

**IN THE COURT OF
APPEAL AT NYERI**

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

JJ.A) CIVIL APPLICATION NO. E054 OF

2025 BETWEEN

BIBIANA NJERI MBOGO.....APPLICANT

AND

NANCY WAMIRU MBOGO.....RESPONDENT

(Application for injunction and stay of execution pending appeal from the judgment and decree of the Environment & Land Court at Kerugoya (Mutungi, J.) dated 27th February 2025

in

ELCA No. 017 of 2021)

RULING OF THE

COURT

1. By her notice of motion dated 16th April 2025, ***the applicant,***

Bibiana Njeri Mbogo, prays for orders of injunction and stay of execution pending appeal from the judgment of the ***Environment & Land Court (ELC)*** at ***Kerugoya (Mutungi, J.)*** dated 27th February 2025. The intended appeal is a second appeal, the dispute having first been heard and determined by the ***Principal Magistrate's Court*** at ***Gichugu,*** followed by a first appeal before the

ELC.

2. The applicant filed a claim in the trial court against the **respondent, Nancy Wamiru Mbogo**, for a declaration that **LR No. Baragwi/Kariru/2617 (the suit property)** was registered in the name of the respondent in trust for the applicant, and an order for subdivision of the suit property into two equal portions, one to be registered in the applicant's name. The applicant averred that the suit property was registered jointly in the names of her late father (the deceased) and the respondent (her step-mother) to hold in trust for her, and that upon the death of her father, the respondent secretly transferred the suit property into her sole name and was intent on evicting her therefrom.
3. In her defence and counterclaim, the respondent denied the applicant's averments and pleaded that the property known as **LR No. Baragwi/Kariri/180** from which the suit property was excised, was initially registered in the name of the deceased alone. In or about 2005, he subdivided the said property into eight parcels, of which he transferred seven to his sons and daughters and left the suit property, which he registered in his name and that of the respondent.

The respondent further

averred that the applicant was a nun who lived in a convent rather than on the suit property and that upon the death of the deceased on 26th February 2020, the suit property was registered in the respondent's sole name to own absolutely and not in trust for the applicant. She therefore prayed by way of counterclaim for a declaration to that effect and an order compelling the applicant to remove a caution she had placed on the suit property.

4. After hearing the dispute, the trial court found that the applicant had not proved the alleged trust, and dismissed her suit. As regards the counterclaim, the court allowed it and granted the orders sought by the respondent. The applicant was aggrieved and appealed to the ELC at Kerugoya where the single issue was whether the deceased and the respondent held the suit property in trust for the applicant.
5. The first appeal was heard by **Mutungi, J.** who by a judgment dated 27th February 2025 found that there was no evidence that the registration of the suit property in the joint names of the deceased and the respondent was in trust for the applicant; that the intention of the deceased to

that effect was

manifestly clear from a letter dated 18th January 2013; and that on account of the joint registration and the doctrine of survivorship, the respondent was entitled to be registered as the proprietor of the suit property upon the death of the deceased.

6. The applicant was still aggrieved and lodged a notice of appeal on 10th March 2025, followed the application now before the Court.

7. In support of the application the applicant contends in her written submissions dated 14th May 2025 that her intended appeal is arguable based on a draft memorandum of appeal where she argues, among others, that the ELC erred by failing to appreciate that her case was based on a constructive trust. In support of her arguments she relies on the decision of the Supreme Court in **Isack M’Inanga Kiebia v Isaaya Theuri**

M’Lintari & Another [2018] KESC 22 (KLR) for the proposition that customary rights can be recognised as customary trust and overriding interest and that such rights can be recognised even where the beneficiary was not in actual and physical possession of land.

