

**IN THE COURT OF
APPEAL AT NYERI**

(CORAM: KARANJA, JAMILA MOHAMMED & KIMARU, JJ.A)

CIVIL APPEAL (APPLICATION) NO. E119 OF 2022

BETWEEN

CHARLES KINYUA KIHUTO.....APPLICANT

AND

JOSEPH KIHARA GITUI.....RESPONDENT

(Being an application for stay of execution pending the hearing and determination of an intended appeal from the Judgment of the Environment and Land Court at Meru (L.N. Mbugua, J.) dated 18th May, 2022

in
**ELC Case No. 10 of
2018)**

RULING OF THE COURT

1. Being dissatisfied with the Judgment of the Superior court rendered on 18th May, 2022, in Meru ELC Case No. 10 of 2018, where the learned Judge dismissed the applicant's counter claim to L.R. No. 11969/123 Marsabit (*suit property*) on the ground that he had acquired the same by adverse possession, the applicant lodged a notice of appeal dated 23rd May, 2022, intimating his intention to appeal against the impugned

decision to this Court. He thereafter filed his record of appeal on 7th October, 2022.

2. The applicant has now moved this Court by way of a notice of motion dated 15th December, 2022, which is brought under **Rules 5(2)(b), 44 and 49** of the **Court of Appeal Rules**, and **Article 159** of the **Constitution**. The application seeks stay of execution of the Judgment of the Superior Court delivered on 18th May, 2022, and the subsequent ruling delivered on 7th December, 2022, pending hearing of the intended appeal.
3. The applicant deposed that after duly filing and serving his notice and record of appeal, the Superior court (Nzili J.) delivered a ruling on 7th December, 2022, directing that the applicant be evicted from the suit property. The applicant averred that he was served with the eviction notice on 9th December, 2022, which ordered that he vacate the suit property within seven days. He averred that the eviction notice was issued in contravention to the provisions of **Section 152E** of the **Land Act** which requires a mandatory ninety (90) days' notice, and not seven days. He urged that unless an order for stay of execution is granted, the

applicant risks being evicted

from the suit property, which eviction would render his

intended appeal, if successful, nugatory. The applicant urged that his appeal raises triable issues, and that the respondent will not suffer any prejudice if the application is allowed as prayed.

4. In response to the application, the respondent filed a relying affidavit sworn on 6th January, 2023. The respondent urged that the application was an afterthought, aimed at derailing him from enjoying the fruits of his Judgment. He deposed that the applicant has not placed before this Court any material to warrant the orders sought. He urged that the applicant's appeal will not be rendered nugatory as the subject matter is land, whose value can be ascertained through valuation, and therefore payable to the applicant in the event his appeal is successful. He was of the view that the intended appeal was not arguable as the applicant failed to establish ownership of the suit property which is registered to the respondent. He urged that the applicant has not offered any security for costs, and is not deserving of any reliefs from this Court.
5. The application was heard by way of written submissions. The

applicant reiterated the averments made in his supporting and further affidavit. He urged that he has been in occupation of the

suit property for a period of over twelve years, and that he and his family will be rendered destitute if he is evicted, and further render his appeal nugatory, if successful. He reiterated that his appeal raises triable issues with high chance of success.

6. No written submissions were filed on behalf of the respondent.
7. We have considered the application, the rival arguments and the law.
8. For this Court to grant any order under **Rule 5(2)(b)** of this **Court's Rules**, an applicant has to show, first that his intended appeal is arguable, and secondly, that unless he is granted the orders sought, the intended appeal, if successful, will be rendered nugatory. This was aptly stated by this Court in **Attorney General v Okiya Omtatah Okiiti & another [2019] eKLR** as follows:

“The principle for our consideration in the exercise of an unfettered discretion under Rule 5(2) (b) to grant an order for stay are now well settled. Firstly, an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an

order of stay is granted the appeal or intended appeal should be rendered nugatory.”

9. In the present application, the appellant has pleaded with the Court that he has an arguable appeal. He states that he has been resident on the suit parcel of land for a period of more than twelve years. The trial court erred when it found that he had not established his case of adverse possession. The respondent does not believe that the applicant has an arguable appeal. He insists that he is the registered owner and should be allowed to enjoy a judgment that has been rendered in his favour. At this stage, we are not required to delve into the minute details of the evidence to determine if the applicant has an arguable appeal. That duty is left to the court that will hear the appeal. It suffices for us to say that the intended appeal is arguable and is not frivolous.

10. As regards whether the intended appeal will be rendered nugatory if the application is not allowed, we hold that if the applicant is evicted from the suit parcel of land his intended appeal will indeed be rendered nugatory. The entire thrust of his appeal is that he is entitled to the suit parcel of land by virtue of having acquired the same by adverse possession. If he is evicted from the suit parcel of land, the intended appeal will

be rendered nugatory.

11. In the premises therefore, the order of eviction issued by the Environment and Land Court shall be stayed pending the hearing and determination of the appeal. The applicant shall however deposit in a joint interest-earning account the sum of Kshs 500,000/= in a reputable bank in the names of the Advocates of the parties. The same shall be deposited within forty-five (45) days of the date of delivery of this Ruling. Costs shall abide the outcome of the appeal.

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

W. KARANJA

.....
JUDGE OF APPEAL

JAMILA MOHAMMED

.....
... JUDGE OF APPEAL

L. KIMARU

.....
.. JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR