



**Mwangi v Macharia & another (Civil Application E100 of 2024)
[2025] KECA 1005 (KLR) (23 May 2025) (Ruling)**

Neutral citation: [2025] KECA 1005 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E100 OF 2024
JW LESSIT, A ALI-ARONI & GV ODUNGA, JJA
MAY 23, 2025**

BETWEEN

GRACE WAIRIMU MWANGI APPLICANT

AND

EDWARD MACHARIA 1ST RESPONDENT

ANTHONY MACHARIA 2ND RESPONDENT

(An application for a stay of execution pending hearing and determination of the appeal arising from the judgment of the Environment and Land Court at Murang'a (Gacheru, J.) delivered on 25th January 2024 in ELC No. E007 of 2023)

RULING

1. The respondents filed a suit, vide a plaint dated 6th February 2023, against the applicant, seeking a declaration that the applicant was holding Land Parcel No. LOC.20/Githuri/67 (hereinafter referred to as the suit property) in trust for the applicant and the respondents. They also sought for an order directing the Land Registrar Murang'a to include the names of the respondents as tenants in common, an order requiring the applicant to initiate the subdivision process of the suit property by executing all necessary documents within 60 days of the suit's resolution subject to payment of the applicable fees by all parties, general damages and costs.
2. In its judgement delivered on 24th January 2024, the trial court determined that while the applicant was the registered owner of the suit property, this ownership was not absolute, as it was subject to a customary trust that constituted an overriding interest. The court found that a customary trust existed in favour of the respondents, which needed to be dissolved. It established that the applicant acted as a trustee. Since the respondents proved their respective families were entitled to a share of the suit property, they dismissed the applicant's defence. Additionally, the respondents were awarded costs.



3. Aggrieved by the turn of events, the applicant filed the application, now before us, by way of a notice of motion dated 15th October 2024 brought under Rule 5(2)(b) of the Court of Appeal Rules, seeking a stay of execution and an order that the Land Registrar be restrained from making any entries affecting the suit property.
4. The application is predicated on the grounds on the face of the application stating that there is sufficient reason to grant the orders sought; the applicant has appealed against the entire decision of the trial court; the applicant has an arguable appeal with a high probability of success; the title of the applicant's husband has been cancelled pursuant to the impugned judgment and unless this Court urgently grants an order of stay of execution, the respondents may interfere with the suit property through selling, leasing, charging or any other dealings. Such actions may cause irreparable harm that cannot be undone; the property may become unreachable by the court if a stay is not granted; and if the applicant's appeal is successful, it may be rendered nugatory.
5. The 1st respondent filed a replying affidavit sworn on 4th November 2024 opposing the application. He deposed that the application is manifestly frivolous, vexatious, and an abuse of the court process. He asserted that the court correctly found that there was no reason to stay the execution of the orders, as the applicant had not met the required threshold. The applicant has failed to demonstrate that the appeal is arguable and has not shown any threat; her sole intention appears to be to deny the respondents the benefits of the judgment.
6. Furthermore, the applicant has not substantiated how the appeal would be rendered nugatory, as the losses mentioned could be compensated through damages. Additionally, the applicant has not provided evidence suggesting that the respondents intend to dispose of the subject property. Therefore, the applicant does not satisfy the requirements for issuing the sought orders, and the application should be dismissed with costs to the respondents.
7. The 2nd respondent also filed a replying affidavit sworn on the 4th of November 2024, reiterating the contents of the 1st respondent's replying affidavit.
8. Learned counsel for the applicant filed submissions dated 29th October 2024, wherein he argued that the Court of Appeal Rules state that the purpose of an application for a stay of execution pending an appeal is to preserve the subject matter in dispute, thereby safeguarding the rights of the appellant who is exercising the undeniable right of appeal, ensuring that if the appeal is successful, it is not rendered futile. He references Rule 5(2)(b) of the Court of Appeal Rules, a procedural measure designed to empower the court to consider interlocutory applications for the preservation of the subject matter of appeals, facilitating the just and effective determination of appeals. Learned counsel contended further that if the application for a stay of execution is not granted, the applicant will likely suffer irreparable harm.
9. Further, learned counsel submitted that the appeal raises triable issues and, therefore, the suit property should be protected until the appeal is heard and determined. He relied on the case of *Githunguri v Jimba Corporation Limited* [1988] KLR 838, where the twin principles necessary for granting an order for a stay of execution were enumerated, namely, the appeal should not be frivolous, in other words the appeal is arguable, and if successful, may be nugatory. Additionally, learned counsel cites the case of *Teachers Service Commission v Kenya National Union of Teachers & 3 Others* (2015) KECA 1008 (KLR).
10. In a rejoinder, learned counsel for the respondents filed submissions dated 4th November 2024 and highlighted the issues for determination: whether the appeal is arguable and whether the appeal will be rendered nugatory if the orders of stay sought are not granted.