8. The applicant also argues that the intended appeal will be rendered nugatory because she lives on the suit property where her father and mother are buried and that she risks losing her share of it for good if the respondent transfers it to third parties.
9. The application is opposed by the respondent through a replying affidavit sworn on 30th April 2025 and written submissions dated 10th June 2025. The respondent contends that an order of stay of execution cannot issue in the circumstances of this application because the ELC merely dismissed the applicant's appeal. Also that the Court cannot stop the implementation of the judgment vide an order of injunction against the ELC. The applicant relied on, among others, the decision of this Court in **Mwanthii & 2 Others v. Mukami** [2024] KECA 624 (KLR) and **Co-operative Bank of Kenya Ltd v. Banking Insurance Finance and Insurance (Kenya)** [2015] KECA 353 (KLR) in support of the proposition that an order of stay of execution will not issue against a negative order.

10. As regards whether the intended appeal is arguable, the respondent argues that both the trial court and the ELC found no evidence of a trust. The respondent did not address whether the applicant's appeal risked being rendered nugatory.
11. We have considered this application. We begin with the applicant's prayer for an order of stay of execution and an order of injunction. We agree with the respondent that, in the circumstances of this application, the prayer for stay of execution is utterly misconceived. The intended appeal is not against the decision of the subordinate court, but against the decision of the ELC. The ELC merely dismissed the applicant's appeal after it found the same bereft of merit.
12. Decisions abound from this Court beholding that an order of stay of execution is not available under **rule 5(2)(b)** of the **Court of Appeal Rules**, where a superior court below has merely dismissed an application, a suit or an appeal. Thus, for example, in **George Ole Sangui v. Kedong Ranch Ltd** [2015] eKLR :-

“In the instant case, the High Court dismissed

***the
suit in which the applicants were seeking a***

declaration and an order to be registered as the proprietors of the suit land on the basis of the doctrine of adverse possession. The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent. That was not a positive order that required any party to do or refrain from doing anything. It was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted.”

The prayer for an order of stay of execution has no basis, and we hereby dismiss it.

13. The applicant has also prayed for an order of injunction, which is a remedy that the Court can issue under **rule 5(2)**

(b) to ensure that, in a deserving case, an intended

appeal is not rendered nugatory pending the hearing and determination of the appeal. The prayer for injunction is

rather poorly drafted that by itself, it is not clear the party against which the injunction is sought, and to stop what. However, a reading of the entire application together with the submissions, it is clear enough that the applicant is seeking to stop the respondent from disposing of the suit property before the intended appeal is heard and determined.

- 14.** Turning to the merits of the application, the onus is on the applicant to satisfy the Court that her intended appeal is arguable, and that unless we grant the order of injunction, that appeal will be rendered nugatory if it succeeds. (See **Stanley Kang'ethe Kinyanjui v. Tony Ketter & 5 Others**

[2013] eKLR). In this regard, the applicant contends that her intended appeal is arguable because the ELC failed to appreciate that her case was based on a constructive trust. As the Court has consistently stated, even one *bona fide* arguable point is sufficient for purposes of an order of injunction, stay of execution or stay of proceedings pending appeal. We are satisfied that the applicant's intended appeal is not frivolous.

15. As regards whether the intended appeal is likely to be rendered nugatory if we do not grant an order of injunction, we reiterate that the purpose of this consideration is to ensure that an appeal which is arguable is not reduced into a paper judgment if it succeeds. The Court seeks to hold things constant, so that a successful appellant does not find that at the end of the day, all his efforts were in vain because the property he was claiming has long gone to third parties and is totally beyond his reach. In this case, the applicant has genuine apprehension that if the appeal succeeds without some form of protection, indeed, the appeal risks being rendered nugatory.
16. Having carefully considered this application, the order that best commends itself to us is to direct the parties to maintain the existing *status quo* until the hearing and determination of the intended appeal. For avoidance of doubt, the respondent's registration as proprietor of the suit property shall continue, but she shall not sell or otherwise transfer the suit property or any part thereof, until the hearing and determination of the intended

appeal. Costs of this

application shall abide the outcome of the intended appeal.

It is so ordered.

Dated and delivered at Nyeri this 27th day of February, 2026.

K. M'INOTI

.....
JUDGE OF APPEAL

S. ole KANTAI

.....
JUDGE OF APPEAL

A. ALI-ARONI

.....
JUDGE OF APPEAL

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

Signed
DEPUTY REGISTRAR