

**IN THE COURT OF
APPEAL AT KISUMU**

(CORAM: ASIKE-MAKHANDIA, KIMARU & MUCHELULE,

JJ.A) CIVIL APPLICATION NO. E180 OF 2024

BETWEEN

YUNIA ATIENO OCHIENG.....APPLICANT

AND

MOSES ELISHA OGUTU.....RESPONDENT

(An application for an order of injunction pending the hearing and determination of an intended appeal from the Judgment and decree of the Environment and Land Court at Siaya (Koross, J.) dated 21st November, 2024

in

ELC Appeal No. E001 of 2024)

RULING OF THE COURT

1. Being dissatisfied with the Judgment of the Environment and Land Court which determined that the applicant had failed to establish her claim to land parcel **No. East Yimbo/Nyamonye/705** (*the suit property*) by adverse possession, the applicants lodged a notice of appeal dated 2nd December, 2024, indicating her intention to appeal against the impugned decision in this Court.
2. The applicant has now moved this Court by notice of motion dated 4th December, 2024, seeking, *inter alia*, an order of temporary injunction to restrain the respondent and his agents from evicting the applicant, disposing off, using, interfering

and/or in any way

dealing with the suit property, pending hearing and determination of the intended appeal.

3. The grounds in support of the application are that the applicant, who is a widow aged 75 years, together with her family, have been in possession and occupation of a portion of the suit property measuring 2.8 Ha (7 acres) since 1965. That the applicant is at risk of being evicted from the suit property, and that if the orders sought are not granted, her appeal, if successful, will be rendered nugatory. That the injunctive orders sought are intended to preserve the suit property pending hearing and determination of the intended appeal. That the application has been made without undue delay and that the respondent will not suffer any prejudice if the orders sought are granted.
4. In the supporting affidavit, the applicant deposed that she has an arguable appeal with high chances of success. She deposed that the learned Judge based her decision on the application of the doctrine of adverse possession, yet the applicant's claim was based on customary trust. The applicant deposed that she stands the risk of being evicted from the suit property, together with her family, which event if it were to occur, would render her appeal nugatory, if successful.

5. In response to the application, the respondent filed a relying affidavit sworn on 13th December, 2024. The respondent deponed that the application was grossly incompetent and defective, and that the applicant has not demonstrated that she has an arguable appeal. He deponed that the applicant's appeal before the ELC alleged the existence of a customary trust as well as a claim of adverse possession, with respect to the suit property. He deposed that the applicant failed to demonstrate the irreparable damage she will suffer, which cannot be compensated by an award of damages, if the orders sought are not granted. He swore that his late father assisted the appellant's husband acquire parcel **No. East Yimbo/Nyamonye/704**, which the applicant has refused to take occupation of. She cannot claim that she will be rendered homeless, in the event she is evicted from the suit property. He deposed that the beneficiaries of the estate of his late father are equally entitled to enjoy the fruits of the Judgment by taking possession of the suit property.
6. The application was heard by way of written submissions. Learned Counsel for the applicant, **Ms. Aketch**, submitted that the applicant's claim before the ELC was founded on customary trust, with the applicant contending that the suit property is

ancestral

land, and that she has lived on the said suit property with her family for a period of over sixty years. Counsel urged that although the suit property was registered in the name of the respondent, he held it in trust for the whole family. It was her submission that no amount of damages would compensate the applicant, in the event she is evicted from the suit property, and that such eviction and probable disposal of the suit property by the respondent, would render her appeal nugatory, if successful.

7. In rebuttal, **Mr. Kanyangi**, learned counsel for the respondent, submitted that the application is grossly incompetent, having been predicated upon **Order 42 Rule 6** of the **Civil Procedure Rules**, as opposed to **Rule 5(2)(b)** of the **rules of this Court**. It was his submission that the applicant's appeal is not arguable, as neither customary trust, nor adverse possession was established by the applicant. He explained that the applicant's husband owns parcel **No. East Yimbo/Nyamonye/704**, which borders the suit property. She will therefore not be rendered homeless and destitute, in the event she is evicted from the suit property. Counsel asserted that any loss that could potentially be suffered by the applicant, in the event her appeal is successful, could be quantified and compensated by way of damages. He opined that the applicant had not established that her appeal would be rendered nugatory, if the injunctive orders sought are not granted.

