

**IN THE COURT OF
APPEAL AT NYERI**

**(CORAM: KANTAI, ALI-ARONI & MUCHELULE,
JJ.A.) CIVIL APPLICATION NO.E062 OF 2025**

BETWEEN

PHYLIS NYAGUTHII MWANGI.....APPLICANT

AND

JOHN MWANGI WAMBUGU.....RESPONDENT

(Being an application for an injunction against the Ruling of the High Court at Nyeri (M. Kizito, J.) delivered on 25th March, 2025

in

HCCC No. E002 of 2022.)

RULING OF THE COURT

The ruling intended to be appealed is not annexed to the Motion before us, but we have seen orders of **Kizito, J.** issued on 23rd March, 2025 where the Judge ordered:

- “1. THAT the parties have not divorced, consequently the court cannot deal with this matter.**
- 2. THAT the suit is struck out.**
- 3. THAT the preservatory order dated 23.3.2023 is hereby vacated.**
- 4. THAT the file is closed...”**

We are asked by the applicant **Phylis Nyaguthii Mwangi** in the Motion brought under **rule 5(2)(b)** of the **Court of Appeal Rules** and **Sections 3A** and **3B** of the **Appellate Jurisdiction Act** that we

be pleased to issue injunctive orders restraining the respondent **John Mwangi Wambugu** or his servants or agents from surveying, subdividing, processing title documents or disposing off in any manner property known as L.R. No. Nyeri/Endarasha/1489 and resultant titles L.R. No. Nyeri/Endarasha/5362 which has further been sub-divided into L.R. No. Nyeri/Endarasha/5659, 5660, 5661, 5662, 5363, 5364, 5365, 5366, 5367, 5368, 5369, 5370, 5371 and 5372 pending hearing and determination of the application and the intended appeal; that we may be pleased to make and/or issue such orders as it may deem fit to grant and we do provide for costs.

In grounds in support of the application and in a supporting affidavit by the applicant it is said amongst other things that the Judge delivered the ruling striking out the applicant's suit and vacating orders he had issued on 23rd March, 2023; that the Judge failed to appreciate in the ruling the import of section 17 of the Matrimonial Property Act "*...wherein parties need not have divorced for such a party to file for an order of declaration of rights to any property deemed as matrimonial property*"; and should the property

L.R No. Nyeri/Endarasha/1489 and the resultant subdivisions be further subdivided or sold off the applicant is at risk of being rendered homeless as she resides on the property where she has built a home and cultivates on the land; that unless injunctive orders are issued the intended appeal will be rendered nugatory.

The applicant says she has an arguable appeal and has filed a Notice of Appeal against the whole of the said ruling and she further says that the respondent is her husband in a polygamous marriage;

that her husband is the registered proprietor of the suit property (Nyeri/Endarasha/1459); that she and her husband disagreed but she remained on the suit property; that her co-wife caused the respondent to subdivide the suit property resulting in the named parcels of land which prompted her to file Matrimonial Cause No. HCCC E002 of 2022, seeking orders for declaration of rights to property, which suit was struck out; that should the suit property or the resultant sub-divisions be sold, she will be rendered homeless. She has set out the proposed grounds of appeal and has attached a draft Memorandum of Appeal.

In a replying affidavit, the respondent denies being the registered proprietor of L.R. No. Nyeri/Endarasha/5362 stating that the land belongs to one Joseph Kago Mwangi, who is not a party to the application “... and the title was closed on subdivision on 9th June, 2023 and the resultant parcels transferred to other individuals. I annex hereto a photocopy of the register of Title Number Nyeri/ Endarasha/5362 and certified copies of the resultant title numbers Nyeri/Endarasha/5659 to 5662 marked “IJ/881 ‘C’/I”, “IJ/881 ‘C’/II”, “IJ/881 ‘C’/III” “IJ/881 ‘C’/IV” and “IJ/881 ‘C’/V” respectively.” Further, that title Nos. Nyeri/ Endarasha/5365, 5364 and 5370 at the time of filing the Amended Originating Summons at the High Court were registered in the names of Herman Gitau Mwangi, Joseph Kago Mwangi and Jane Muthoni Mwangi who are not parties to the application; that title Nos. Nyeri/Endarasha/5372 and 5371 are for the applicant's two sons

Charles Wambugu Mwangi and Kariuki Mwangi, who he intended to transfer them to

but that the applicant had persuaded them to decline; that although the applicant was not entitled to any land from him he intended to register Nyeri/Endarasha/5368 in her name and that of his other wife, but the applicant had frustrated their effort by declining to sign an application for consent of the Land Control Board; that he has no objection to the three parcels being transferred in that manner; that:

“...I have no intention of disposing off the three parcels of land which are in my name to anyone other than the Applicant's two (2) sons and herself and my other wife as aforesaid...”

He asks that the application be dismissed for lack of merit.

We have seen and considered the written submission filed by both sides.

For a party to succeed in an application under rule 5(2)(b) of our rules, he must firstly demonstrate that the appeal or intended appeal, as the case may be, is arguable, which is to say that the same is not frivolous. That party must, in addition, show that the appeal would be rendered nugatory absent stay - see ***Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2013] eKLR.***

The applicant intends to argue on appeal as shown in draft Memorandum of Appeal that the Judge erred by not recognizing the applicant's rights to property under section 17 of the Matrimonial Property Act. There are other grounds set out, but on this ground alone we think that it is an arguable point on appeal and as has

been held by this Court an arguable point on appeal is not one that will succeed, it is one that deserves consideration and determination by the Court - **Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd Civil Application No. Nai 345 of 2004.**

What about the nugatory aspect, which an applicant must also satisfy to be entitled to appropriate orders?

We are told, and this is not controverted, that the original title Nyeri/Endarasha/1489 is no longer in existence. It was closed and resultant titles issued after subdivision, most of them in the names of parties who have not been sued and are not parties to the Motion before us. We doubt that it could be appropriate to make orders, as we are requested to do, which would have the effect of prejudicing parties who have not been sued by the applicant. We think that it would be wrong to do that. The applicant has not in those circumstances shown how the intended appeal would be rendered nugatory.

As observed earlier the Judge struck out the suit in effect not making any positive order capable of being executed. This Court had this to say in similar circumstances in **Mbaruk vs. Mwasi & 6 Others (Civil Application E006 of 2020) [2022] KECA 520 (KLR) (6 May 2022) (Ruling):**

"In response to that challenge, we shall rely and adopt this Court's ruling in the case of County Secretary of Kajiado & 47 others v Salaries &

Remuneration Commission & another [2021] eKLR where the Court observed:

“In addition, in Daniel Lomagul Kandeji & 2 Others v. Kamanga Holdings Limited & 40 Others (2017) eKLR this Court expressed itself as follows:-

“In the motion before us the applicants sought a stay of the striking out of the O.S.

This was a negative order which, by parity of a long line of decisions of this court as demonstrated above, is incapable of being stayed.”

The applicant having failed to meet the threshold for grant of stay or injunction the application lacks merit and we dismiss it with costs to the respondent.

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

S. ole KANTAI

.....
JUDGE OF

APPEAL ALI-

ARONI

.....
JUDGE OF APPEAL

A. O. MUCHELULE

.....
JUDGE OF APPEAL

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

original
Signed

DEPUTY REGISTRAR