

**IN THE COURT OF  
APPEAL AT MOMBASA**

**(CORAM: GATEMBU, LAIBUTA & NGENYE,  
JJ.A.)**

**CIVIL APPLICATION NO. E053 OF 2025**

**BETWEEN**

**CALVIN MWAKABA MWASUNGIA.....1<sup>ST</sup> APPLICANT  
BETHUEL NGUTA.....2<sup>ND</sup> APPLICANT**

**AND**

**THOMAS WANDETO KIMBIO.....RESPONDENT**

*(Being an application for stay of the Judgment of the  
Environment and Land Court of Kenya at Voi (E.K.  
Wabwoto, J.) dated 19<sup>th</sup> September 2024*

***in***

***ELC Appeal No. E005 of 2023)***

**\*\*\*\*\***

**RULING OF THE COURT**

1. The subject matter of the dispute in the present application is an unregistered parcel of land “located at Voi/Mombasa Road Junction at Kirumbi area within Kishamba B Group Ranch”. The respondent filed suit against the appellants before the Magistrate’s Court at Voi claiming ownership of the said property on the basis that it was allocated to him in 2005. The respondent asserted in that suit that the appellants had intruded and trespassed on the property.
2. After conducting a trial and upon hearing the parties and their

respective witnesses, the trial court, in its judgment delivered

on 30<sup>th</sup> October 2023, found that it had been demonstrated that the property was allocated to the respondent, and that the applicants had continued to trespass thereon despite having been required by the management of the Group Ranch to vacate the premises. The trial court issued an order in favour of the respondent permanently restraining the applicants by an order of injunction from trespassing, selling, leasing or otherwise interfering with the suit property. The applicants were ordered to vacate and hand over the property to the respondent by close of business on 30<sup>th</sup> December 2023 and, in default, the respondent be at liberty to evict them therefrom.

3. Aggrieved, the applicants filed an appeal before the Environment and Land Court (ELC) at Voi which, in a judgment delivered on 19<sup>th</sup> September 2014, affirmed and upheld the findings and judgment of the trial court and dismissed the appeal.
4. Still dissatisfied, the applicants lodged a Notice of Appeal in this Court dated 27<sup>th</sup> September 2024. On the strength of that notice, the applicants filed the present application dated 26<sup>th</sup> June 2015 under Rule 5(2)(b) of the Court of Appeal Rules. They pray for a conservatory order or stay orders “to maintain and protect the *status quo* and preserve the land” and in particular, the applicants’ possession of the property pending the hearing and determination of their appeal.

5. We heard the application on 6<sup>th</sup> October 2025. Learned counsel **Mr. Mkan** appeared for the applicants while **Mr. Mwazige**, learned counsel, appeared for the respondent. Based on the grounds appearing on the face of the application, the supporting affidavit of the 1<sup>st</sup> applicant Calvin Mwakaba Mwasungia, and the applicants' written submissions as orally highlighted by counsel, it is the applicants' case that the appeal is arguable; that, as shown in the memorandum of appeal, both the trial court and the first appellate court erred; that inadmissible hearsay evidence was admitted and relied upon; that the trial court wrongly allowed production of documents when the maker was not called; and that a single *bona fide* arguable ground is sufficient. In support, the decision in ***Kenafriic Matches Limited vs. Match Masters Limited & Another, Civil Application No. E092 of 2021 [2021] KECA 188 (KLR)*** was cited.
6. On the nugatory aspect, it is the applicants' case that they, and their families are, and have been in possession of the property for many years; that they are threatened with eviction and if that, happens before the appeal is determined, it will be rendered nugatory.
7. In opposition to the application, the respondent's case as borne out from the replying affidavit sworn by Mwazighe Micar and the respondent's written and oral submissions, is that the present application is an abuse of the process of the Court; that

the applicants sought similar orders in an earlier application dated 28<sup>th</sup> November 2024, which was dismissed in a ruling dated 23<sup>rd</sup> May 2025; that the present application is a replica of the application that was dismissed; and the matter is therefore *res judicata* under Section 7 of the Civil Procedure Act. In support, decisions in **Denise Granata vs. Invesco Assurance Company Limited [2022] eKLR;** and **Independent Electoral and Boundaries Commission vs. Maina Kiai & 5 Others [2017] eKLR** were cited.

8. We have considered the application, the affidavits, the written and oral submissions and the authorities cited. It is established that in an application of this nature, an applicant is obligated to satisfy two requirements so as to find favour with the Court in its exercise of its discretion under Rule 5(2) (b) of the Court's Rules. The applicants need to show that they have an arguable appeal and, secondly, that the appeal and, if successful, will be rendered nugatory if the interim orders sought are not granted. See **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] KECA 378 (KLR).**
9. However, in the present case, the record shows that the present applicants were the applicants before the Court in Civil Appeal (Application) No. E223 of 2024 in which they presented an application dated 28<sup>th</sup> November 2024 seeking orders of this Court "to order and direct that the execution of the judgment and decree in Voi Chief Magistrate's Court

Environment and

Land Case No. E040 of 2021, which are the subject of these appellate proceedings, be stayed pending the hearing and final determination of the appeal...". That application was heard by the Court and dismissed in a ruling delivered on 23<sup>rd</sup> May 2025. In that application, the applicants had sought to stay execution of the judgment of the Magistrate's Court. In the present application, they seek conservatory orders to maintain the *status quo*. Despite the effort made in couching the prayers in the present application differently, the substance and effect is the same. The applicants are therefore seeking to relitigate the substance of the very application that has already been heard and determined on merits.

10. As pronounced by the Supreme Court in the case of **John Florence Maritime Services Limited & Another vs. Cabinet Secretary Transport & Infrastructure & 3 Others [2021] KESC 39 (KLR)** cited by counsel for the applicants, the doctrine of *res judicata* is based on the principle of finality which is a matter of public policy; that the principle of finality is one of the pillars upon which the judicial system is founded, and the doctrine of *res judicata* prevents multiplicity of suits which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties and ensuring that litigation comes to an end.
11. Based on the foregoing, the contention by the respondent that the applicants are, by the present application, seeking

to re-

litigate a matter already determined is well founded. Consequently, the applicants' application dated 26<sup>th</sup> June 2025 fails and is hereby dismissed with costs to the respondent.

12. Orders accordingly.

**Dated and delivered at Mombasa this 25<sup>th</sup> day of March 2026.**

**S. GATEMBU KAIRU, FCI Arb, C. Arb.**

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

**DR. K. I. LAIBUTA, C Arb, FCI Arb.**

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**JUDGE OF APPEAL**

**G.W. NGENYE-MACHARIA**

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

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

*Signed*

**DEPUTY REGISTRAR**