



**M’Nyiruu (Suing as the Legal Representative of the Estate of Stanley M’Nyiruu M’Nchau) & another v Koome & another (Legal representative of the Estate of M’Ajogi M’Nchau alias Nchau) (Civil Application E082 of 2024) [2025] KECA 1002 (KLR) (23 May 2025) (Ruling)**

Neutral citation: [2025] KECA 1002 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION E082 OF 2024  
JW LESSIT, A ALI-ARONI & GV ODUNGA, JJA  
MAY 23, 2025**

**BETWEEN**

**JOHN BUNDI M’NYIRUU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF STANLEY M’NYIRUU M’NCHAU) ..... 1<sup>ST</sup> APPLICANT**

**DAVID KIBITI IGWETA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KIREMA M’IGWETA M’NCHAU) ..... 2<sup>ND</sup> APPLICANT**

**AND**

**STANLEY KOOME & GRACE NTINYARI CATHERINE (LEGAL REPRESENTATIVE OF THE ESTATE OF M’AJOGI M’NCHAU ALIAS NCHAU) ..... RESPONDENT**

*(Being an application for a stay of execution pending the hearing and determination of an appeal from the Judgment of the Environment and Land Court at Meru (C.K. Nzili, J.) delivered on 12th June 2024 in E.L.C. Case No. E003 of 2023)*

**RULING**

1. This is a Notice of Motion application dated 27<sup>th</sup> August 2024 and brought pursuant to Rule 5 (2)(b) of the Court of Appeal Rules (hereinafter the Rules) in which the applicants are seeking orders: That there be a stay of execution against the judgment/decree of the superior court dated 12<sup>th</sup> June, 2024 and all consequential orders pending the hearing and determination of the intended appeal or in the alternative, this Court be pleased to order the parties herein to maintain status quo prevailing as to the registration, user and occupation of the suit land being part of Nyaki/Mulathankaru/9 pending the hearing and determination of the intended appeal. Costs do abide the outcome of the intended appeal.



2. The application is supported by the supporting affidavit sworn by Mr. Nwanzia Muia advocate of even date and a further supporting affidavit sworn by John Bundi M’Nyiruu dated 11<sup>th</sup> December 2024, in rejoinder to the replying affidavit of the respondents dated 24<sup>th</sup> September 2024.
3. The brief background of the case was that the respondents file suit against the applicants, claiming that they conspired to subdivide the suit land fraudulently and then registered in the name of their kin, who they claimed had severe mental problems and were in and out of the hospital, and could not have had the capacity to deal with the suit land. The learned Judge of the ELC, in the judgment delivered on 12<sup>th</sup> June 2024, found in favour of the respondents. The application arises from the judgment of the ELC court.
4. The Motion is premised on the grounds that; the applicant has timeously lodged the notice of appeal; that the intended appeal is arguable and not frivolous and that if the prayers are not granted and the appeal succeeds, the intended appeal shall be rendered nugatory.
5. The application is supported by a further supporting affidavit sworn by the applicants where they aver; that they have lived on the suit land for all their life; that the respondents cut down the trees on the suit land in an attempt to try and evict them but were unable to; that the respondents have been to all authorities to try and tarnish their peaceful occupation of the suit land; that the respondents conceded that they have never resided on the suit land; and, that an order of status quo is called for, to prevent their appeal, which is arguable, from being rendered nugatory.
6. In a replying affidavit sworn and filed by the respondents, they stated that the application is fatally defective and is an afterthought and only meant to deny them the fruits of their judgment; that the applicants have not demonstrated that they have an arguable appeal with chances of success; that the applicants do not deserve this Court’s discretion being exercised in their favour because they have disobeyed the judgment of the court by cutting down all the trees and constructing a house therein. The respondents further aver that they are living in fear of constant harassment and threats from the applicants, especially after the judgment being appealed against was rendered. They aver that the application has been overtaken by events, since the suit land has already been distributed to the rightful heirs through Meru Chief Magistrate Succession Cause No. 17 of 2017, as evidenced by the confirmed grant annexed to the applicant’s supporting affidavit. The respondents aver that the applicants, despite having knowledge that the grant was coming up for confirmation before the court, did not protest but instead filed an application in the High Court being Misc. Application No. E116, seeking to stay the succession cause until the ELC case was heard, but they eventually withdrew that suit. The respondents aver that if the orders of stay are granted, they are likely to suffer since they have never resided on the said land save for the 2<sup>nd</sup> respondent, who occupies a very small portion. At the same time, the applicants have allocated themselves the larger part of the land and are unlikely to suffer any prejudice if the stay is not granted.
7. We heard the application on the 17<sup>th</sup> December 2024. Present for the applicants was learned counsel, Mr. Muia Mwanzia and for the respondents was learned counsel Ms. Nelima. Each counsel had filed written submissions upon which they relied entirely. Mr. Mwanzia relied on the supporting affidavit sworn by Rael Karimi Kariuki, a co-applicant dated 27<sup>th</sup> August 2024. On the other hand, Ms. Nelima relied on the replying affidavit sworn by Catherine Ntinyari Grace on 9<sup>th</sup> September 2024.
8. Mr. Mwanzia for the applicant submitted that the appeal is arguable and not frivolous citing paragraph 4 of the affidavit in support together with the further supporting affidavit dated 10<sup>th</sup> December 2024. The applicants argue that the suit land is ancestral and held in trust by the respondents and that the trial Judge erred in finding that the applicants have lived on the land for a lifetime.



