

IN THE COURT OF
APPEAL AT NAIROBI
(CORAM: JAMILA MOHAMMED, MUMBI NGUGI & TUIYOTT, JJ.A.)
CIVIL APPLICATION NO. E272 OF 2025

BETWEEN

MOHAMED MAALIM KULMIA.....APPLICANT

AND

KANTILAL MEGHJI SHAH.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2ND RESPONDENT

DIRECTOR OF SURVEY.....3RD

RESPONDENT ATTORNEY GENERAL.....4TH

RESPONDENT

NATIONAL LAND COMMISSION 5TH
RESPONDENT

(Being an application for stay of execution of the judgment and
decree of the Environment and Land Court of Kenya at Nairobi
(L. Mbugua J.) dated 2nd April, 2025

in

ELC Case No. 201 of
2007)

**

RULING OF THE COURT

Background

1) **Mohamed Maalim Kulmia** (the applicant) has, vide a notice of motion dated 5th May 2025 expressed to be brought pursuant to the provisions of **Sections 3A** and **3B** of the **Appellate Jurisdiction Act, Rules 5(2)(b)** and **43** of the **Court of Appeal Rules, 2022** (this Court's Rules) sought the following orders:

i. Spent;

ii. Spent;

- iii. That an order of stay do issue suspending the execution and enforcement of the judgment and decree of the Environment and Land Court (ELC) at Nairobi (**L. Mbugua J.**) delivered on 2nd April 2025 in ELC Suit No. 201 of 2007 pending the hearing and determination of the intended appeal;
- iv. That costs of the application abide the outcome of the intended appeal.

Kantilal Meghji Shah, Chief Land Registrar, Director of Survey, Attorney General and National Land Commission are the 1st to 5th respondents respectively.

- 2) A brief background of the application will help place the application in context. The gist of the application is that the 1st respondent sued the applicant claiming that he was the registered owner of the suit property registered under the Registration of Titles Act Cap 281 (RTA) (repealed) and that the applicant purported to hold a certificate of lease over the same land registered under the Registered Land Act Cap 300 (RLA) (repealed). The 1st respondent claimed that the applicant's certificate of lease was acquired fraudulently.
- 3) The 1st respondent sought: a declaration that he was the registered proprietor of the suit property; and an order to expunge the applicant's records over the suit property. The applicant defended the suit and raised a counterclaim on the grounds that: the 1st respondent's suit was time barred; and that he was the first registered owner of the land and had erected a perimeter wall

around it. The applicant further sought

dismissal of the 1st respondent's suit and a declaration that he held a valid title over the suit property. The 1st respondent also sought that the record in respect of the applicant's title over the suit land be expunged.

4) After analysing the evidence, the ELC held in part as follows:

"... I note that the 1st defendant has proffered a defence of limitation in respect of plaintiff's claim at paragraph 15A of his defence. However, and as rightly submitted by the plaintiff this averment was not supported by any evidence.

... I will say no more on that issue save to add that the plaintiff has pleaded and adduced evidence to the effect that he learnt of interreference (sic with the suit property in December 2006 and he filed the case in year 2007.

...

As it were, the land was already private land registered to Nalin and Sushila who sold the same to the plaintiff. Thus, the suit land was not available for allocation to the 1st defendant. It follows that the root of 1st defendant's title is tainted with illegality and is hence null and void."

5) The said decision prompted the filing of the notice of appeal and the instant application for stay of execution of the impugned judgment.

6) The motion is premised *inter alia* on grounds that on 1st July 1978, the applicant was issued with an allotment letter for an unsurveyed residential plot. That upon satisfying the conditions therein, he was issued with a Certificate of Lease being **Nairobi/Block 92/157** (the suit property) on 9th July 1984 for a term of 99 years with effect from 1st June 1978. That upon registration as the proprietor, the applicant

took possession of the suit property and erected a perimeter wall
and

continued with the possession thereafter. That on 8th June 2007, the applicant was served with a letter by the 1st respondent's advocates claiming that the suit property belonged to the 1st respondent who was purportedly issued with a Certificate of Title in June 1978.

