

**IN THE COURT OF APPEAL
AT NYERI**

(CORAM: JAMILA MOHAMMED, KIMARU & MUCHELULE,

JJ.A) CIVIL APPLICATION NO. E028 OF 2023

BETWEEN

ANTHONY NYUTHE KIMARU.....APPLICANT

(On behalf of the Estate of Paul
Kimaru Murage (deceased))

AND

**JOHN WACHIRA KIMARU1ST
RESPONDENT MICHAEL MURAGE KIMARU
....2ND RESPONDENT JOSEPH MURAGE KIMARU
.....3RD RESPONDENT**

(Being an application for injunction and stay of execution pending the hearing and determination of an intended appeal from the Judgment of the Environment and Land Court at Nyeri (Olola J.) dated 16th February, 2023

in

***ELC Appeal No. 647 of
2014)***

RULING OF THE COURT

1. Before us is a notice of motion application dated 17th April, 2023.

It is brought under **Rules 1(2)** and **5(2)(b)** of the **Court of Appeal Rules**, **Sections 3A** and **3B** of the **Appellate Jurisdiction Act**, and **Article 159(2)** of the **Constitution**.

The applicant seeks, *inter alia*, stay of execution of the Judgment and decree of the Nyeri Environment and Land Court

(Olola J.), delivered on 16th February, 2023, in ELC Appeal No. 647 of 2014, and any other subsequent orders issued thereto; as well as injunctive orders

restraining the respondents from dealing in any manner with parcel No. **Magutu/Gatei/201** (*suit property*), pending hearing and determination of the intended appeal.

2. The application is supported by an affidavit sworn on the same date. The applicant averred that the suit property is registered in the name of his late uncle, **Githua Murage**, who was the original defendant in the suit before the trial court. That upon his demise, the applicant's father substituted him, and after his father passed away, the applicant took over the case. The applicant urged that his late uncle (deceased) left behind two widows; **Margaret Nduta Githua** and **Shelmith Wandia Githia**. He asserted that the suit property is occupied by three families: the respondents; the family of the deceased comprising of the two houses; and the family of **Paul Kimaru** (applicant's family). He deponed that upon delivery of the impugned judgment, the respondents started erecting beacons with a view to subdivide the suit property into two portions, which move, if it proceeds, will displace the family of **Margaret Nduta Githua**, one of the deceased's widows. He swore that his appeal has merit and will demonstrate that the impugned judgment was grossly erroneous, misconceived and departed from the pleadings and evidence on record. The

applicant faulted

the learned trial Judge for finding that customary trust existed, when the same issue was dispensed with by another court of competent jurisdiction. The applicant averred that he has filed a notice of appeal demonstrating his intention to challenge the impugned Judgment on appeal to this Court. He deposed that the appeal will be rendered nugatory unless the orders sought are granted.

3. The application was opposed. The respondents filed a replying affidavit dated 28th April, 2023, sworn by the 1st respondent. He deposed that the applicant's application does not satisfy the requirements of **Rule 5(2)(b)** of the **Rules of this Court** to warrant grant of the orders sought. He deposed that the respondents and their families have lived on the suit property for a period of over 70 years, and had buried their kin on the said property. He deposed that the respondents' father, **Kimaru Nderu**, and the deceased, **Githua Murage Nderu**, settled on clear and distinct portions of the suit property. He averred that the applicant is not truthful as regards the position on the ground as each family has a different access road to their homes, and that the deceased's widow will not be rendered homeless or destitute. He pointed out that the applicant has not

demonstrated that he has an arguable

appeal, as customary trust was established. He urged that if the applicant is granted the orders sought, the respondents will be greatly prejudiced as they have been residing on the suit property for a very long time.