11. In arguing the first limb necessary, learned counsel placed reliance on the case of *Trust Bank Limited and Another v Investec Bank Limited & 3 Others* [2000] eKLR, where this Court reiterated the twin principles and argued that an arguable appeal must not be one that will succeed, but ought not to be frivolous or an effort in futility. Learned counsel emphasized that the court must consider the grounds of appeal in light of the judgment the applicant seeks to challenge.
12. Learned counsel contended that the applicant had attached the memorandum of appeal or the judgment/order of the trial court, which omission undermined the applicant's application, as it fails to demonstrate any arguable grounds. Further, he stated that the court can only assess the appeal's arguability by comparing the impugned decision with the grounds of appeal; in support of this proposition, he cited the case of *Attorney General & Another v Eunice Makori & Another* [2021] eKLR.
13. On whether the appeal will be rendered nugatory if the orders of stay sought are not granted, learned counsel cited the case of *Permanent Secretary Ministry of Roads & Another v Fleur Investments Limited* [2014] eKLR, where court made reference to the case of *Reliance Bank Limited v Norlake Investments Ltd* [2002] 1 E A 227, where this Court held that the term 'nugatory' has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
14. Learned counsel for the respondents argued further that, despite the applicant's contentions that her title has been cancelled pursuant to the impugned judgment, the concerns about the respondents potentially selling part of the property are not only reversible but can also be adequately addressed through monetary damages. Additionally, the assertion that the estate of the applicant's late husband will be squandered by the respondents, leaving her destitute, is neither supported nor properly pleaded in the application. Therefore, the respondents urged the court to dismiss the application for failing to meet the threshold with costs.
15. To succeed in an application under Rule 5 (2)(b) of the Court of Appeal Rules, an applicant has to satisfy the twin principles that are enumerated in many decisions of this Court, namely:
 - i. An applicant must demonstrate that they have an arguable appeal; and
 - ii. That the intended appeal (or appeal if already filed) will be rendered nugatory if the execution of the decree or order of proceedings is not stayed.
16. On the first limb of this twin principle, this Court held in *David Morton Silverstein v Atsango Chesoni* [2002] eKLR that for an order of stay to be issued, the applicant must first demonstrate that the appeal or intended appeal is arguable, that is, it is not frivolous and that the appeal or intended appeal, would in the absence of a stay, be rendered nugatory.
17. Regarding the sufficiency of the pleaded grounds of appeal to warrant a grant of the stay of the orders sought, this Court in *Yellow Horse Inns Ltd v A. A Kawir Transporters & 4 Others* [2014] eKLR, observed that an applicant need not show multiple arguable points, as one would suffice. Neither is the applicant required to show that the arguable point would succeed, as this Court held in *Kenya Commercial Bank Limited v Nicholas Ombija* [2009] eKLR.
18. As the respondents pointed out, the applicant did not annex a draft memorandum of appeal to her application to demonstrate the likely arguable grounds of appeal. This anomaly could have been cured if the affidavit supporting the application had listed the possible grounds of appeal. A close look at the affidavit does not enlist even one ground. Therefore, we are unable to discern any arguable ground from the material placed before us.



- 19. The applicant did not back her assertion of the eminent danger of alienation of the property by the respondents. They deny that they are about to alienate or interfere with the same. The applicant has not demonstrated either that she cannot be compensated by way of damages.
- 20. The applicant has failed to demonstrate the twin principles necessary. As such, the fate of her application is sealed. It must be dismissed.
- 21. The costs of the application will abide by the outcome of the appeal.

DATED AND DELIVERED AT NYERI THIS 23RD 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