9. Ms. Nelima submitted that the suit land has already been distributed to the beneficiaries in the Succession Cause and therefore, the application is moot. In addition, counsel submitted that the applicants have not established that they have an arguable appeal and that therefore the appeal is frivolous.
10. In a brief response, Mr. Mwanzia submitted that he was unaware that there was a Succession Cause touching on the suit land in this matter.
11. We have considered the motion, affidavits, submissions, and the authorities cited.
12. What the applicant needs to demonstrate in order to obtain the orders sought is the fulfilment of the twin principles: one that the appeal is arguable, and two, that it is likely to be rendered nugatory if the application is declined and the appeal were to subsequently succeed. What is arguable was explained in the case of *Somak Travels Ltd vs. Gladys Aganyo* [2016] eKLR. This Court held:

“It is trite law that the applicant need not show a multiplicity of arguable points. One arguable point is sufficient to satisfy the first principle. In addition, an arguable point is not necessarily one that must succeed on appeal, but one that merits a consideration and determination by this Court. While it would have been desirable for the applicant to annex a draft proposed memorandum of appeal to its application, we are of the view that the omission to do so is not fatal, and is curable in so far as the applicant has sufficiently set out its grievances on the face of the application. That is the case in this application.”
13. On arguability the applicants have annexed a memorandum of appeal to the supporting affidavit. We have considered it. Among the grounds raised are that the learned Judge erred to find that the transfer of the suit land to the applicants was fraudulent, and for failing to find that the deceased transferred the suit land to them. The Judge is also faulted for finding that fraud was proved yet no evidence was adduced, and finally that the learned Judge misconstrued the evidence and arrived at a wrong finding.
14. On the nugatory aspect it was submitted that if the order is not granted, the applicants stand to lose the land.
15. We do agree that there may be an arguable ground raised in the annexed memorandum of appeal. As for the nugatory aspect, nowhere has the applicant alleged that the appeal will be rendered nugatory if the order sought is not granted. The applicant needed to plead not just that the appeal will be rendered nugatory, but to sufficiently demonstrate the same. The applicant has not demonstrated in what manner the appeal may be rendered nugatory.
16. We find no merit in this application and the same is dismissed with costs to the respondents.

**DATED AND DELIVERED AT NYERI THIS 23<sup>RD</sup> DAY OF MAY, 2025.**

**J. LESIIT**

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**JUDGE OF APPEAL**

**ALI - ARONI**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**



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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

