



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kathuma v Musimba (Civil Application E599 of 2025)  
[2026] KECA 820 (KLR) (30 April 2026) (Ruling)**

Neutral citation: [2026] KECA 820 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E599 OF 2025  
SG KAIRU, P NYAMWEYA & AO MUCHELULE, JJA  
APRIL 30, 2026**

**BETWEEN**

**JULIUS MAWEU KATHUMA ..... APPLICANT**

**AND**

**SUSAN KAVULI KING'OO MUSIMBA ..... RESPONDENT**

*(Being an application for stay of execution and injunction of the Judgment and Decree of the Environment and Land Court of Kenya, at Makueni (E. O. Obaga J.) dated 2nd October 2025 in ELC Case No. E040 OF 2022)*

**RULING**

1. The history of this application originates in the Environment and Land Court at Makueni, where the respondent, Susan Kavuli King'oo Musimba, sued the applicant, Julius Maweu Kathuma, over land parcel Konza South Block 2/207 (Parcel 207) measuring about 10 acres. The respondent claimed to have bought parcel 207 from the applicant for Kshs.1,000,000/= in an agreement dated 15<sup>th</sup> June 2007, and possession given, but that the applicant had failed to transfer the same to her. The respondent sought a declaration that she was a bona fide purchaser of the parcel of land; asked for its transfer; and a permanent injunction against the applicant.
2. The applicant denied these claims and pleaded that he was the valid registered owner of the suit property; that the said sale agreement was a forgery in which he had not entered; claimed that the respondent's occupation of the suit property was illegal; and he sought in a counterclaim, the respondent's eviction. It was his case that what he had sold to the respondent was 5 acres comprised in Konza South Block 2/208 (parcel 208) measuring 5 acres, whose occupation he had granted but whose full purchase price had not been paid.
3. The learned trial Judge (Obaga, J.) received evidence of the parties and their witnesses, and found that there was a valid sale agreement for the parcel 207 which the applicant had refused to transfer. The



applicant was ordered to transfer the suit property within 60 days failing which the deputy registrar of the court would assist in the transfer. A permanent injunction was issued against the applicant. The counterclaim was dismissed.

4. The applicant was aggrieved by the judgment and filed a notice of appeal dated 4<sup>th</sup> October 2025 seeking to challenge the decision on appeal before this Court. With the notice was the present motion dated 7<sup>th</sup> October 2025 in which the applicant seeks stay of the execution of the judgment and decree, a temporary injunction and a conservatory order in respect of the execution pending the hearing and determination of the intended appeal.
5. In the supporting affidavit and annexed draft memorandum of appeal, the applicant challenged the findings of the trial court stating that the sale agreement was a forgery and yet the trial court had relied on it; the court had erred in failing to find that what existed was the sale agreement for parcel 208 and not parcel 207; that the trial court had unfairly relied on inconsistent and contradictory evidence of the respondent and his witnesses; and that the court had failed to consider his evidence and submissions in the case.
6. The motion was opposed by the respondent who supported the findings by the trial court. According to her, the claims of forgery and fraud were unfounded; that there was a valid sale agreement over parcel 207 between the parties which the trial court had simply enforced; that, therefore, the intended appeal was not arguable.
7. Learned counsel Mr. Mutisya for the appellant and learned counsel Mr. Kioko Mwanzia, holding brief for Mr. Muinde for the respondent, addressed us on the application and their rival written submissions.
8. It was submitted for the applicant that, on the basis of Stanley Kang'ethe Kinyanjui -vs- Tony Ketter & 5 Others [2013] eKLR, an arguable appeal had been demonstrated as the alleged sale agreement had been challenged. It was argued that the sale agreement was questioned on whether it was for 5 acres or was for 10 acres. Reference was made to the decision in Ahmed Musa Ismael -vs- Kumba ole Ntamorua [2014] eKLR for the holding that where an agreement fails to meet the essential land transaction requirements, enforceability becomes an arguable issue. It was further argued that the misapprehension of evidence by the trial court was another arguable issue.
9. The applicant's further case was that, now that it was evident that the respondent had leased the suit property to a third party and was benefitting from the proceeds, it was incumbent upon this Court to secure the property to await the intended appeal, and also to secure the proceeds of rent by ordering their deposit into a joint account of the parties. Anything else, as was argued, would render the intended appeal nugatory.
10. The application was opposed. In the submission by counsel for the respondent, the appellant's suit had been dismissed; that this was a negative order that was incapable of stay (see Kanwal Sarjit Sinah Dhiman -vs- Kesharje Jurraj Shah [2008] eKLR).
11. On whether the intended appeal was arguable, it was submitted that the applicant had admitted to having sold parcel 207 for which full purchase price had been paid and possession granted. Therefore, the intended appeal lacked any arguable grounds.
12. On the question whether the intended appeal, in the absence of stay, would be rendered nugatory, reliance was placed on Reliance Bank Ltd -vs- Norlake Investment Ltd [2002] 1 EA 227, for the argument that, even if the suit property is transferred to the respondent, this action can be reversed, were the intended appeal to succeed. Further that, the parcel of land had a value which could be determined, and therefore whatever loss would be recoverable in monetary terms.



13. We have considered the notice of motion, the rival affidavits and submissions, both written and oral. We have to determine whether the applicant has made a case for stay, injunction and or conservatory orders.
14. This application was substantially brought under Rule 5(2) of the Court of Appeal Rules, 2022. The Rule gives this Court original and discretionary power to do justice to the parties at this stage of their dispute. The question is whether we should temporarily halt the enforcement of the judgment by the Environment and Land Court to enable the review on appeal of the applicant's case, and to ensure that the intended appeal, were it to be successful, is not rendered worthless or nugatory. The applicant is required to demonstrate that the intended appeal is arguable, in the sense that it raises bona fide issues that this Court will consider on appeal, and to show that, if stay is not granted, and the intended appeal were to succeed, the same would be rendered nugatory. (see Stanley Kang'ethe Kinyanjui -vs- Tony Ketter & 5 Others (supra)).
15. It is also trite that the single arguable issue would suffice for the purposes of the application for stay (see Public Service Commission & 72 Others -vs- Okiya Omtatah & 4 Others, Civil Appeal (Application) No. E131 of 2021).
16. We have no hesitation in finding that, when one considers whether there was a valid agreement of the sale of 10 acres, whether the sale was for 5 acres or 10 acres, whether there was forgery or fraud in the land transaction, or whether the trial court misapprehended the evidence, all these raise arguable grounds. In fact, each one of them raises an arguable ground of appeal.
17. As to whether the intended appeal may be rendered nugatory if stay is not granted, we have considered the alleged invalidity of the 10 acres sale in regard to parcel 207. We consider that, as matters stand, although the applicant is still the registered owner, there are activities on the land by third parties who are not parties to this dispute. The question of there being a negative order that is incapable of stay does not arise, as the applicant was ordered to transfer the title to the respondent. In any case, there was request for temporary injunction. If we do not issue stay, the suit property will be transferred to the respondent who may possibly take it away from the jurisdiction of the Court. We also consider that, the respondent is, in any case, in possession. The nugatory ground has been established.
18. Consequently, we grant the stay of the execution of the judgment and decree issued on 2<sup>nd</sup> October 2025 by the ELC Court at Makueni in ELC No. E040 of 2022 in terms that the applicant's transfer of parcel 207 is stopped until the intended appeal is heard and determined. So that the applicant does not go into slumber, he is directed to file and serve the appeal within 60 days from today, failing which the stay order shall automatically lapse.
19. Costs will abide the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF APRIL 2026.**

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

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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

**A.O. MUCHELULE**



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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