4. In response, the applicant filed a further affidavit dated 4th May, 2023. He deposed that the respondents' claim that they have lived on the suit property for a period of over 70 years was untrue, as adjudication was done in 1959. He urged that the respondents' kin were buried on the suit property under much protest. He averred that three families live on the suit property, that is, **Githua Murage** (deceased), **Kimaru Murage** (applicant's family), and **Kimaru Nderu** (respondents' father). He deposed that **Githua Murage** and **Kimaru Murage** are brothers, while **Kimaru Nderu** (the respondents' father) is their uncle. He averred that the suit property was bequeathed to the two brothers, and registered in the name of the deceased, to hold in trust for himself and his brother (**Kimaru Murage**), and that the said trust did not include the respondents' father. He asserted that the respondents' father occupied the suit property under license.
5. The application was canvassed by way of written submissions.

Counsel for the applicant, **Ms. Njoroge**, submitted that the

applicant's appeal is arguable. She averred that the respondents' claim on the suit property before the trial court was pegged on adverse possession and customary trust, and that the learned Judge found in favour of the respondents, with respect to their claim of customary trust. It was her submission that the learned Judge ordered that the suit property be divided into two equal portions, without considering the evidence on record that three families occupied the suit property. She contended that a similar claim on the suit property pegged on customary trust was lodged by the respondents in a different suit (**Nyeri SRMCC No.83 of 1983**) and was dismissed on merit. **Ms. Njoroge** further submitted that the appeal would be rendered nugatory unless this application is allowed, as the respondents are hell bent on interfering with the deceased's widow's right of occupancy of the suit property.

6. **Ms. Mwai**, counsel for the respondents, submitted that the applicant did not have capacity to lodge the notice of appeal, as he obtained the grant of letters of administration ad litem on 30th March, 2023, twenty-two days after filing the notice of appeal before this Court. She averred that the notice of appeal as filed is null and void, and that this Court lacks jurisdiction

to entertain

the said appeal, as well as the instant application. She urged that the applicant has not fulfilled the twin principles under **Rule 5(2)(b)** of the **Rules of this Court**, as there is no substantive notice of appeal upon which the main appeal would be predicated upon.

7. We have considered the application, the grounds in support thereof, the replying affidavit, the submissions, the authorities cited and the law. The principles for granting an order for stay of execution under **Rule 5(2)(b)** of this Court's rules are well settled. This Court in the case of **Trust Bank Limited and Another v. Investech Bank Limited and 3 Others [2000] eKLR** delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under Rule 5(2) (b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”

8. There is a preliminary issue that arose before this Court that we think will determine the application; and that is, whether the notice of appeal that was filed by the applicant is competent.

According to the respondents, the notice of appeal was filed by the applicant

before he had obtained a grant of letters of administration *ad litem* to enable him to take over proceedings on behalf of the estate of **Paul Kimani Murage** (deceased). Our perusal of the grant of letters of administration *ad litem* shows that it was obtained by the applicant twenty-two (22) days after he purported to have lodged the notice of the appeal in the appeal. *Prima facie*, the said notice of appeal is incompetent as it was filed by a person who did not have legal authority to represent the estate of the deceased at the time.

9. This Court in **Rajesh Pranjivan Chudasama V Sailesh Pranjivan Chudasama [2024] KECA 250 (KLR)** held thus in regard to a suit that was filed before the party obtained a grant of letters of administration:

“A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in case of intestate succession. In Otieno V Ougo (supra) this Court differently constituted rendered itself thus;

“...an administrator is not entitled to bring action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.””

10. It is therefore evidence that the chances that the intended appeal to be filed will be arguable are remote. The applicant

filed the notice

of appeal before he had the requisite *locus standi* to prosecute the appeal on behalf of the estate of the deceased. He put the cart before the horse by rushing to court before he had obtained a grant of letters of administration intestate.

11. Since we have found that the applicant's intended appeal may not likely see the light of the day, it is unnecessary for us to consider whether the intended appeal will be rendered nugatory if the application is not granted.

12. The application lacks merit and is hereby dismissed with costs to the respondents.

Dated and delivered at Nyeri this 6th day of March, 2026.

JAMILA MOHAMMED

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**... JUDGE OF
APPEAL**

L. KIMARU

.....

. JUDGE OF APPEAL

DEPUTY REGISTRAR

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

Signed

A.O. MUCHELULE

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**JUDG
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APPE
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