8. We have considered the application, the rival submissions and the law. The respondent urged that the applicant did not properly

invoke this Court's jurisdiction, having predicated her application upon **Order 42 Rule 6** of the **Civil Procedure Rules**, as opposed to **Rule 5(2)(b)** of the **rules of this Court**. **Order 42 Rule 6** relates to applications for stay of execution made before the Magistrates Courts, the High Court and Courts of equal status. On the other hand, applications for injunctive orders or stay of execution or stay of proceedings pending hearing and determination of an intended appeal before this Court are predicated upon **Rule 5(2)(b)** of the **Court of Appeal Rules**. Does this error render the applicant's application fatally defective? We think not. The Supreme Court in the case of **Steyn v Ruscone (Application 4 of 2012) [2013] KESC 11 (KLR) (Civ) (23 May 2013) (Ruling)** while addressing this issue stated as follows:

“The question then is, whether this omission is fatal to the applicant's case. It is trite law that a Court of law has to be moved under the correct provisions of the law. We note that this Court is the highest Court of the land. The Court, on this account, will in the interest of justice, not interpret procedural provisions as being cast in stone. The Court is alive to the principles to be adhered to in the interpretation of the Constitution, as stipulated in Article 259 of the Constitution. Consequently, the failure to cite [the relevant provision] will not be fatal to the applicant's cause.”

9. In view of the foregoing, we find that failure to cite the correct

provision of the law is not fatal to the application, and shall not

warrant its striking out in the spirit of **Article 159(2)(d)** of the **Constitution**.

10. On the merits of the application, for this Court to grant any order under **Rule 5(2)(b)**, an applicant has to show, first that his intended appeal is arguable, and secondly, that unless she 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 Okoiti & 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.”

11. In respect to the first principle of whether an applicant has an arguable appeal, this Court in **R.F.S. v J.D.S. [2013] eKLR** observed thus:

“Now an appeal is said to be arguable when it contains grounds, points or issues that can genuinely be asserted, on which there can be divergent legal or factual positions of some merit worthy of juridical investigation and determination. To succeed, it is enough that even a single, solitary ground of such description exists and the same need not be one that must necessarily succeed an

appeal.”

12. Applying the above threshold to the applicant's grounds of appeal on the face of the annexed draft memorandum of appeal, as well as her submission before this Court, we are of the considered view that the applicant's appeal is arguable. Some of the questions raised by the applicant's appeal that need to be determined before the Court are whether the suit property constituted family land, and whether the appellant's claim to the suit property was hinged upon customary trust, or the application of the doctrine of adverse possession. It is our considered opinion that there are clearly arguable points of law in the intended appeal.
- 13.** With regard to the second limb on whether the appeal will be rendered nugatory if stay is not granted, the position in law is that this is pegged on whether or not 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. See the case of **Reliance Bank Ltd v. Norlake Investments Ltd [2002] 1 EA 227.**
14. It is apparent that the applicant and her family, who are in occupation of a portion of the suit property, face the eminent threat of eviction. In the event that the applicant is evicted, and

her appeal is successful, it would be rendered nugatory, as the substratum of the appeal would have been lost.

15. Accordingly, we allow the applicant's application dated 4th December, 2024 as prayed. The costs of this application shall abide the outcome of the intended appeal.

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

ASIKE-MAKHANDIA

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**... JUDGE OF
APPEAL**

L. KIMARU

.....
**JUDGE OF APPEAL
A.O. MUCHELULE**

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

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

Signed

DEPUTY REGISTRAR.