

**IN THE COURT OF
APPEAL AT KISUMU**

(CORAM: OMONDI, KIMARU & JOEL NGUGI,

JJ.A.) CIVIL APPEAL (APPLICATION) NO. E253

OF 2024 BETWEEN

**SHADRACK ORINA MOGENI.....1ST
APPLICANT**

**HEZRON NYANG'AU MOGENI.....2ND
APPLICANT**

**EVANS GESORA MOGENI.....3RD
APPLICANT**

AND

**ABEL KARURA TINEGA (suing as the
legal representative of the Estate of
NAHASHON TINEGA KURURA).....RESPONDENT**

*(Being an appeal from the Judgment of the Environment and
Land Court at Nyamira (M. Kamau, J.) dated 25th July, 2024*

in

ELC No. 109 of 2021)

RULING OF THE COURT

1. The application before the Court is dated 20th November, 2025. It is brought under Rule 5(2)(b) of the Court of Appeal Rules seeking an order of stay of execution of the judgment and decree of the Environment and Land Court (ELC) at Nyamira (*M. Kamau, J.*) delivered on 25th July, 2024 in ***ELC No. 109 of 2021*** pending the hearing and determination of ***Kisumu Civil Appeal No. E253 of 2024***.
2. The dispute giving rise to the present application concerns land parcel SFT/EKERUBO/26 (suit property) situated within a settlement

scheme in Nyamira County. The Respondent, suing as the legal

representative of the estate of Nahashon Tinega Kurura, instituted proceedings before the ELC seeking recovery of possession of the land from the Applicants whom he contended were unlawfully occupying it. The Applicants resisted the claim and asserted that they had been in open and uninterrupted occupation of the land for several decades and had developed homes and farming activities thereon. Upon hearing the parties, the ELC entered judgment in favour of the Respondent and issued orders entitling him to possession of the suit property.

3. Being dissatisfied with that determination, the Applicants lodged a notice of appeal and subsequently filed a record of appeal challenging the findings and conclusions of the trial court. The present motion arises from the Applicants' apprehension that the Respondent intends to execute the decree and evict them from the suit property before their appeal is heard and determined.
4. In their supporting affidavit, written submissions and oral highlights before us, the Applicants contend that their appeal is arguable on several grounds. They argue that the learned Judge of the ELC misapprehended and misapplied the legal principles governing adverse possession and failed to properly evaluate the evidence demonstrating their long-standing occupation of the suit property spanning over thirty years. They further contend that the trial court failed to consider documentary material relating to the area list used by the allocating society within the settlement scheme which, according to them, sheds light on how parcels were allocated to members. The Applicants, therefore, maintain that these questions regarding the application of the doctrine of adverse possession and

the evaluation of the evidence on record raise *bona fide* issues deserving full interrogation on appeal.

5. The Applicants further state that they have occupied approximately twenty acres of the suit property for over three decades. They depose that the land hosts their homes and supports their farming activities which constitute their principal source of livelihood. They, therefore, contend that eviction would result in demolition of their homes, displacement of their families and disruption of their livelihoods.
6. The Respondent opposes the application through a replying affidavit sworn by Abel Kurura Tinega and written submissions filed on his behalf. According to the Respondent, the dispute between the parties has a lengthy history dating back to the early 1990s and has been litigated in several forums without success on the part of the Applicants. He further states that following the delivery of the judgment of the ELC on 25th July, 2024, the parties recorded a consent before that court granting the Applicants a stay of execution for twelve months to enable them vacate the suit property. That consent, he argues, expired on 16th October, 2025 and the Applicants have, therefore, already enjoyed a significant period of indulgence.
7. The Respondent contends that the Applicants have not demonstrated the existence of an arguable appeal. In his view, the memorandum of appeal filed is internally contradictory because the Applicants simultaneously claim adverse possession over the disputed parcel while also acknowledging allocation of a different parcel of land. He further argues that the appeal would not be rendered nugatory because any loss suffered by the Applicants can be compensated by damages.

8. The application came up for plenary hearing before us on 16th February, 2026. Learned counsel Mr. Paul Macharia Muchiri appeared for the Applicants while Ms. Mercy Moraa Caleb appeared for the Respondent. Both counsel relied on their written submissions but also made brief oral highlights before us.
9. In his oral highlights, Mr. Muchiri reiterated that the Applicants challenge the trial court's application of the doctrine of adverse possession and its failure to properly consider the Applicants' long-standing occupation of the suit property. Counsel emphasized that the Applicants have lived on the land since the early 1990s and that eviction before the appeal is heard would render them homeless and destroy their farming livelihoods.
10. Opposing the application, Ms. Caleb submitted that the Applicants had failed to satisfy the twin principles governing applications under Rule 5(2)(b). Counsel insisted that the Applicants had not identified any *bona fide* point of law arising from the judgment of the trial court and that their complaints merely reflected dissatisfaction with factual findings. On the nugatory limb, counsel submitted that the Applicants had not demonstrated that the Respondent would be unable to compensate them should the appeal ultimately succeed. Counsel further urged the Court to consider that the Respondent has been kept away from the land for decades while the Applicants continue to enjoy possession notwithstanding the judgment in the Respondent's favour.
11. The jurisdiction of this Court under Rule 5(2)(b) is well settled. It is original, discretionary and exercised to preserve the subject matter of an appeal. The governing principles were restated in **Stanley**

Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR

where this Court held:

“In dealing with Rule 5(2)(b) applications the Court exercises original and discretionary jurisdiction. The applicant must satisfy the Court on two principles: first, that the appeal or intended appeal is arguable; and second, that unless the order sought is granted, the appeal or intended appeal would be rendered nugatory.”

12. We first consider the arguability limb. The Court, in the ***Stanley Kang'ethe Kinyanjui Case***, explained the meaning of an arguable appeal as follows:

“An arguable appeal is not one which must necessarily succeed but one which ought to be argued fully before the Court; one which is not frivolous.”

13. We have carefully considered the grounds contained in the memorandum of appeal together with the submissions made by counsel. The Applicants challenge the trial court's treatment of the evidence relating to their alleged long-standing occupation of the suit property and its application of the legal principles governing adverse possession. They also contend that the trial court failed to consider documentary evidence relating to the allocation process within the settlement scheme.

14. Whether the trial court properly evaluated the evidence on record and correctly applied the law governing adverse possession are not trivial questions. These are issues which properly belong to the province of the appellate court and merit full interrogation at the hearing of the appeal. In our view, they raise *bona fide* questions

which cannot be dismissed as frivolous. We are, therefore, satisfied that the Applicants

have demonstrated the existence of at least one arguable ground of appeal.

15. We now turn to the second limb of the inquiry: whether the appeal would be rendered nugatory if the orders sought are not granted. The Court, in the ***Stanley Kang'ethe Kinyanjui Case*** also explained the nugatory principle in these terms:

“Whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed, if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

16. The Respondent contends that any loss suffered by the Applicants should execution proceed can be compensated by damages and that the Applicants have not demonstrated that he would be unable to compensate them should the appeal ultimately succeed.

17. We are not persuaded that damages would be an adequate remedy in the circumstances of this case. The Applicants have deposed, and it is not controverted, that they have occupied the suit property for decades and have established homes and farming activities thereon. Eviction from the land would inevitably involve demolition of homes and displacement of families who have lived there for a significant period of time. Even if the appeal were ultimately to succeed, restoration of the *status quo ante* would be extremely difficult and in some respects impossible.

18. In those circumstances, the subject matter of the appeal would be irreversibly altered if eviction were allowed to proceed before the appeal is heard. That is precisely the situation which the

jurisdiction

under Rule 5(2)(b) is designed to guard against. While we are mindful that the Respondent holds a judgment in his favour and is entitled to enjoy its fruits, the function of this Court in an application such as the present one is to ensure that the appellate process is not rendered futile.

19. In balancing the competing interests of the parties, we are satisfied that the interests of justice favour preservation of the *status quo* pending determination of the appeal. Consequently, we find that the Applicants have satisfied both limbs of the test under Rule 5(2)(b).

20. The Notice of Motion dated 20th November, 2025 is, therefore, allowed. There shall be a stay of execution of the judgment and decree of the Environment and Land Court at Nyamira delivered on 25th July, 2024 in ***Nyamira ELC No. 109 of 2021*** pending the hearing and determination of ***Kisumu Civil Appeal No. E253 of 2024***. Costs of the application shall abide the outcome of the appeal.

21. It is so ordered.

Dated and delivered at Kisumu on this 13th of March, 2026.

H. A. OMONDI

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

L. KIMARU

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

JOEL NGUGI

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

I certify that this is a

true copy of the
original.

Signed
DEPUTY REGISTRAR