- 7) It was the applicant's further ground that consequently, the 1st respondent filed a plaint dated 9th July 2007 claiming that he was the registered owner of L.R. No. 12325/17 and that a certificate of Lease was issued to him on 9th July 1984. That the applicant filed a Statement of Defence and Counterclaim dated 31st August 2007. That the 2nd - 4th respondents filed a statement of defence dated 19th November 2018. That upon conclusion of the hearing of the case, judgment was delivered in favour of the 1st respondent. The applicant's counterclaim was dismissed.
- 8) The applicant averred that the judgment of the ELC was erroneous *inter alia* as the trial Judge: wrongfully assumed jurisdiction over a matter that was statute barred; violated Article 50(1) of the Constitution as the applicant's submissions were not considered; disregarded the applicant's long occupation on the suit property; and disregarded the applicant's title which was a first registration and therefore unimpeachable.
- 9) The applicant further averred that the intended appeal will be rendered nugatory unless stay orders are granted in that the applicant's title will be cancelled and the record expunged; and that the applicant is also required to remove any materials of construction

on the suit land.

- 10) Further, the applicant averred that the intended appeal is arguable with high chances of success as per the grounds of appeal enumerated in the draft memorandum of appeal annexed; and that the instant application was filed without delay.
- 11) The motion is supported by the applicant's affidavit who reiterated the grounds on the face of the application.
- 12) The 1st respondent opposed the applicant's application through a replying affidavit sworn on 16th May 2025 deposing, *inter alia*, that the instant application is aimed at delaying enforcement of a lawful judgment; that the trial of the case took over 15 years and the delay was partly occasioned by the applicant; that the applicant failed to file his submissions to the case despite being given adequate time to do so; that the trial court rightly found that the 1st respondent is the rightful registered proprietor of L.R. No. 12325/17, Hill View Estate, Nairobi with an indefeasible title under the Registration of Titles Act (repealed) while the applicant's purported Certificate of Lease in respect of Nairobi/Block 92/157 was found to be rooted on illegal double allocation. Further, that the ELC rightly found that the 1st respondent discovered the encroachment in 2006 and filed a suit in 2007 which was within time under section 9(1) of the Limitation of Actions Act.
- 13) The 1st respondent further averred that the application failed to meet the threshold for grant of stay orders as the applicant failed to

demonstrate an arguable appeal that will be rendered nugatory if the orders sought are denied. That the applicant's occupation of the suit property since 1984 was premised on an illegal and procedurally defective title. That the applicant has benefitted from unlawful occupation of the suit property for over forty (40) years without any legal right. That the stay order, if granted, will deny the 1st respondent access, possession and lawful use of his land and will unjustly extend an illegal occupation. That granting a stay order will protect a title already declared void. That the 1st respondent is ready to restore the status quo or compensate the applicant should he succeed on appeal.

Submissions by Counsel

- 14) The parties filed written submissions which were orally highlighted during the hearing of the application. Learned counsel, **Mr. Mbatai**, from the firm of **Issa & Company Advocates** held brief for **Mr. Issa**, learned counsel for the applicant while learned counsel **Mr. Gathu**, from the firm of **Mucheru Law LLP** represented the 1st respondent. There was neither representation nor submissions by the 2nd to 5th respondents despite service of the hearing notice.
- 15) **Mr. Mbatai** for the applicant submitted that the intended appeal is arguable as it raises issues that deserve consideration by this Court. Counsel relied upon the annexed draft memorandum of appeal and submitted that there are arguable issues in the intended appeal including

that the ELC assumed jurisdiction over a matter that was statute barred under section 7 of the Limitation of Actions Act, which provides that a suit for recovery of land cannot be brought after expiry of 12 years from the date when the cause of action accrued. Counsel further submitted that there was inordinate delay in filing the suit as the same was filed 23 years after the applicant was issued with a certificate of title and had taken possession of the suit property.

16) Counsel further submitted that the finding of the ELC that no evidence was tendered on the issue of time bar of the suit was a misdirection of law as the same was an issue of law that was properly pleaded and required no evidence to be adduced. Further, that the ELC caused a miscarriage of justice in failing to consider the applicant's submissions and the same amounted to violation of his right under Article 50(1) of the Constitution. Further, that upon conversion from the RTA to RLA regime, the applicant was registered as the first proprietor of the suit property. That the ELC disregarded that the applicant was a first proprietor of the suit property registered under the RLA and his title could only be challenged on narrow grounds of fraud or misrepresentation involving him, which was not established.

