stay sought was not granted, the appeal would be rendered nugatory.
4. In response, the respondent filed his replying affidavit, sworn on 29<sup>th</sup> January, 2025. He avers that the first appellate court did not grant positive orders capable of being stayed. In addition, the execution of the lower court's judgment had already commenced, and the suit land had been subdivided

in

compliance with the decree of the lower court. He averred that, therefore, the applicant's appeal to this Court was hopeless and incompetent. The respondent averred that the applicant had sought similar orders for stay in the lower court as well as in the first appellate court, which were dismissed, hence, the application for stay offended the principle of finality. Lastly, the respondent argued that no injustice was occasioned to the applicant.

5. At the hearing of the application before us on the 18<sup>th</sup> February, 2025 the applicant appeared in person, while **Mr. Njoroge** learned counsel appeared for the respondent. The matter proceeded by way of written submissions with a brief oral highlighting. In summary, the appellant submitted that the survey team had already visited the suit land on 24<sup>th</sup> January, 2024, and were scheduled to return on 20<sup>th</sup> February, 2025. That if the subdivision proceeded to be done before the case is determined, he would suffer loss. In addition, his appeal will be rendered nugatory. He emphasized that the suit land was originally adjudicated and registered in his name. He disputed the findings of the lower court and the first appellate court that he held the suit land in trust for his relatives.
6. On his part, **Mr. Njoroge** reiterated the respondent's written submissions dated 29<sup>th</sup> January, 2025. In brief, he argued that the superior court had dismissed the matter, leaving no positive orders capable of being stayed. He added that

even an

injunction should not be granted because the appeal lacked merit, had no arguable grounds, and was unlikely to succeed, particularly since it was a second appeal. Lastly, he pointed out that the applicant delayed in filing the application with no explanation advanced which showed that he was not deserving of this Court's intervention.

7. We have carefully considered the application, the averments in the supporting affidavit and the annexures thereto, the replying affidavit, the rival arguments by the parties in both written and oral submissions, the authorities cited and the applicable law. The only issue for determination is whether the applicant has satisfied the requisite twin principles for the grant of the orders sought by demonstrating that he has an arguable appeal and that, should the orders not be granted and the appeal eventually succeeds, his appeal would be rendered nugatory. See **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] KECA 378 (KLR)**.
8. On the first limb, as to whether or not the appeal is arguable, we have perused the grounds of appeal contained in the memorandum of appeal. The applicant challenges the judgment of the first appellate court for failing to consider that he was the sole registered owner of the suit land, failing to consider section 26 of the Land Registration Act and finding the suit land was encumbered by the existence of a customary trust, which finding was in error. Bearing in mind that an arguable appeal

must not be one which will necessarily succeed, we find that the grounds raised are arguable.

9. On the second limb of whether or not the appeal will be rendered nugatory if the order sought is not granted, were the appeal to eventually succeed. The applicant contends that if the injunction orders sought are not granted, he will suffer irreparable loss. The nature of the loss has not been disclosed or demonstrated.
10. The respondent's position is that the decree of the lower court has already been executed, and the suit land subdivided as per the decree of the lower court. He maintained that there was nothing left to stay as the applicant delayed bringing this application.
11. The applicant confirmed that the execution process was underway and that the survey team had visited the suit land and were in the process of finalizing the exercise. This Court cannot act in vain. It was not clear whether by the time the application was heard, the survey process had actually been completed. Apart from that lacuna as to the true position on the ground, the applicant, despite claiming that he would suffer loss if the injunction sought was not granted, has not demonstrated what kind of loss he stood to suffer, and whether it was such as cannot be adequately compensated by an award of damages. Therefore, we find that even though the applicant may have an arguable appeal, having not established that his

appeal would be rendered nugatory, we find that the application fails.

12. The upshot is that the applicant's application dated 9<sup>th</sup> July, 2024, lacks merit and is accordingly dismissed with costs to the respondents.

**Dated and delivered at Nyeri this 27<sup>th</sup> day of February, 2026.**

**S. ole KANTAI**

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

**J. LESIIT**

.....  
**JUDGE OF**

**APPEAL ALI**

**- ARONI**

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

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

*Signed*  
**DEPUTY REGISTRAR**