17) On the nugatory aspect, counsel asserted that the impugned judgment called for cancellation of the applicant's certificate of lease, removal of structures on the suit property, and transfer of

possession to the 1st

respondent. Counsel emphasised that the applicant occupied the suit property for over forty (40) years and faces imminent eviction and permanent loss of investment.

18) Counsel for the 1st respondent opposed the application and submitted that the grounds of appeal are not arguable in that the plea of statute bar was vague as the applicant failed to specify the act that led to limitation or the specific provisions of the Act which barred the 1st respondent's claim. On the 2nd issue of denial of right to fair trial, counsel submitted that the applicant was given time to file his submissions but failed to do so and consequently, the same cannot be an arguable issue of appeal. Counsel further submitted that the principle of indefeasibility of title was no longer good law in its strict sense as per the decision of the Supreme Court in **Dina Management Ltd v County Government of Mombasa & 5 others (2023) KESC 30 (KLR)**.

19) On the nugatory aspect, the 1st respondent submitted that the intended appeal will not be rendered nugatory if stay is denied merely because the impugned judgment called for cancellation of the applicant's title. Counsel submitted that the cancellation of the applicant's title is reversible in the event that the appeal succeeds. In the circumstances, counsel submitted that the instant application fell short of the nugatory test as per the decision of **Stanley Kangethe Kinyanjui v Tony Ketter**

& 5 others (2013) KECA 378 (KLR). Counsel submitted that as such, it

will be unfair for this Court to grant the order of stay of execution.

Determination

20) We have considered the application, the replying affidavit, the submissions by the parties, the authorities cited and the law. The jurisdiction under **Rule 5(2)(b)** of this **Court's Rules** is discretionary and guided by the interests of justice.

21) The principles for granting a stay of execution, injunction or stay of proceedings under **Rule 5(2)(b)** of this Court's Rules are well settled.

This Court in the case of **Trust Bank Limited and Another v.**

Investech

Bank Limited & 3 Others [2000] eKLR delineated the jurisdiction of

this Court in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”

22) In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this Court, both limbs must be demonstrated to the Court's satisfaction.

23) On the first principle, as to whether or not the appeal is arguable, we

have to consider whether there is at least a single *bona fide* arguable

ground that has been raised by the applicant in order to warrant ventilation before this Court. See: **Stanley Kang'ethe Kinyanjui**

v

Tony Ketter & 5 Others [2013] eKLR where this Court described an

arguable appeal in the following terms:

“vii) 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.

viii) In considering an application brought under Rule 5 (2)

(b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”

24) We have carefully considered the grounds set out in the motion and the draft memorandum of appeal. In our view, it is arguable, *inter alia*: whether the ELC erred in law in wrongfully assuming jurisdiction over a matter that was statute barred and as a result arrived at a perverse decision in law. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.

25) On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in **Stanley**

Kang'ethe Kinyanjui v Tony

Ketter & 5 Others (supra) this Court stated that:

“ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

x). Whether or not an appeal will be rendered nugatory depends 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”.

26) In determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties and each case has to be determined on its own merits. In the instant application, the applicant’s main contention is that unless this Court grants a stay of execution, the intended appeal will be rendered nugatory as the impugned judgment directs the cancellation of the applicant’s certificate of lease, the removal of structures on the suit property, and the immediate transfer of possession of the suit property to the 1st respondent. The applicant, who has occupied the suit property for over forty (40) years, therefore faces imminent eviction and personal loss of his investment.

27) In the circumstances, we are inclined to find that the applicant has demonstrated that his appeal will be rendered nugatory if the orders sought are declined and the appeal succeeds.

28) In the circumstances, the applicant has satisfied both limbs of the requirements under Rule 5(2)(b) of this Court’s Rules. We are satisfied

that in the circumstances, this is a proper case for the Court to exercise its discretion in favour of the applicant by granting the orders sought.

29) We therefore grant a stay of execution of the judgment and decree of the ELC dated 2nd April 2025 in **ELC Suit No. 201 of 2007** pending the hearing and determination of the intended appeal.

30) We direct that the intended appeal be filed and served, (if not already filed and served) within thirty (30) days from the date of this ruling.

31) Costs of the application shall abide the outcome of the intended appeal.

32) It is so ordered.

Dated and delivered at Nairobi this 24th day of April, 2026

JAMILA MOHAMMED

.....
JUDGE OF

APPEAL MUMBI

NGUGI

.....
JUDGE OF APPEAL

F. TUIYOTT

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR